ADVISORY COMMITTEE
ON
EVIDENCE RULES

October 27, 2023

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

October 27, 2023

University of St. Thomas School of Law

I. Panel of Evidence Scholars on Possible Amendments to the Evidence Rules

The Committee has invited five of the best Evidence scholars in the country to speak on the following topic: "What are the one or two amendments to the Evidence Rules that are at the top of your wish list?"

The five scholars are:

Hillel J. Bavli, Associate Professor of Law, SMU Dedman School of Law

Jeffrey Bellin, Engh Research Professor and Mills E. Godwin, Jr., Professor of Law, William & Mary Law School

Edward J. Imwinkelried, Edward L. Barrett, Jr., Professor of Law, Emeritus, U.C. Davis School of Law

Erin E. Murphy, Norman Dorsen Professor of Civil Liberties, NYU Law School

Andrea Roth, Barry Tarlow Chancellor's Chair in Criminal Justice, University of California, Berkeley, School of Law

Each professor will make an opening presentation and then there will be general discussion. Questions from the Committee are invited and encouraged. The Committee is very grateful to the Evidence professors for providing their insights on possible amendments to the Evidence Rules.

Each of the professors has prepared written materials. They can be found behind Tab 1 of this Agenda Book.

II. Presentation on "Deepfakes"

The Committee has invited Dr. Maura Grossman and Hon. Paul Grimm to make a presentation to the Committee about the evidentiary problems that are raised by "deepfakes" - the use of artificial intelligence (AI) to prepare a false visual and/or audio recording. Dr. Grossman and former Judge Grimm have co-authored several important articles on deep fakes and AI.

Dr. Grossman is a professor at the David R. Cheriton School of Computer Science at the University of Waterloo; she is also an adjunct professor at Osgoode Hall Law School of York University and an affiliate faculty member of the Vector Institute of Artificial Intelligence. She previously was of counsel to Weil, Gotschal & Manges LLP.

Judge Grimm is the David F. Levi Professor of the Practice of Law and the Director of the Bolch Judicial Institute at Duke Law School. He is a retired U.S. District Judge, whose legal opinions were crucial to the preparation of Rule 502 and the new amendment to Rule 106. The Committee is most grateful to Dr. Grossman and Judge Grimm for their participation at this meeting.

The following materials, pertinent to admissibility issues raised by deep fakes, are set forth behind Tab II of the agenda book:

- A short introductory memorandum prepared by the Reporter, providing background on deepfakes and the current rules on authentication, and discussing amendments suggested by commentators to address the use of deepfakes.

- A proposed amendment to Rule 901(b)(9) and explanatory note, prepared by Judge Grimm and Dr. Grossman.

- Two important articles on deepfakes and AI, co-authored by Professor Grossman and Judge Grimm. These articles are for background reading for those who are interested.

III. Committee Meeting - Opening Business

Opening business includes:

- Approval of the minutes of the Spring 2023 meeting.

- Report on the June 2023 meeting of the Standing Committee.

- Welcome to new members, Hon. Valerie E. Caproni, Hon. Edmund A. Sargus, and John Siffert, Esq.

IV. Discussion of Morning Presentations

The Committee will have an open discussion of the takeaways from the morning presentations. This will include a discussion of the possibility of further consideration of amendments proposed by the participants in the presentations. The question for the Committee is whether the Reporter should prepare a memo on any particular proposal for the Committee's Spring 2024 meeting.

V. Prior Statements of Testifying Witnesses and the Hearsay Rule

The Chair and Reporter recommend that the Committee consider whether the current treatment of prior statements of testifying witnesses as hearsay under Rule 801(c) should be changed. Prior statements of testifying witnesses are problematic candidates for hearsay because the declarant of such a statement is by definition available at trial to be cross-examined about it.

The Reporter's memorandum on prior statements of testifying witnesses is behind Tab V. The memo considers whether prior statements of testifying witnesses should be exempt from the hearsay definition; and it also considers the lesser alternative of expanding Rule 801(d)(1)(A) to allow for greater substantive admissibility of prior inconsistent statements.

VI. Possible Amendment to Rule 803(4)

Professor Richter has prepared a memo evaluating suggestions made in a recent law review article on Rule 803(4). The authors suggest that Rule 803(4) should be applied to preclude statements made to doctors solely for purposes of litigation. It also suggests that the rule specifically allow admission of statements made between providers when the statements are made for a medical purpose. Professor Richter's memo on these and other suggestions for amending Rule 803(4) is behind Tab VI.

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Richard J. Sullivan	C	Second Circuit		2021	2026
R.L. Valladares	FPD	Nevada		2022	2024
Daniel J. Capra Reporter	ACAD	New York		1996	Open

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* Ex-officio - Principal Associate Deputy Attorney General

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TAB 1

TAB 1A

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

Jeffrey Bellin*

Federal Rule of Evidence 609 authorizes the admission of prior convictions to impeach criminal defendants who testify. And in this important and uniquely damaging application, the Rule's logic fails, distorting American trials and depriving defendants of a fair opportunity to defend against the charges. The Advisory Committee should propose the elimination of Rule 609 and prohibit cross-examination with specific instances of a criminal defendant's past conduct when those instances are unrelated to the defendant's testimony and unconnected to the case.

This short essay begins by setting out the proposed rule change alongside a proposed Advisory Committee Note. The balance of the essay elaborates on the Note's discussion. The discussion highlights the proposal's consistency with recent White House and Department of Justice policy initiatives, and the unique opportunity that the elimination of Rule 609 presents to the Advisory Committee to improve the fairness and legitimacy of American trials.

I. Proposed Rule Change and Advisory Committee Note

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

… (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.…

~~**Rule 609. Impeachment by Evidence of a Criminal Conviction**~~

Deleted *[see Appendix for current text of Rule 609]*

* The author is the Mills E. Godwin, Jr., Professor at William & Mary Law School, and a former federal prosecutor.

Advisory Committee Note

Rule 609 is deleted, leaving the impeachment of a witness's character for truthfulness to Rule 608.

Rule 609 failed to give concrete direction to the courts, instead condensing an unresolved policy debate into an amorphous balancing test. That balancing test has proven unworkable.[1] Rule 609 caselaw is marred by inconsistent and erroneous rulings.[2] And because defendants can sidestep Rule 609 impeachment by declining to testify, a primary impact of the rule is that defendants remain silent at trial, depriving jurors of the opportunity to hear from a witness whose account may be critical to accurate factfinding.

While the removal of Rule 609 will result in more defendant testimony, it will not upset the balance of trials. Prosecutors have little need to impeach the credibility of criminal defendants through indirect means such as prior convictions. Jurors already view the defendant's testimony with skepticism. As the Second Circuit explains: "Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict."[3] There is little added to the credibility assessment when jurors are told that testifying defendants – already powerfully incentivized to shade their testimony to preserve life and liberty – have a criminal record. And there is a substantial danger that the jury will consider prior conviction impeachment for an improper purpose, such as to reduce the government's burden of proof, or assume that the defendant is the kind of person who would commit the charged offense.

Even without Rule 609, prosecutors will still be able to introduce evidence of a defendant's prior crimes through other avenues provided by the rules, such as Rule 404(b)(2) (other crimes admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident), Rule 404(a)(2)(A) (rebutting defense character evidence), Rule 413 (past sexual offenses), and Rule 414 (past child molestation). With the elimination of Rule 609, however, the admission of prior crimes will no longer be tied to the defendant's decision to testify, removing a substantial burden on the constitutional right to testify in one's own defense.[4]

Rule 608 is amended to prevent the migration to that rule of the same impeachment of defendants that previously occurred under Rule 609. Character impeachment of other witnesses will continue to be permitted, however. For example, under Rule 608(b)(1), parties can cross-examine witnesses (other than the criminal defendant) with specific instances relevant to that witness's character for truthfulness, including instances that resulted in a criminal conviction. And any party can always introduce non-character impeachment, such as evidence of a witness's bias, under the normal relevance rules.[5] For similar rules forbidding impeachment of defendants with criminal convictions, see Hawaii R. Ev. 609; Kansas Stat. Ann. § 60-421; Montana R. Evid. 609.

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[1] *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289 (2008); Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. Rev. 993 (2018).

[2] *Id.*

[3] United States v. Gaines, 457 F.3d 238 (2d Cir. 2006).

[4] Rock v. Arkansas, 483 U.S. 44, 49 (1987) ("[A] defendant in a criminal case has the right to … testify in his or her own defense.").

[5] Davis v. Alaska, 415 U.S. 308 (1974).

II. Rule 609 in the Courts

Rule 609 permits the admission of criminal convictions to impeach a witness's character for truthfulness. Because Rule 608(b)(1) already permits cross-examination with specific instances of a witness's conduct, Rule 609's primary significance is that it creates a specific mechanism for the admission of a testifying defendant's prior convictions. As a technical matter, Rule 609(a)(1)(B) only permits this evidence if its probative value with respect to the character for truthfulness of the defendant-witness outweighs its prejudicial effect.[6] And this balance should generally foreclose impeachment.[7] But many judges reflexively admit prior convictions under Rule 609 as the price the defendant must pay to take the witness stand.[8]

For example, the Ninth Circuit in *United States v. Perkins* approved the admission of a defendant's prior bank robbery conviction in a bank robbery trial with this reasoning:

> "In this case, defendant's credibility and testimony were central to the case, as Perkins took the stand and testified that he did not commit the robbery. We therefore conclude that the district court did not abuse its discretion in denying Perkins's motion to preclude the government from asking him about his recent prior conviction for bank robbery."[9]

The language is notable not for what it says but for what it omits. The court's reasoning does not distinguish the case from any other, relying solely on the fact that the defendant (Perkins) denied committing the bank robbery to support the introduction of his prior bank robbery conviction.

A recent Eighth Circuit opinion, *United States v. Cooper*, reveals the same flaw, explaining why a defendant's six-year-old aggravated assault conviction was admissible to impeach his character for truthfulness:

> "Under Rule 609(a)(1)(B), a crime punishable by more than one year in prison "**must** be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B). Here, [defendant-]Cooper's credibility was at issue: the jury heard testimony from Hoff, H.K., and another witness implicating Cooper in drug distribution, while Cooper denied his involvement. We agree with the district court that the prior felony conviction was probative as to Cooper's credibility as a witness. The district court conducted the appropriate balancing and concluded that the probative value outweighed its prejudicial effect. We find no error in the district court's analysis."[10]

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[6] That is the rule for felonies. For dishonesty crimes, Rule 609(a)(1)(B) permits impeachment without balancing.

[7] *See* Bellin, 42 U.C. Davis L. Rev. at 338 (explaining why, for criminal defendants, "Rule 609 dictates exclusion" in the "vast run of cases").

[8] See survey results below; *cf.* United States v. German, No. 22-11811, 2023 WL 1466609, at *1 (11th Cir. 2023) ("A criminal defendant who chooses to testify places his credibility in issue as does any witness; therefore, he is subject to impeachment through evidence of prior convictions."); United States v. Reza, 2023 WL 1070474 at *5 (D.N.M. 2023) (responding to defendant's motion to exclude prior convictions by noting that "[prior conviction evidence under Rule 609] is the norm and admissible under current law") (alterations in original).

[9] United States v. Perkins, 937 F.2d 1397, 1406 (9th Cir. 1991).

[10] United States v. Cooper, 990 F.3d 576, 585 (8th Cir. 2021).

Again, there is nothing in this reasoning that is unique to this case. In every criminal trial where the defendant testifies, a government witness "implicat[es]" the defendant, and the defendant "denie[s] his involvement."

These binding federal appellate opinions establish that the defendant's denial of guilt triggers impeachment with prior convictions, even if the prior conviction is for the same crime (as in *Perkins*) or has minimal relevance to credibility (as in *Cooper*). Illustrating how far this logic extends, in 2023 a federal district court ruled that "the government may impeach [the defendant] Mr. Crittenden with the thirteen prior convictions included in the government's response to Mr. Crittenden's motion *in limine*."[11] If Rule 609 permits the introduction of 13 prior convictions, it is hard to imagine any impeachment that would be sufficiently prejudicial to be excluded.

Importantly, these examples do not prove that federal courts always allow prior conviction impeachment. A 2018 survey of federal district court cases and judges found that district courts admit about two thirds of testifying defendants' prior convictions. The survey also identified "some troubling trends."

> "Judges admit crimes of violence at an oddly high rate: over half of the prior convictions for assault-type crimes were admitted…. Judges also admitted three quarters of the prior convictions for drug possession…. Perhaps most troubling of all is that in approximately 18% of the cases, the prior conviction was admitted--including the name of the crime--even though it was identical or nearly identical to the crime for which the defendant was currently on trial. This implies that a substantial minority of the judges admit prior convictions in which the unfair prejudice almost certainly outweighs the probative value. This is not surprising: [a separate] survey [of judges] indicated a number of outlying judges who would admit nearly every prior conviction; thus, we can assume that some judges will be very liberal in their courtroom rulings. Nevertheless, evidence that such a significant percentage of rulings are so out of step with the mainstream consensus provides support for the argument that the rule may need to be amended to avoid these types of rulings."[12]

This inconsistency is not surprising because, as explained below, Rule 609 is inherently contradictory.[13] But inconsistency is also to be expected due to the infrequency of appellate review. There will not be any review when a district court excludes prior convictions since defendants will not want to, and prosecutors cannot, appeal such rulings. In addition, the Supreme Court has held that a defendant can only appeal the admission of prior convictions under Rule 609 if the defendant testifies and allows the prosecutor to introduce the impeachment.[14] If, as is more frequent, the defendant declines to testify

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[11] United States v. Crittenden, 2023 WL 2967891, at *4 (N.D. Okla. 2023); United States v. Taylor, 44 F.4th 779, 794 (8th Cir. 2022) (sex trafficking defendant impeached with "26- and 28-year-old convictions" for armed burglary and forgery); United States v. German, 2023 WL 1466609 at *2 (11th Cir. 2023) ("Because his credibility was a key issue at his trial, the conviction's probative value outweighed any prejudicial effect despite it being over ten years old.").

[12] Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. Rev. 993, 1034 (2018).

[13] In addition, some courts will admit prior convictions but exclude reference to the type of conviction – something that is in tension with the rule, United States v. Estrada, 430 F.3d 606, 616 (2d Cir. 2005), and that recent research suggests particularly disadvantages Black defendants. See James McLeod, *Evidence Law's Blind Spots*, Iowa L. R. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4545448 ("When mock jurors lacked information about the nature of the defendant's prior conviction, they rated the Black defendant more likely to be guilty than the white defendant.").

[14] Luce v. United States, 469 U.S. 38 (1984); Ohler v. United States, 529 U.S. 753, 757 (2000). Review is also foreclosed if a district court refuses to rule on whether impeachment will be allowed should the defendant testify. United States v. Howell, 17 F.4th 673, 682 (6th Cir. 2021).

once the judge rules that prior conviction impeachment is permitted, the *in limine* ruling authorizing that impeachment becomes unreviewable.[15] Thus, most Rule 609 decisions avoid review, exacerbating the evidentiary free-for-all described above.

In sum, the present situation in the courts is that the admission of a testifying defendant's prior convictions depends on the policy preferences of the assigned trial judge. That undermines the trial system's legitimacy and fairness. And it is anathema to a system of evidence rules and to the Advisory Committee tasked with overseeing those rules.

III. The Outdated Arguments in Favor of Rule 609

There are two arguments typically offered to support Rule 609, one logical and one rhetorical. The argument based in logic is that a prior conviction reveals the witness's flawed character and that this flaw suggests that the witness may be lying. Here is Justice Holmes' classic explanation of the concept in 1884:

> "[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit."[16]

The rhetorical argument comes through in a more recent judicial defense of the rule:

> "[C]onvicted felons are *not* generally permitted to stand pristine before a jury with the same credibility as that of a Mother Superior. Fairness is not a one-way street and in the search for truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not."[17]

Both arguments appeared when Congress first debated Rule 609 in 1974. The chief proponents of prior conviction impeachment, Representative Lawrence Hogan (Maryland) and Senator John McLellan (Arkansas) waged extensive floor battles to preserve the practice. In the House, Hogan argued that there were two kinds of people: those with criminal records ("antisocial") and those without ("law-abiding citizens"). He asked: "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."[18] Later he expanded on this world view, contending on the House floor: "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."[19]

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[15] *See, e.g.*, United States v. Janqdhari, 755 F. App'x 127, 130 (3d Cir. 2018) (declining to review ruling that prior robbery conviction was admissible under Rule 609 in prosecution for robbery if defendant testified).
[16] Gertz v. Fitchburg R. Co., 137 Mass. 77, 78 (1884).
[17] United States v. Lipscomb, 702 F.2d 1049, 1077 (D.C. Cir. 1983).
[18] 120 Cong. Rec. 2348, 2376 (1974).
[19] *Id.* at 2380.

After Hogan lost his floor battle, Senator McClellan took up the mantle on the Senate floor. McLellan argued (without evidence) that the House's effort to eliminate prior conviction impeachment would increase crime: "The further we go in loosening up the laws, the more and more crime increases.… Everything today is being done to find some way to protect the criminal, while society is forgotten."[20] Senator Roman Hruska (Nebraska) rose to support McClellan during the Senate debate, emphasizing the importance of being able to impeach "thugs with prior criminal records."[21] These arguments, which had failed in the House, succeeded in the Senate, ultimately sending the debate to a Conference Committee and preserving the prior conviction impeachment rule we have today.

Proponents of Rule 609 focus on the value of impeachment generally, overlooking that impeachment that is permitted under Rule 609 would generally be permitted in similar fashion (even without Rule 609) under Rule 608. The primary significance of Rule 609 is its pathway to impeach criminal *defendants* who testify. And there, the arguments in favor of Rule 609 fail. As explained in the next sections, the rule provides no useful information to juries, while regularly depriving them of testimony from the person who knows the most about what occurred.

As for the arguments summarized above, there is, of course, no evidence that Rule 609 impacts crime. And criminal justice policymakers no longer view the world through the simplistic "criminal" versus "law-abiding citizen" framework underlying the Rule. In fact, President Biden issued Executive Order 14074 in May 2022 recognizing "the legacy of systemic racism in our criminal justice system" and the need to "work together to eliminate the racial disparities that endure to this day."[22] Nowhere are these disparities more apparent within the evidence rules than in Rule 609, which disproportionately impacts Black defendants. While 6% of adults have felony convictions, the percentage is 23% for Black adults.[23]

President Biden's Executive Order directs the government to: "facilitat[e] reentry into society of people with criminal records, including by providing support to promote success after incarceration; sealing or expunging criminal records, as appropriate."[24] In April 2023, the Department of Justice expressed a commitment to implement the Order, stating: (1) "DOJ will advance efforts to expand access to record sealing and expungement for eligible individuals"; and (2) "DOJ will work to build understanding among policymakers and service providers of the barriers and obstacles that individuals must navigate upon returning to the community from incarceration and help problem-solve solutions to those barriers."[25] Eliminating Rule 609 fits squarely within the DOJ's commitment.[26] The rule is

[20] 120 Cong. Rec. 37039, 37081 (1974).
[21] *Id.* at 37077.
[22] Executive Order 14074 § 1 (2022).
[23] *See* Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States*, 1948-2010, Demography, Vol. 54, No. 5 (2017) (as of 2010); Montré D. Carodine, *"the Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 544 (2009) (critiquing Rule 609's disproportionate racial impact).
[24] Executive Order 14074 § 15(d)(iii) at 32958 (2022).
[25] U.S. Department of Justice, Rehabilitation, Reentry, and Reaffirming Trust, The Department of Justice Strategic Plan Pursuant to Section 15(f) of Executive Order 14074 46, 50, 53, 54 (2023), https://www.justice.gov/d9/2023-04/the_department_of_justice_strategic_plan_pursuant_to_section_15f_of_executive_order_14074.pdf;
[26] *See also id.* (committing to "reduc[e] stigma upon release" and "facilitate reentry into society of people with criminal records"); *cf.* White House, Fact Sheet: President Biden's Safer America Plan, Aug. 2022 (including as one of bullet points for plan: "Help formerly incarcerated individuals successfully reenter society."); SBA, Returning Citizens Empowered to Start and Grow Businesses Under Proposed Rule, Sept. 14, 2023 ("Updated regulations would remove barriers to capital for entrepreneurs with certain types of justice involvement").

premised on an outdated notion that then-Senator Biden critiqued in 1974 as: "if you are a former convicted felon … your credibility should always be questioned the rest of your life."[27]

IV. The Absence of Probative Value

Rule 609 applies to all witnesses, but its primary significance is its application to criminal defendants who testify. And whatever one wants to say about the general assumptions underlying Rule 609, the rule's logic loses force in this critical context. That is because any generic value of prior convictions as credibility impeachment is overwhelmed by a criminal defendant's inherent – and transparent – self-interest in avoiding conviction.

Every person faces a strong incentive to lie when accused of a crime. There are undoubtedly those, like Immanuel Kant, who will tell the unvarnished truth even if that means decades in prison.[28] But most people undoubtedly shade the truth to preserve their freedom. This pressure to lie was once viewed as so compelling that it justified a ban on interested-witness testimony altogether.[29]

The powerful self-interest in avoiding criminal punishment is common sense. With respect to critical facts and at strategic moments, typical defendants – like typical politicians, celebrities, and people generally – may omit facts and shade their testimony to place themselves in the best light. As a consequence, jurors are skeptical of defendant testimony; and while jurors want to hear from defendants, they carefully scrutinize defendant testimony in light of the other evidence in the case.[30] Thus, in one experiment, jurors rated the defendants' credibility as approximately 3 out of 10 regardless of whether prior convictions were introduced, less than half of the average credibility rating (7) assigned to non-party witnesses.[31]

Indeed, courts sometimes instruct juries to view defendant testimony with skepticism due to the defendant's "deep personal interest" in the verdict.[32] The modern trend, however, is to go without such instructions because, as the Second Circuit explains: "Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict."[33]

Since everyone knows that criminal defendants face great pressure to lie when testifying, Rule 609 adds nothing legitimate to the process. Rule 609 admits prior convictions to suggest that the witness might lie under oath. But for criminal defendants, the pressure to lie created by the prospect of

[27] See below for Biden's argument against Rule 609 during the 1974 debate on the Senate floor.
[28] Kant argued that people must always tell the truth regardless of the consequences.
[29] Ferguson v. Ga., 365 U.S. 570, 574 (1961) ("Disqualification for interest was thus extensive in the common law when this Nation was formed.").
[30] Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 299 (2008) ("Jurors, who generally have little sympathy for a person charged with a crime, are well aware that even otherwise honest defendants have a strong incentive to shade their trial testimony in favor of acquittal."); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and A Proposed Overhaul*, 38 UCLA L. Rev. 637 (1991) (critiquing reasoning underlying Rule 609 as follows: "At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.").
[31] Roselle L. Wissler and Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law and Human Behavior 37, 41 (1985).
[32] United States v. Gaines, 457 F.3d 238, 246 (2d Cir. 2006) ("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."); United States v. King, 485 F. App'x 588, 590 (3d Cir. 2012) (discussing trend); *cf.* Reagan v. United States, 157 U.S. 301, 304 (1895) (origin of the language).
[33] United States v. Gaines, 457 F.3d 238, 248 (2d Cir. 2006).

incarceration already establishes that point beyond doubt.[34] And the defendant's self-interest in liberty is many orders of magnitude greater than any hypothetical dishonesty-inducing character flaw revealed by a prior conviction. If a defendant's self-interest in avoiding criminal punishment is analogized to a lake of credibility impeachment, the fact of a prior conviction is a drop of rain. Perhaps the raindrop adds something.[35] But its impact is too small to matter.

V. The Danger of Unfair Prejudice

While prior convictions do not add anything significant to the jury's assessment of the criminal defendant's credibility as a witness, the introduction of the defendant's prior crimes has powerful side effects. The most obvious is that the jury will use the prior convictions for purposes that are not permitted by the evidence rules: namely, to convict the defendant based on past conduct, rather than present guilt.

Exclusion of the defendant's prior crimes is a longstanding foundation of American criminal procedure. As the Supreme Court explained in 1948:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. 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."[36]

Rule 609 creates an exception to this prohibition purportedly to open a window into "the witness's character for truthfulness."[37] But juries use prior convictions for other purposes even when instructed not to.[38] As the Advisory Committee's Note to the 1990 Amendment to Rule 609 states, "in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice." The Note highlights the danger that "convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes." As the Supreme Court recognizes, that is not all. In addition, the jury may simply deem a defendant with a serious criminal record to be less deserving of their protection, reducing the burden of proof and undermining the presumption of innocence.[39] And in fact, this was the finding of a comprehensive study of criminal trials, where the authors found a

[34] Based on this argument, English courts have effectively abolished the practice. See R v. Campbell [2007] EWCA (Crim) 1472 [30].
[35] In fact, there is some question whether it adds anything at all. There is little empirical evidence connecting prior convictions and lying and many reasons to suspect that the noise outweighs the signal. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 566 (2014) (critiquing convictions as an unreliable proxy for underlying conduct).
[36] Michelson v. United States, 335 U.S. 469, 475-76 (1948); People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) ("[A] defendant starts his life afresh when he stands before a jury, a prisoner at the bar.").
[37] Fed. R. Ev. 609.
[38] *See* Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 427 (2018) (collecting empirical evidence of the phenomenon).
[39] Michelson v. United States, 335 U.S. 469, 475-76 (1948); Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (requiring redaction of name of prior conviction in felon in possession prosecutions due to the danger that juries will improperly use prior convictions to "generaliz[e] a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).

correlation "in cases with weak evidence" between "the jury's learning of a criminal record and conviction."[40]

VI. Distorting the Trial Process

Defense attorneys recognize the tremendous damage wrought by the introduction of prior convictions. Consequently, a common response to an *in limine* ruling that a defendant's prior convictions will be admitted under Rule 609 is for the defendant to decline to testify. This tactical retreat can be viewed as a kind of prejudice to the defendant, but it is more than that. When the evidence rules cause defendants to withhold their testimony, it is a perversion of the system itself.

The adversary process works best when both sides present relevant information to the jury. If the rules of evidence prevent that, the process suffers. That is why early Rule 609 case law highlighted "the importance of the defendant's testimony" as a basis for excluding prior convictions offered as impeachment.[41] The courts reasoned that if the defendant's testimony was important, *juries* suffered if the defendant declined to testify to avoid impeachment – sadly, this reasoning has faded from the caselaw as courts increasingly embrace prior conviction impeachment.[42]

Live testimony from the witnesses to disputed events is the American courts' primary fact-finding tool and a key contributor to the legitimacy of verdicts. Thus, when striking down obstacles to defendant testimony in 1987, the Supreme Court stated: "The conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury."[43]

Yet testimony from the most knowledgeable witness is frequently missing from American trials, in large part because of Rule 609.[44] In every other context where someone is accused of wrongdoing, we instinctively seek out an explanation from the accused. Yet jurors frequently go without input from the accused in the most serious disputes of all – criminal trials. It can be a mercy to permit a defendant to decline to testify when the defendant chooses silence.[45] It is not a mercy, however, when defendants remain silent because the evidence rules threaten to parade their criminal record before the jury if, and only if, they testify.

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[40] Theodore Eisenberg, Valerie P. Hans, *Taking A Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1357 (2009) ("Juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction.").

[41] Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 325 (2008) (discussing history of "the importance of the defendant's testimony" factor).

[42] *Id.* (highlighting the "bizarre and as yet unexplained reversal," where "the courts began to emphasize the necessity for prior conviction impeachment precisely because the defendant's direct examination testimony was 'important,' 'crucial,' 'central,' 'critical' or, most poignantly, 'of utmost importance'").

[43] Rock v. Arkansas, 483 U.S. 44, 54 (1987); Ferguson v. Georgia, 365 U.S. 570, 582 (1961) ("[D]ecades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case."); United States v. Nixon, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive," and "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.").

[44] John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008) ("In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."). Defendants decline to testify in about 50 percent of trials. Eisenberg & Hans, 94 Cornell L. Rev. at 1373 tbl.2.

[45] U.S. Const., Amend. V.

The twisted incentives generated by Rule 609 require the large group of defendants who stand trial with prior convictions[46] to choose either to remain silent at trial or be impeached with their prior convictions. Studies show that defendants suffer regardless of which path they choose. If they remain silent, juries assume it is because they are guilty.[47] If they testify, juries hear about their prior record, undermining the presumption of innocence.[48]

This confluence of tactics and history creates one of the most indefensible scenarios in the American trial process – documented cases of *innocent* defendants who decline to testify in their own defense to avoid the introduction of prior convictions, and are then convicted. In a study of defendants who were later cleared by post-conviction DNA testing, John Blume found that 39% of these innocent defendants did not testify at their trials, 91% of those who did not testify had prior convictions, and that "[i]n every single case in which a [later exonerated] defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions."[49] Blume adds: "In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."[50]

VII. Rule 609's Tumultuous Origin Story

Rule 609 has the most convoluted origin story of any of the rules of evidence. And it involves one of the Advisory Committee's worst moments.

Rather than craft the rule it thought best, the Advisory Committee "backed off" under pressure from Representative Hogan and Senator McClellan.[51] Based on Hogan and McClellan's representations of Congress's position, the Advisory Committee proposed a version of Rule 609 that allowed automatic impeachment with felony convictions, and with crimen falsi regardless of degree. Hogan and McLellan then touted the Advisory Committee's support for broad impeachment in subsequent Congressional debates.

The Advisory Committee was misled. The House rejected the Committee's proposed rule and adopted a rule that prohibited impeachment with prior convictions except if the crime "involved dishonesty or false statement."[52] The Senate Judiciary Committee "agreed with the House limitation that only offenses involving false statement or dishonesty may be used."[53] The Committee listed the few convictions that would be permitted, those falling in the narrow *crimen falsi* category: "perjury, or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense."[54] At that moment, the practice of impeaching criminal defendants with prior convictions neared extinction.

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[46] Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* 8 (reporting that 75% of suspects charged with a felony had a prior arrest, 60% had a prior felony arrest, 60% "had at least one prior conviction," and 43% "had at least one prior felony conviction").
[47] Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 426 (2018) (surveying empirical evidence on "the surprising power of the silence penalty" that harms defendants who do not testify at trial).
[48] *Id.*; Eisenberg & Hans, 94 Cornell L. Rev. at 1357.
[49] *See* Blume, 5 J. Empirical Legal Stud. at 489-91.
[50] *Id.*
[51] *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 516 (1989) (recounting that in response to interference by McClellan, "The Advisory Committee backed off.").
[52] Richard D. Friedman & Joshua Deahl, Federal Rules of Evidence: Text and History 230-231 (2015) (reprinting legislative history).
[53] *Id.* (reprinting Senate Judiciary Committee Report).
[54] *Id.*

Both houses of Congress agreed that impeachment of criminal defendants should be limited to a tiny set of crimes; the Conference Committee would have been obligated to track that agreement.[55]

John McClellan, however, would not let it go. In his 31st year in the Senate, he moved, on November 22, 1974, to amend the Judiciary Committee's version of Rule 609. McClellan's amendment reverted to the Advisory Committee (really McClellan's own) proposal, broadly permitting impeachment of criminal defendants with convictions. After debate, the motion was called, votes entered and "[t]he result was announced–yeas 35, nays 35." A tie. "Mr. McClellan's amendment was rejected." McClellan was frustrated, but "in view of the closeness of the vote" announced his intention to move to reconsider. Since McClellan had been on the losing side, he could not so move, leaving the fate of Rule 609 to someone from the prevailing side. In a moment of collegiality, Senator James Abourezek who would vote three times against McLellan that day moved to reconsider on his behalf.[56] Debate renewed, with Senator Joe Biden speaking at length against McLellan's amendment.

Drawing on his own experience in the criminal courts, Biden summarized the numerous objections to prior conviction impeachment,[57] but his primary contention was that the rule itself was based on a false premise.

> "I do not see why it should even be advanced as going to the credibility of the witness, because if we do that, we assume, under our justice system, that if you have once committed a crime, …you have lost your credibility forever, you have lost the reliance on the ability to go into court and be adjudged to be credible until proved not credible on the basis of the testimony introduced by the witnesses…. I would plead with my colleagues [to reject the argument that] if you are a former convicted felon, you are not capable of coming around and being a credible citizen, and your credibility should always be questioned the rest of your life."[58]

Despite Biden's opposition, the motion for reconsideration carried 38 to 34 and a subsequent motion to adopt McClellan's amendment carried 39 to 33.[59] This meant that the House and the Senate now disagreed on Rule 609 and the rule went to a Conference Committee.

The Conference Committee tried to reconcile the House and Senate positions with a judicial balancing test. Judges would admit the convictions of testifying defendants "if the probative value of the evidence outweighs its prejudicial effect."[60] This was, of course, the same "if" question that divided Congress. And by offering the balancing test without additional guidance, the Conference Committee left the courts in an impossible position.

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[55] Congressional Research Service, Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses 13 (2019) ("The House's managers may agree on the House position, the Senate position, or some middle ground. But they may not include a provision in a conference report that does not fall within the range of options defined by the House position at one extreme and the Senate position at the other."), https://crsreports.congress.gov/product/pdf/RL/98-696#:~:text=Since%20the%20purpose%20of%20conference,disagreement%20to%20each%20other's%20positions.

[56] 120 Cong. Rec. 37039, 37081 (1974).

[57] For example, Biden argued that the jury would use prior convictions as substantive evidence: "the jury would not view the introduction of the evidence of a prior crime as going to credibility, but would view it as to going to the substance of the case in question." *Id.* at 37082.

[58] *Id.*

[59] "So Mr. McClellan's amendment was agreed to." *Id.* at 37083.

[60] Fed. R. Ev. 609(a)(1)(B).

Judges understandably struggle with the Rule 609(a)(1)(B) balancing test because the rule seems to assume that prior convictions should be admitted even when criminal defendants testify.[61] But the balancing test, if rigorously applied, almost always rules them out.[62] This is the inevitable result of a rule based on diametrically opposed views. There was no way to bridge a gap between legislators who on one side argued for impeachment to strike a blow against rising crime, "antisocial" deviants, "white slaver[s]," and "thugs with prior criminal records."[63] And on the other side rejected any "us versus them" dichotomy, recognized the practice's "devastating prejudice to a defendant" and sought to prevent impeachment to "encourage more defendants to take the stand."[64] The Conference Committee punted the policy question – one of the most important in modern evidence law – to the courts where it continues to fester.

VIII. Modifying Rule 608 to Effectuate the Elimination of Rule 609

The federal rules of evidence rely on two rules to govern character impeachment of witnesses: Rules 608 and 609. Rule 608 governs the topic generally, while Rule 609 is a special application when the impeachment concerns a prior conviction. If Rule 609 did not exist, prosecutors could invoke Rule 608 to cross-examine testifying defendants about the underlying conduct that formed the basis of a conviction so long as that conduct was "probative of character for truthfulness."[65] Consequently, proposed revisions of Rule 609 require attention to the implications for Rule 608.

A small caveat can be added to Rule 608(b) to prevent the most problematic form of prior conviction impeachment from migrating to that rule. Here is the text of Rule 608(b) with the underlined caveat:

> "[T]he court may, on cross-examination, allow [specific instances] to be inquired into if they are probative of the character for truthfulness or untruthfulness of (1) the witness <u>(if the witness is not a defendant in a criminal case)</u>; or (2) another witness whose character the witness being cross-examined has testified about."[66]

Rule 608 would still permit (1) cross-examination of non-criminal-defendant witnesses with specific instances that were probative of character for truthfulness, including conduct that resulted in a conviction;[67] and (2) cross-examination of witnesses who testify as to the truthful character of any witness with specific instances relevant to that witness's character (even if that witness is a criminal defendant). In addition, prior convictions can always be used to contradict specific representations made by a testifying witness, including a defendant.[68] Further, prosecutors will continue to be able to offer the defendant's criminal record (where warranted) as substantive evidence under Rules 404(b),

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[61] *Cf.* United States v. Burston, 159 F.3d 1328, 1335 (11th Cir. 1998) ("The implicit assumption of Rule 609 is that prior felony convictions have probative value.").
[62] Bellin, Circumventing Congresss, at 338.
[63] 120 Cong. Rec. 37039, 37077 (1974).
[64] *Id.* at 37078.
[65] Fed. R. Ev. 608(b).
[66] *Cf.* Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and A Proposed Overhaul*, 38 UCLA L. Rev. 637, 690 (1991) (proposing similar change of eliminating Rule 609 and amending Rule 608 to read: "if other than an accused").
[67] If a criminal defendant sought to impeach a government witness with prior convictions, the trial court could consider the inadmissibility of the defendant's own convictions (if applicable) in assessing the admissibility of the government witness's convictions under the Rule 403 balancing test.
[68] United States v. Mustafa, 753 F. App'x 22, 38 (2d Cir. 2018) (prior convictions admissible to contradict defendant's testimony because "where a defendant testifies on direct examination about specific facts, the prosecution may use cross-examination to prove that the defendant lied as to those facts").

412, and 413. And if a defendant sought to introduce positive character evidence, prior convictions could become admissible under Rule 404(a)(2)(A).

In sum, the proposed change is narrow. The deletion of Rule 609 and amendment to Rule 608 prohibit one thing: cross-examination with specific instances of a criminal defendant's past conduct when that conduct is unrelated to the defendant's testimony and unconnected to the case. Again, nothing legitimate is lost with this change since jurors are always deeply skeptical of a testifying defendant's claims of innocence. Instead of assuming the defendant is lying (or guilty) because he is "a criminal," however, the jury would assess the testimony in light of the defendant's self-interest and the other evidence in the case.

IX. Conclusion

Rule 609 permits the introduction of evidence with almost no probative value despite a grave danger of unfair prejudice. And the rule artificially ties the admission of the defendant's criminal record to the decision to testify. This distorts the trial process, causing both innocent and guilty defendants to forego testifying.

The best argument in favor of Rule 609 is that its drafters tried to mitigate these problems with a balancing test. But that effort has been a failure. The case law is filled with nonsensical analysis and inconsistent rulings. And the reality is likely worse than it appears since the most problematic rulings avoid appellate review. Rule 609 is worse than nothing; it is the illusion of a problem solved while the problem rages out of control.

Eliminating Rule 609 and preventing the character impeachment of testifying defendants through Rule 608 solves all the difficulties referenced above with no negative collateral effects. These changes would:

- work an enormous simplification of evidence law, eliminating a lengthy rule with multiple distinct balancing tests;
- permit more defendants to exercise their constitutional right to testify;
- eliminate the prospect of jurors assigning guilt based on impermissible character reasoning (or worse); and
- allow juries to hear more frequently from the defendants whose fates they decide.

And these changes can be accomplished without collateral damage. Most defendants plead guilty, and those who don't are almost always convicted at trial. In 2022, prosecutors won over 90% of criminal trials in U.S. District Court.[69] This is not likely to change when more defendants testify since jurors are skeptical of defendant testimony and prosecutors are skilled at impeaching witnesses with a broad range of non-character evidence, like prior inconsistent statements and bias. Eliminating Rule 609 will have a narrow and predictable impact. It will eliminate the widely recognized unfair prejudice created by the introduction of prior crimes as impeachment, and enhance the legitimacy and richness of trial proceedings by allowing more juries to hear from the people whose fate they must determine.

[69] United States Courts, Statistics, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf

Appendix: Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

TAB 1B

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)

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Your Honors, at the outset I want to thank you for the opportunity to speak with you today. I want to take this occasion to discuss Federal Rule of Evidence 608(b) governing the admission of specific instances of a witness's untruthful conduct to impeach the witness's credibility. As you know, Rule 608(b) reads:

> 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 . . . the witness . . . .[1]

However, I do not want to talk about Rule 608(b) in isolation. Rather, I would like to discuss Rule 608(b) in the context of the evolution of another provision of the Federal Rules, namely, Rule 404(b) governing the admission of a person's specific acts for substantive purposes such as proving the accused's identity as the perpetrator of the charged crime. That Rule states:

> (1) Prohibited Uses. 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.
> (2) Permitted Uses. 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.
> (3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
> (A) Provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
> (B) Articulate in the notice the permitted purposes for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
> (C) Do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.[2]

As best I can, I have endeavored to follow the development of Rules 404(b) and the related case law closely for approximately for four decades.[3] During that period of time, Rule 404(b) has not only emerged as the most frequently cited Federal Rule of Evidence on appeal.[4] In addition, the statute and its case law have undergone significant change. As Part I of this short article will point out, in many respects the substantive standards for admitting Rule 404(b) evidence have tightened; and the related procedural rules for pretrial notice and limited instructions have been changed to subject evidence proffered under Rule 404(b) to closer scrutiny by both the judge and the opposing party.

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[1] Fed.R.Evid. 608(b), 28 U.S.C.A..

[2] Id. at Fed.R.Evid. 404(b).

[3] Edward J. Imwinkelried, Uncharged Misconduct Evidence (1984).

[4] Capra & Richter, Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants, 118 Colum.L.Rev. 769, 771 (2018)(Rule 404(b) is "the most frequently utilized and cited rule of evidence that 'has generated more published opinions than any other subsection of the rules'").

In the post-World War II period, American law enforcement authorities have amassed staggering amounts of data about criminal activity in the United States. Jurisdictions now maintain extensive databases about crimes and recidivist criminals in particular.[5] For example, the National Crime Information Center (NCIC) has compiled a database of Computerized Criminal History (CCH).[6] As in the case of the CCH, massive quantities of the data have been compiled and computerized by national, state, and local law enforcement agencies.[7] Doing so not only enables each jurisdiction to quickly access its own data; computerization also allows the sharing of data among jurisdictions throughout the United States.

Given these huge, computerized databases, today prosecutors have more information about an accused's other misdeeds than ever before. It is relatively easy for a prosecutor in New York to learn about a New York accused's prior criminal activity in Missouri or California. In the past, prosecutors have enjoyed great success resorting to Rule 404(b) as a gateway for introducing testimony about an accused's other misconduct at criminal trials. Respected commentators have gone to the length of asserting that the courts have applied Rule 404(b) so liberally that they have permitted "wholesale evasion[]" of the character evidence prohibition,[8] "almost totally negat[ed the prohibition] in practice,"[9] reduced the prohibition to mere "rhetoric,"[10] and at the very least frequently misapplied the Rule to allow prosecutors to regularly ignore the prohibition.[11] The basic thrust of the criticism is that under Rule 404(b), the courts have allowed prosecutors to use conclusory "catch-phrases"[12] and engage in "game playing" to "disingenuously" introduce bad character evidence in violation of Rule 404(b).[13]

Although those previous criticisms have merit, Part I of this article argues that more recently in several respects the substantive and procedural standards for admitting bad acts evidence under Rule 404(b) have been toughened. As a matter of substance, several courts have repudiated the use of buzz words such as "res gestae;" and other courts now subject prosecution proffers to more rigorous scrutiny when the government endeavors to invoke such theories as the doctrine of objective chances, the inextricable intertwinement doctrine, and plan. Perhaps even more importantly, on the procedural front there are now pretrial notice requirements that give the defense much more time to evaluate and critique the prosecution claims that the evidence in question possesses legitimate, non-character relevance. For their part, many appellate courts are demanding that trial judges administer limiting instructions that single out the supposed non-character theory and encouraging trial judges to explain the theory in clearer, more detailed terms.

Part I concludes by predicting that in the long term, the tightening of Rule 404(b}'s substantive and procedural standards will give prosecutors a powerful incentive to resort to Rule 608(b) as an alternative

[5] Hall, The Trial of a Recidivist and Proof of Other Crimes, Case & Comment 48 (Sept.-Oct. 1979).
[6] Justice Department Issues Clarification of Policies for Criminal Intelligence Systems, 57 U.S.L.W. (BNA) 2405 (Jan. 19, 1999).
[7] Badiru, Adedeji et al., ARREST: Armed Robbery Eidetic Suspect Typing Expert System, 16 J. Pol. Sci. & admin. 210 (1988).
[8] Blinka, Character, Liberalism, and the Protean Culture of Evidence Law, 37 Seattle U.L.Rev. 87, 110 (2013).
[9] Leudsdorf, Presuppositions of Evidence Law, 91 Iowa L.Rev. 1209, 1223 (2006).
[10] Melilli, The Character Evidence Rule Revisited, 1998 B.Y.U.L.Rev. 1547, 1548.
[11] Reed, Admitting the Accused's Criminal History: The Trouble With Rule 404(b), 78 Temp.L.rev. 201, 202, 212, 216, 218, 227, 251 (2005).
[12] Zuckerman, The Principles of Criminal Evidence 229.
[13] Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 So.Cal.L.Rev. 35, 51 (1980).

justification for informing the jury of the accused's other misdeeds. Currently, prosecutors make minimal use of Rule 608(b). Prosecutors prefer Rule 404(b) as a theory of admissibility because it permits the substantive use of extrinsic testimony about an accused's other misconduct. Given the courts' past receptivity to Rule 404(b) evidence, prosecutors have felt little need to turn to Rule 608(b), which allows the testimony to be used only for the limited purpose of impeachment and restricts resort to extrinsic evidence. For the last three decades, I have made it a practice to at least quickly scan every opinion published in a Federal Supplement advance sheet. It speaks volumes that the typical Federal Supplement advance sheet contains multiple 404(b) cases but no 608(b) cases. In the near future that might change.

Part II discusses the problems that will arise if prosecutors begin to shift toward Rule 608(b). Part II points out that Rule 608(b) is the subject of several splits of authority. To begin with, may the proponent employ Rule 608(b) if the act in question has already been the subject of a conviction? In addition, during 608(b) cross-examination, to what extent, if any, may the cross-examiner use documentary evidence to pressure the witness to concede his or her performance of the untruthful act? Finally, despite the Rule's seemingly explicit ban on "extrinsic evidence" of the act, may the cross-examiner confront the witness if a judge or jury has made a finding rejecting the witness's testimony on a prior occasion? There is some case law on each of these issues. However, compared to the volume of Rule 404(b) decisions, the bodies of relevant Rule 608(b) case law are quite small. To date these issues have not been especially troublesome because, again, by a wide margin prosecutors have usually opted to take the Rule 404(b) route rather than the Rule 608(b) tack.

In addition to identifying the splits of authority, Part II evaluates the conflicting views on these issues. My hope is that by calling the Committee's attention to these issues and describing the competing policy considerations, the article will persuade the Committee to address these issues and help the Committee choose how to come down on these issues. The resolution of these 608(b) issues arguably requires an amendment to the Rule. As it has done in the past, the Committee could offer useful guidance to courts applying Rule 608(b) in a Note. However, my understanding is that the Committee's settled practice is that it will not issue a new Note unless the Note accompanies a proposed amendment. If the toughening of Rule 404(b) standards has the foreseeable effect of prompting prosecutors to turn more frequently to Rule 608(b), in the near future that amendment and Note guidance might prove valuable.

I. THE TIGHTENING OF THE SUBSTANTIVE AND PROCEDURAL STANDARDS FOR INVOKING RULE 404(B) AND THE LIKELY IMPACT OF THAT DEVELOPMENT ON RULE 608(B)

A. Substantive Standards

The past three decades have witnessed a desirable trend in which courts have more carefully policed the substantive application of Rule 404(b).

Res Gestae. Initially, consider the res gestae doctrine. In the past, numerous courts had cited the doctrine as a justification for admitting evidence of other acts that were part of the same transaction or episode as the charged crime or that at least were committed in the same short time period as the charged crime. However, many contemporary courts, both federal and state, have condemned and consequently abandoned the "res gestae" doctrine. In the words of one federal court, the "very

looseness and obscurity" of the phrase creates "too many opportunities for . . . abuse."[14] In 2021, another federal court declared that the doctrine illustrates only "the marvelous capacity of a Latin phrase to serve as a substitute for reasoning."[15] In 2022, the Colorado Supreme Court joined the jurisdictions "that have abandoned this always-nebulous and long-superfluous doctrine."[16] The Hawaii[17] and Kansas[18] Supreme Court have expressly rejected the doctrine as an independent basis for admitting evidence of an accused's uncharged misconduct. The Montana Supreme Court repudiated the doctrine as a "magic incantation . . . ."[19] The Indiana Supreme Court succinctly stated that in that jurisdiction, the doctrine "is no more."[20]

While stopping short of completely jettisoning a supposed noncharacter theory that had been popular in the past, a large number of courts have heightened the foundational requirements for invoking the theory. Consider three illustrative theories: the doctrine of objective chances, inextricable intertwinement, and plan.

The Doctrine of Objective Chances. One such theory is the doctrine of objective chances. The seminal case, of course, is the famous English "brides in the bath" case, *Smith v. The King.*[21] On July 12, 1912, the accused's wife was found drowned in her bath. Her life was insured in Smith's favor. The prosecution offered evidence that two other women who had been married to Smith has been discovered drowned in their own bathtubs. The Court of Criminal Appeals sustained the admission of the evidence on the theory that cumulatively, the incidents constituted an extraordinary coincidence that was relevant to show that one or some of the deaths were not accidental. The Seventh Circuit capsulized the logic of the doctrine when it remarked, "The man who wins the lottery once is envied; the one who wins it twice is investigated."[22]

However, the key to triggering this doctrine is a showing that the accused has been involved in similar incidents more frequently than an average, innocent person would become enmeshed in such events. To be sure, some cases like *Smith* involve "once in a lifetime events" such as a spouse's drowning by death or winning the lottery. In those cases, standing alone common sense suggests that together,

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[14] United States v. Hill, 953 F.2d 452, 457 n. 1 (9th Cir. 1991).
[15] United States v. Higgins, 526 F.Supp.3d 311, 314-15 (S.D.Ohio 2021).
[16] Rojas v. People, 504 P.3d 300 (Colo. 2022).
[17] State v. Fetelee, 117 Haw. 53, 175 P.3d 709 (2008).
[18] State v. Campbell, 308 Kan. 763, 423 P.3d 539 (2018)(the accused was charged with murdering his wife; the court refused to hold that all "marital discord" evidence was admissible).
[19] State v. Lake, 407 Mont. 350, 503 P.3d 274 (2022).
[20] Snow v. State, 77 N.E.3d 173 (Ind. 2017).
[21] (1915) 11 Cr.App.R. 229.
[22] United States v. York, 933 F.2d 1343, 1350 (7th Cir.), cert. denied, 502 U.S. 916 1991). See also United States v. Stevens, 303 F.3d 711 (6th Cir. 2002)(a series of fires in buildings owned by the accused), cert.denied, 537 U.S. 1142 (2003); United States v. Woods, 484 F.2d 127 (4th Cir. 1973), cert.denied, 415 U.S. 979 (1974).
There is an ongoing controversy over the question of whether the doctrine possesses genuine noncharacter relevance. Bavli, An Aggregation Theory of Character Evidence, 51 J. Legal Stud. 39 (2022); Rothstein, Intellectual Coherence in an Evidence Code, 28 Loy.L.A.L.Rev. 1259 (1995); Imwinkelried, A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct, 50 N.M.L.Rev. 1 (2020); Morris, Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence, 17 Rev.Litig. 181 (1998). However, as we shall see, even assuming arguendo that the doctrine is a valid noncharacter theory, some courts have applied its foundational requirements too laxly. That are signs, though, that the courts are beginning to apply those requirements more rigorously.

the charged incident and the other incident amount to an exceptional coincidence. However, in other cases to demonstrate the threshold for an extraordinary coincidence, the prosecution ought to be required to present expert testimony or official data to establish the ordinary baseline frequency.[23] In many cases in the past, the courts overlooked the need for such data and applied the doctrine without demanding any proof of the baseline frequency.[24] However, astute judges are now calling attention to that issue. In a Utah case, an accused homeless person claimed self-defense. To rebut the defense, the prosecution offered evidence that during a four-year period, the accused had been involved in three similar incidents. In a thoughtful concurrence in the case, Judge Harris faulted the trial judge for admitting the evidence under the doctrine of chances although there was no reliable evidence of the frequency with which a similarly situated, innocent person would have had to resort to self-defense.[25] Judge Harris wrote that the trial judge had relied on nothing more than an "intuition-level conclusion" about the frequency with which "a person living in that part of the city of [Salt Lake typically] became involved in . . . fight[s] . . . ." Judge Harris stated that the trial judge

> needed to take additional evidence—from experts, if necessary,--to arrive at a sound conclusion about whether the number of assaults in which Lane was involved was atypical for a resident of that part of town.

The Inextricable Intertwinement Doctrine. As a growing number of courts abandoned the res gestae theory, as a fallback prosecutors turned increasingly to the inextricably intertwined doctrine. According to this doctrine, if in some sense the other act is inextricably intertwined with the testimony about the charged offense, evidence of the other act is also admissible. Over time the courts used such expressions as blended with, integral to, intermingled, interrelated, interwoven, and intertwined with.[26] In some cases, the doctrine can be applied legitimately. For instance, the crime and the other incident might be linguistically intertwined. As a case in point, suppose that the accused made a confession to committing the charged crime but that on its face, the statement is ambiguous because the accused stated that on the charged occasion, he acted "exactly the way" they did at the time of the other incident. As a practical matter the jury cannot understand the confession to the charged crime without the benefit of testimony about the other incident.[27] If as in the example the judge finds the requisite connection—linguistic or otherwise--between the charged crime and the other act, the judge permits reference to the other act on the theory that it is an inseparable part of the story of the charged crime.[28]

However, like the vague res gestae notion, the loose inextricable intertwinement doctrine lent itself to abuse.[29] In the final analysis, the question was whether the witness[es] to the charged crime could

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[23] Imwinkelried, Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent, 45 Hofstra L.Rev. 851 (2017).
[24] Id.
[25] State v. Lane, 444 P.3d 553 (Utah App. 2019).
[26] 1 E. Imwinkelried, Uncharged Misconduct Evidence 2023 Edition § 6:33, at 1048-49 (2022).
[27] United States v. Skowronski, 968 F.2d 242 (2d Cir. 1992)(the coconspirator stated that the charged crime would be committed in a manner "similar" to the uncharged crime). See also United States v. Alqahtani, 523 F.Supp.3d 1304, 1311 (D.N.M. 2021)("inseparable").
[28] United States v. Dudley, 941 F.2d 260 (4th Cir. 1991), cert.denied, 502 U.S. 1046 (1992).
[29] United States v. Green, 617 F.3d 233 (3d Cir.)("Like its predecessor res gestae, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore that danger it poses to the vitality of Rule 404(b)"), cert.denied, 562 U.S. 942 (2010).

coherently describe that crime without referring to the other act—a problem of redacting and editing.[30] Fairly early on appellate courts began tasking trial judges to take "a hard look to ensure there is a clear link or nexus between the evidence and the story of the charged offense, and that the purpose for which the evidence is offered is actually essential."[31] As time passed, more courts began rejecting strained prosecution attempts to rely on the doctrine as a justification for admitting testimony about uncharged acts.[32] Ultimately, the Court of Appeals for the Seventh Circuit characterized the doctrine as "overused, vague, and quite unhelpful."[33] For that reason, the court not only directed its trial judges to examine the claimed nexus more carefully; the court also went to the length of announcing that "[h]enceforth, inextricable intertwinement is unavailable" as a theory of admissibility in that jurisdiction.[34] Most federal courts have not gone that far, but they no longer accept superficial prosecution claims of inextricable intertwinement at face value.

Plan. The text of Rule 404(b)(2) expressly mentions proof of "plan" as an acceptable, noncharacter theory of logical relevance. The rub is that the Rule does not provide a definition of the term. Some plan scenarios clearly possess legitimate noncharacter relevance.

-----For example, in some cases—sequential plans--there is a natural sequence to the offenses: The accused first steals the key to a till and later uses the key to steal money from the till,[35] or the accused initially steals the instrumentalities needed to carry out a crime and then employs them to commit the crime.[36] Proof of the first crime tends to prove the accused's commission of the second crime without positing any assumption about the accused's personal, subjective bad character. For example, if there was only one key to the till, the accused's theft of that key would be relevant to singling out the accused as the perpetrator of the second crime.

-----In other cases—"chain" plans--the accused is attempting to achieve some larger objective, and the individual crimes are merely means to the end of attaining that objective. Thus, a potential heir to an estate might murder the other competing heirs to ensure that he or she inherits the property, or someone might bribe several city council members in order to gain enough votes to ensure the approval of a matter pending before the council.[37] The overarching goal of securing title or a favorable vote inspires all the killings or bribes; evidence of the other crimes is relevant for a purpose other than showing that the accused has a propensity to kill or bribe.

------Finally, in still other cases—"template" plans--there is evidence that before committing a series of crimes, the accused gave forethought to the subsequent commission of the offenses. The accused might

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[30] Imwinkelried, The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 59 Cath.U.L.Rev. 719, 733-41 (2010).
[31] United States v. Brizuela, 962 F.3d 784, 795 (4th Cir. 2020).
[32] E.g., United States v. Steiner, 847 F.3d 103, 112-13 (3d Cir. 2017); United States v. Stephens, 571 F.3d 401, 410-11 (5th Cir. 2009); United States v. Taylor, 522 F.3d 731, 735 (7th Cir. 2008); United States v. Cervantes, 170 F.Supp.3d 1226, 1239 (N.D.Cal. 2016), cert.denied, 142 S.Ct. 730, 211 L.Ed.2d 411 (2021); United States v. Nektalov, 325 F.Supp.2d 367, 370-71 (S.D.N.Y. 2004).
[33] United States v. Gorman, 613 F.3d 711, 719 (7th Cir. 2010).
[34] Id. See Saltzburg, Inextricably Intertwined? Maybe Not, 16 Crim.Just. 60, 62 (Spr. 2001).
[35] 1 Wigmore, Evidence § 215 (3d ed.).
[36] Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv.L.Rev. 988, 1009 (1938).
[37] Peats v. State, 213 Ind. 560, 12 N.E.2d 270 (1938).

even have gone to the length of preparing a written list of targets[38] or victims.[39] Just as Rule 404(b) mentions "plan" as a permissible use to 404(b) evidence, it refers to "preparation."[40] Again, the evidence is relevant to prove the accused's guilt without any assumption about the accused's character.

However, in the past in a large number of cases the courts went further and invoked the plan "rubric" where there was nothing more than evidence of a number of recent, similar crimes.[41] In this situation, "plan" is merely a euphemism for bad character.[42] As in the case of the inextricable intertwinement doctrine, a growing number of federal courts now demand more before allowing the prosecution to invoke the plan theory.[43] In the words of the Court of Appeals for the Second Circuit, "the mere similarity of separate crimes committed within a short period of time does not create a 'common plan or scheme.'"

Thirty years ago all of the above theories were gateways to admissibility that prosecutors often successfully turned to. Today in many cases the prosecutor's attempt to invoke the theory will fail.

B. Related Procedural Restrictions

As Subpart I.A demonstrated, the courts have made it more difficult for prosecutors to introduce uncharged misconduct under Rule 404(b) by toughening the Rule's substantive standards. As previously stated, some courts have repudiated the res gestae and inextricable intertwinement glosses on the Rule; and other courts are applying the foundational requirements for the doctrine of objective chances and plan theories more rigorously . At the same time two procedural changes have also raised the 404(b) barriers. The changes relate to pretrial notice and limiting instructions.

Pretrial Notice. In 1991, Rule 404(b) was amended to add a pretrial notice requirement. The original amendment required only that "on request" the prosecution disclose to the defense "the general nature of any such evidence that the prosecutor intends to offer at trial." As a practical matter, even that limited requirement made it more difficult for prosecutors to introduce Rule 404(b) evidence. If the defense requested and received the disclosure before trial, the defense would have ample time to think through the potential prosecution theories of admissibility such as plan. Prosecutors realized that they had to be better prepared to substantiate their claim of noncharacter relevance because the defense would no longer be caught by surprise at trial.

The further amendment that took effect in 2020 gave the notice requirement even more teeth. By the terms of that amendment, even absent a defense request the prosecution must now not only disclose the nature of the evidence. Much more importantly, under 404(b)(3)(B), the prosecution must "articulate in the notice the permitted use for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose . . . ." In short, in its mandatory pretrial notice the prosecutor

[38] United States v. Fortenberry, 919 F.2d 923 (5th Cir. 1990).
[39] People v. Corona, 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978)(a ledger naming the victims).
[40] Fed.R.Evid. 404(b)(2), 28 U.S.C.A..
[41] 1 Uncharged Misconduct Evidence, supra 26, at § 3:26.
[42] People v. Tassell, 36 Cal.3d 77, 679 P.2d 1, 201 Cal.Rptr. 567 (1994).
[43] Becker v. ARCO Chemical Co., 207 F.3d 176 (3d Cir. 2000); United States. v. Himelwright, 42 F.3d 777 (3d Cir. 1994); United States v. LeCompte, 99 F.3d 274, 278 (8th Cir. 1996); United States v. Tai, 994 F.2d 1204 (7th Cir. 1998); United States v. Temple, 862 F.2d 821 (10th Cir. 1988)("This circumstantial evidence is entirely too thin . . . ."); United States v. Lynn, 856 F.2d 430 (1st Cir. 1988).

must: identify the item of evidence that it intends to proffer at trial, specify its intended use (e.g., one of the permissible purposes listed in the text of 404(b)(2)), and finally explain how the jury can reason from that item of evidence to that fact of consequence without positing an assumption about the accused's personal bad character. Since the text of the amended Rule requires that the prosecution identify both the purpose and the reasoning, without more a prosecutor's bald, conclusory assertion that the evidence is admissible to prove identity or intent falls short. Prosecutors must now think through their claimed noncharacter theory of logical relevance not only in greater depth but also much earlier in the process. And, of course, once the prosecution identifies a theory in the pretrial notice, the defense can sharply focus on that theory and develop more specific objections to the proffer.

Limiting Instructions. The Rule drafters made it more challenging for prosecutors to introduce uncharged misconduct by initially imposing and then toughening a pretrial notice requirement. Appellate courts have intensified the challenge by changing the law governing limiting instructions on such evidence. In particular, the appellate courts increasingly prohibit the use of so-called "shotgun" instructions. Previously, many trial judges gave "shotgun" instructions mentioning all the permissible purposes listed in Rule 404(b). In one case, the federal District Court judge "told the jurors they could use the evidence for all seven of the purposes explicitly listed in Rule 404(b) . . . ."[44] Such an instruction is an invitation for the jury to misuse the testimony as bad character evidence. Even if the item possesses genuine noncharacter relevance on one theory such as modus operandi, testimony about a bad act possesses dual relevance. In addition to its permissible use, the item is relevant as evidence of the accused's bad character. By treating the accused's character as an intermediate inference, the jurors can reason to other facts of consequence in the case; the instruction might list six other "purposes" on which the evidence is relevant only by employing the accused's character as an intermediate inference. Consequently, a growing number of courts condemn "shotgun" instructions as an unacceptable laundry list[45] of the purposes mentioned in Rule 404(b).

By virtue of the first step, trial judges must specify the particular purpose or purposes on which they believe that the testimony possesses legitimate noncharacter relevance. As a second step, some federal courts are now encouraging trial judges to elaborate on that purpose or those purposes. Traditionally, most appellate courts have balked at requiring trial judges to do so. In part the courts have been reluctant to prescribe that requirement because it was arguable that the trial judge's elaboration on the purpose or purposes could amount to improper judicial comment on the evidence.[46] Another contributing factor may have been the appellate courts' unwillingness to impose on trial judges the sometimes difficult task of composing an instruction clearly delineating the noncharacter theory.

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[44] United States v. Johnson, 98 Fed.Appx. 5, 7 (D.C.Cir. 2004).

[45] United States v. Garcia, 994 F.3d 17, 34 (1st Cir. 2021)("for limiting instructions to be 'suitably prophylactic' in the Rule 404(b) context, they must guide the jury's attention away from the forbidden propensity inference by clearly directing it toward the specific permissible relevance that the prior bad act evidence has in the case"); United States v. Davis, 726 F.3d 434 (3d Cir. 2013)("a wide list of purposes"); Becker v. ARCO Chemical Co., 207 F.3d 176 (3d Cir. 2000)(an entire litany of purposes); United States v. Everett, 270 F.3d 986, 991-92 (6th Cir. 2001)(the trial judge "must carefully identify . . the specific factor named in the rule that is relied upon to justify the admission of the other-acts evidence"), cert.denied, 537 U.S. 828 (2002); United States v. Spikes, 158 F.3d 913, 930 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999); United States v. Kern, 12 F.3d 122, 125 n. 3 (8th Cir. 1993)("We do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes"); United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989; United States v. Munson, 819 F.2d 337, 346 (1st Cir. 1987).

[46] H. Kalven & H. Zeisel, The American Jury 418-21 (1966).

However, the 2020 amendment to Rule 404(b) simplifies the trial judge's task. As previously stated, the amendment requires the prosecution to specify both the permissible use of the evidence and the supporting "reasoning." If the trial judge vigorously enforces that requirement, the judge can pressure the prosecutor to lay out the complete chain of circumstantial reasoning underlying the proffer. The prosecutor's notice can then serve as an excellent starting point for the judge to craft a more refined limiting instruction. Beginning in 2021—the year after the amendment took effect--an occasional appellate opinion has directed trial judges to "clearly direct[the jury] toward the specific permissible relevance that the prior bad act evidence has in the case."[47]

C. The Cumulative Impact of the Changed Substantive Standards and Procedural Restrictions

As the Introduction pointed out, prosecutors now have ready access to massive amounts of data about an accused's prior criminal activity. Under the Federal Rules, prosecutors have two routes for introducing evidence about such activity, Rules 404(b) and 608(b). In the past, prosecutors have understandably preferred Door A, Rule 404(b). While Rule 608(b) evidence is admitted for the limited purpose of impeachment, Rule 404(b) testimony qualifies as substantive evidence on the historical merits. Moreover, while Rule 608(b) purports to bar "extrinsic evidence" (other than concessions elicited during the witness's cross-examination), the courts routinely admit extrinsic evidence qualifying under Rule 404(b). Prior to the recent reforms, many courts liberally admitted such evidence under Rule 404(b) even though the defense had no advance pretrial notice of the evidence and at trial the government relied on conclusory claims that the evidence was logically relevant on a noncharacter theory. After deciding to admit the evidence, trial judges administered limiting instructions that gave jurors little useful guidance as to how to confine the evidence to legitimate, noncharacter uses.

As Subpart I.A demonstrated, federal courts are now tightening the substantive standards under Rule 404(b). They have jettisoned spurious theories such as res gestae and are insisting that prosecutors lay fuller foundations in order to invoke noncharacter theories such as plan and the doctrine of objective chances. Moreover, as Subpart I.B added, prosecutors can no longer spring such evidence as a surprise at trial. The defense is entitled to advance notice of the government's intent to resort to Rule 404(b) and can be much better prepared to formulate specific objections to the 404(b) proffer. Furthermore, since appellate courts are increasingly banning "shotgun" instructions, trial judges know that they must draft limiting instructions that hone in on the permissible purpose or purposes. In addition, since the 2020 amendment requires that prosecutors disclose the "reasoning" underlying their claim of noncharacter relevance, trial judges have a strong incentive to demand that prosecutors comply with the 2020 amendment.

The cumulative impact of these substantive and procedural changes is clear: It is now harder for prosecutors to introduce uncharged misconduct evidence through Door A, Rule 404(b). Door B, Rule 608(b), is likely to become more attractive than it has been in the past. Part II turns to Rule 608(b). As we shall see, though, there are several splits of authority over the scope of Rule 608(b). Previously, the existence of those splits of authority was tolerable and posed few problems because prosecutors had so little occasion to turn to Door B. However, the tightening of substantive rules and procedural restrictions under Rule 404(b) may change the dynamic. In the future prosecutors may invoke Rule 608(b) more often, and the splits of authority under Rule 608(b) will then grow in importance and become more

[47] United States v. Garcia-Sierra, 994 F.3d 17, 34 (1st Cir. 2021).

troublesome. The Advisory Committee should consider whether it is time to address some or all of those splits of authority in anticipation of increased reliance on Rule 608(b).

II. THE SPLITS OF AUTHORITY OVER THE SCOPE OF RULE 608(b) AND THE MANNER IN WHICH THE ADVISORY COMMITTEE MIGHT CONTRIBUTE TO THE RESOLUTION OF THOSE SPLITS

A. The Splits of Authority

Although the body of case law construing Rule 404(b) dwarfs the Rule 608(b) case law, three splits of authority have emerged under Rule 608(b). Further, while the typical item of 608(b) evidence plays a modest role in the case, 608(b) can be the theory that the defense relies on to introduce evidence of a rape complainant's prior false rape accusation[48]--currently an important, hot button issue.

1. Can the proponent invoke Rule 608(b) if the act in question has already been the subject of a conviction?

Both Rules 608(b) and 609 are parts of Article VI devoted to "Witnesses." They both deal with impeachment techniques. Moreover, by their terms both allow the opponent to attack the witness's "character for truthfulness." Rule 609(a) permits the opponent to use conviction evidence as a basis for impeaching that character trait:

> In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
> (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> (B) must be admitted in a criminal case, in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.[49]

What if the untruthful act (otherwise a proper subject of inquiry under Rule 608(b)) is part of an event that was the subject of a prior conviction? Does the existence of the conviction preclude the opponent from inquiring under Rule 608(b)? The federal courts of appeal are divided over that question.[50]

The mootness of the issue. At first blush, the issue might appear to be moot. After all, when there is a conviction, it would seem that Rule 609 ought to permit the opponent to elicit the detail that during

[48] Imwinkelried, Formalism Versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Evidence to Prove Impeaching, Untruthful Acts That Have Not Resulted in a Conviction, 48 Creighton L.Rev. 213, 228-32 (2015).
[49] Fed.R.Evid. 609(a), 28 U.S.C.A..
[50] United States v. Deleon, 308 F.Supp.3d 1229, 1235 (D.N.M. 2018).

the course of conduct that is the subject of the conviction, the accused committed an untruthful act. However, on closer scrutiny, that is not the case.

Initially, consider Rule 609(a)(1) regulating the use of felony grade convictions. The rub is that when 609(a)(1) governs, the courts ordinarily limit the opponent to eliciting the details of the name of the underlying crime,[51] the date and site of the conviction,[52] and the sentence.[53] Suppose that the accused lured a victim to her death by lying to her about the purpose of a meeting in a relatively secluded area. Assume further that the accused was later convicted of the felony of murdering the victim. On the one hand, at trial the prosecutor could elicit the fact that in December 2021 in St. Louis, the accused was convicted of first degree murder and sentenced to 30 years' imprisonment. On the other hand, given the case law construing Rule 609(a)(1), the prosecutor could not elicit the specific detail that the accused had lied to the victim as part of his plan to murder her.

But even if Rule 609(a)(1) would not permit the inquiry, one would think that the inquiry is surely permissible under Rule 609(a)(2). After all, that provision seems to allow inquiry about any conviction for *crimen falsi* offenses consisting of "a dishonest act or false statement."[54] However, on close scrutiny, the language of the Rule is more restrictive. Inquiry is permissible only "if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."[55] Assume *arguendo* that at the trial culminating in the conviction, the prosecution had introduced admissible evidence that the accused had lied to the victim; a third party might have overheard the accused's end of the accused's telephone conversation with the victim. Standing alone, the inclusion of that testimony in the record of trial is insufficient to trigger Rule 609(a)(2). The text of the Rule requires that the judge be able to "readily" make the necessary determination.[56] The accompanying Advisory Committee Note explains:

> The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions . . . . But the

[51] 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. 2023)("'[A]bsent exceptional circumstances, evidence of a prior conviction admitted for impeachment purposes should not include collateral details and circumstances attending upon conviction. Generally, only the prior conviction, its general nature, and punishment of felony range are fair game for testing the 'witness's] credibility'").

[52] United States v. Estrada, 430 F.3d 606, 616 (2d Cir. 2005)(only "the essential facts" of the conviction), cert.denied sub nom. Rosario v. United States, 555 U.S. 937 (2008).

[53] United States v. Albers, 93 F.3d 1469, 1480 (10th Cir. 1996), aff'd, 145 F.3d 1246 (10th Cir. 1998), cert.denied, 528 U.S. 1126 (2000); Starmel v. Tompkin, 634 F.Supp.3d 41 44 (N.D.N.Y. 2022).

[54] Fed.R.Evid. 609(a)(2), 28 U.S.C.A..

[55] Id.

[56] Id.

> amendment does not contemplate a "mini-trial" in which the courts plumbs the record of the previous proceeding to determine whether the crime was in the nature of crimen falsi.[57]

Thus, there is not a complete overlap between Rules 609(a)(2) and 608(b); there are times when Rule 609(a)(2) is inapplicable because of the "readily determine" limitation, but the underlying act would be an appropriate subject of inquiry under 608(b).

The upshot is that in the murder hypothetical, neither Rule 609(a)(1) on felony grade offenses nor 609(a)(2) on *crimen falsi* offenses would permit the prosecutor to inquire about the lie. The bottom line is that the issue is not moot.

The merits of the statutory construction issue. If the issue is a live one, what are relevant arguments? A proponent of barring inquiry can first point to the text of Rule 608(b); the introductory language is "Except for a criminal conviction under Rule 609."[58] However, that language is a restriction on the admissibility of extrinsic evidence of the deceitful act, not a definition of the basic scope of Rule 608(b).

The proponent might next point to a passage in the original Advisory Committee Note to Rule 608(b). That Note refers to "[p]articular instances of conduct, though not subject of criminal conviction."[59] Yet, that reference is ambiguous. The use of "though" does not necessarily mean that the drafters forbade the use of Rule 608(b) when there has been a conviction. Suppose that the violation of a constitutional rule is *per se* error. Referring to that rule, a court might write: "A violation, though not prejudicial in character, is a ground for reversal." Given the common usage of the term "though," the court would mean that whether or not the violation was prejudicial, the violation is reversible. By the same token, the passage in the Note could mean that whether or not the act has been "the subject of criminal conviction," the act is a subject for proper inquiry.

As we have seen, there is at most a questionable statutory construction case for barring inquiry under Rule 608(b) if the untruthful act was part of an act that has been the subject of a conviction. Even more to the point, Rules 608 and 609 purport to be distinct methods of impeachment; and the text of Rule 608(b) does not expressly bar its use when there has been a prior conviction. In addition, barring inquiry would be inconsistent with the Rule 404(b) case law. Like Rule 608(b), Rule 404(b)(1) refers to an "act."[60] Yet, the cases are legion in which courts have allowed the proponent to use convictions as proof of the acts admissible under Rule 404(b).[61] Indeed, some courts declare that a prior conviction is "the strongest proof" of an accused's identity for purposes of Rule 404(b).[62] As a general proposition, it is dubious to "import" restrictions from one Federal Rule provision into another provision.[63] Doing so can strain the notion of "context" to the breaking point. Concededly, if an Advisory Committee Note to one Rule identifies a constitutional concern that (1) inspires a restriction codified in the first rule and (2) is

[57] Id. at Adv.Comm.Note accompanying the 2006 amendment to Rule 609.
[58] Id. at Fed.R.Evid. 608(b).
[59] Id. at Adv.Comm.Note, Fed.R.Evid. 608(b).
[60] Id. at Fed.R.Evid. 404(b).
[61] 1 Uncharged Misconduct Evidence, supra note 26, at § 2:8, at 125-30.
[62] Id. at 125-26.
[63] Imwinkelried, supra note 48.

also relevant to another Rule, there is a case for extending the restriction from one Rule to the other.[64] The constitutional concern that inspires the restriction might also apply to the provision in the other Rule. Whenever reasonably possible, a court should construe a statute in a manner to uphold its constitutionality. Extending a constitutionally inspired restriction from one Rule to another would be consistent that that statutory construction policy. However, in the instant case, the Notes to Rules 608 and 609 do not identify any constitutional concern that would seemingly justify treating Rule 609 as essentially preempting Rule 608.

This is one of the issues on which there is very little Rule 608(b) case law. Allowing this split of authority to persist has been tolerable in the past because, again, prosecutors have usually chosen Door A rather than Door B. However, if the government begins invoking Door B, Rule 608(b), much more frequently in the future, this is an issue that the Advisory Committee should consider addressing.

2. To what extent, if any, should the opponent be permitted to use exhibits such as writings during the cross-examination to pressure the witness to concede that he or she committed the untruthful act? Should there be an absolute ban on the use of such documents?

On its face, Rule 608(b) embodies a general prohibition on the use of "extrinsic evidence."[65] The question is the breadth of that prohibition. There is agreement that the prohibition comes into play after the witness to be impeached has left the stand.[66] When the witness has already concluded his or her testimony and left the stand, the prohibition would apply if the opponent later called a second witness to prove the first witness's commission of the untruthful act. However, the point of disagreement is the extent to which, if any, the cross-examiner may use exhibits to pressure the first witness to concede that he or she committed the untruthful act. Does the "extrinsic evidence" prohibition go that far?

The authority on this question is fragmented. The language of both the Rule and the accompanying Advisory Committee Note appears to cut in favor of an expansive definition of "extrinsic evidence" barring the use of documents during cross-examination. The text of Rule 608(b) contains a blanket prohibition of "extrinsic evidence."[67] The Advisory Committee to the 2003 amendment to Rule 608(b) refers to "the absolute prohibition on extrinsic evidence" imposed by the Rule. 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; the limited right is to refer only to the untruthful act itself without any use of documents expressly referring to the act or implying the act by reflecting actions that third parties have taken against the witness because of the act.

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[64] See United States v. Oates, 560 F.2d 45 (2d Cir. 1977)(discussing the legislative history indicating that Congress wanted to limit the scope of Rule 803(8) to safeguard the accused's Confrontation rights). Rule 803(8)(A)(ii) excludes certain observations by "law enforcement personnel" from the scope of the official record exception to the hearsay rule. Fed.R.Evid 803(8), 28 U.S.C.A.. If a court read the Advisory Committee Note to Rule 803(8) as clearly signaling that the drafters thought that the Confrontation Clause mandates that restriction, there would be a strong case for also precluding the admission of such evidence under Rule 803(6) governing business entries.

[65] Fed.R.Evid. 608(b), 28 U.S.C.A..

[66] Blumhagen v. State, 11 P.3d 889, 893 (Wyo. 2000)(testimony by another witness).

[67] Fed.R.Evid. 608(b), 28 U.S.C.A..

Relying on the text and Note, many courts bar not only evidence presented after the witness leaves the stand but the use of virtually any documents during the witness's cross-examination. For example, in a case in which the witness had suffered a prior civil fraud judgment, the court held that it was error for the trial judge to permit the cross-examiner to force the witness to "read [the] last few lines of [the] opinion . . . ."[68] Other courts have barred references during cross-examination to findings by administrative agencies,[69] State Bar records,[70] bankruptcy judgements,[71] and the witness's own resume[72] and other statements.[73]

However, there are contra authorities.[74] There is a statutory construction argument as well as a policy argument in favor of the result reached by those authorities. The statutory construction argument is based on context, namely, the wording of Rule 613 governing prior inconsistent statement impeachment. Rule 613(a) controls cross-examination about the statement. The Rule eliminates the need for the cross-examiner to show a prior inconsistent writing to the witness. 613(a) expressly refers to such writings but does not characterize them as "extrinsic evidence" if they are used during cross-examination. In contrast, 613(b) includes the expression, "extrinsic evidence":[75]

> Extrinsic Evidence. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it . . . .[76]

The original Advisory Committee Note makes it clear that under Rule 613(b) there is no "particular timing" requirement and that hence, the "extrinsic evidence" can be introduced after the witness has left the stand so long as the witness is excused subject to recall.[77] Both the text and Note suggest that in Rule 613(b), "extrinsic evidence" narrowly means evidence introduced after the witness leaves the stand. That suggestion would lend support to the argument that in Rule 608(b), the identical expression, "extrinsic evidence," should not apply to or limit the witness's cross-examination. As in Rule 613(b), Rule 608(b)'s wording might signify only that after the witness leaves the stand, the cross-examiner may not present evidence such as documents contradicting the witness's denial of an untruthful act.

That reading of "extrinsic evidence" become all the more credible when Rule 608(b) is considered in light of its common-law antecedents. The ban on "extrinsic evidence" under Rule 608(b) is traceable to

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[68] United States v. Herzberg, 558 F.2d 1219, 1222-23 (5th Cir.), cert.denied, 434 U.S. 930 (1977).
[69] United States v. Teron, 478 Fed.Appx. 683 (2d Cir. 2012)(findings by a Civilian Complaint Review Board).
[70] Bonin v. Calderon, 59 F.3d 815, 829 (9th Cir. 1995), cert.denied, 516 U.S. 1051 (1996).
[71] United States v. Joseph, 156 Fed.Appx. 180, 184 (11th Cir. 2005), cert.denied, 547 U.S. 1092 (2006).
[72] United States v. Elliott, 89 F.3d 1360 (8th Cir. 1996), cert.denied, 519 U.S. 1118 (1997).
[73] United States v. Smith, 277 Fed.Appx. 870, 872 (11th Cir. 2008).
[74] United States v. Jones, 728 F.3d 763, 767 (8th Cir. 2013)(a federal magistrate's findings at a detention hearing), cert.denied, 571 U.S. 1151 (2014); United States v. Desantis, 134 F.3d 760 (6th Cir. 1998)(administrative agency findings), cert.denied, 532 U.S. 1013 (2001), cert.denied, 543 U.S. 822 (2004); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980)(suspension from the practice of law).
[75] Fed.R.Evid. 613(b), 28 U.S.C.A..
[76] Id. Of course, the pending amendment to Rule 613(b) will change the wording of the provision to read:
> Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement . . . .

[77] Id. at Adv.Comm.Note, Fed.R.Evid. 613(b), 28 U.S.C.A.. Again, the pending amendment will change the timing rule.

the application of the common-law collateral fact rule to that mode of impeachment.[78] However, the collateral fact rule did not restrict cross-examination about untruthful acts.[79] Instead, the restriction applied to evidence presented after the witness to be impeached has left the stand.[80] The cross-examiner had to "take the witness's answer"[81] and could not call a second witness to testify to the untruthful act the witness to be impeached had denied.

There is also a sensible policy argument pointing to this conclusion. On several occasions Professor Schmertz, the former editor of FEDERAL RULES OF EVIDENCE NEWS, argued that at the very least the cross-examiner should be permitted to pressure the witness by using documents that the witness is competent to authenticate.[82] In Professor Schmertz' mind, the primary rationale for the limitation on the use of documents during cross-examination is that the battle over the document might "waste trial time" if the parties have a lengthy wrangle over the authenticity of the document.[83] However, consider perhaps the most sensitive variation of the problem: the cross-examination of a criminal accused. When asked about a prior untruthful act, the accused perjures himself or herself and denies the act. The accused persists in refusing even after the cross-examiner reminds the accused of the penalties for perjury. However, unbeknownst to the accused, the cross-examiner has obtained a copy of a letter that the accused wrote to a relative or friend. In the letter, the accused admits the untruthful act. Under Rule 901(b)(1), the accused is certainly competent to authenticate their own letter;[84] and the relevant contents of the letter also qualify as nonhearsay, since they are the statements or admissions of a party-opponent under Rule 801(d)(2)(A).[85] It is true that allowing the cross-examiner to resort to the letter is likely to prolong the cross-examination a bit. However, Professor Schmertz makes a plausible argument that in these circumstances, the additional time expenditure is likely to be minimal and the interest in exposing perjury is so substantial that the cross-examiner ought to have the right to confront the accused witness with his or her own letter establishing the prior untruthful act. The accused has lied once—the Rule 608(b) act; and Professor Schmertz believed that it was in the interest of justice to prevent the accused from compounding the falsehood by lying a second time about the prior lie.

Again, this is an issue that the Advisory Committee could clarify for the judiciary. The Committee could state its views as to whether the reference to "extrinsic evidence" in Rule 608(b) altogether bans any cross-examination reference to and use of documents that would tend to prove the witness's commission of an untruthful act. The above hypothetical involving an accused witness involves perhaps the strongest case for carving out an exception. But for a ban on later extrinsic evidence, the opponent could probably overcome both authentication and hearsay objections to the evidence; and the additional trial time needed to confront the accused witness with the document would likely be negligible.

[78] 1 McCormick on Evidence § 49, at 388 (8th ed. 2020).
[79] Id. at 386.
[80] Id. at 386-87.
[81] Id. at 386.
[82] 21 Fed.Rules Evid. News 96-168; 21 Fed. Rules Evid.News 96-106.
[83] 21 Fed.Rules Evid. News 96-168.
[84] Fed.R.Evid. 901(b)(1) ("testimony of a witness with knowledge"), 28 U.S.C.A..
[85] Id. at Fed.R.Evid. 801(d)(2)(A).

However, if the Committee decided that the prohibition of the use of "extrinsic" documents during cross-examination should not be absolute but rather merely general, the question would arise what other, if any, additional exceptions should there be.

3. What exceptions should there be to a general ban on the use of documents during cross-examination to pressure the witness to concede his or her commission of an untruthful act?

In a sense, the above hypothetical involving an accused witness is the simplest case. The witness is competent to authenticate the letter, and the letter is not subject to a hearsay objection. Other exhibits might be vulnerable to one or both objections, and it thus might be contended that the solitary exception should be for situations like the hypothetical. However, several courts have gone farther and permitted the cross-examiner over objection to refer to findings by judges and juries.[86] Before identifying and analyzing the potential objections to that practice, it is worth remembering that it is well settled under Rule 608(b) that while the cross-examiner must have a good faith basis in fact for believing that the witness committed the untruthful act, the information furnishing the basis in fact need not be independently admissible evidence.[87]

Of course, even if the form of the information does not render the information independently inadmissible, the form could both reduce the probative worth of the document and possibly trigger a long colloquy over whether the evidence establishes the witness's commission of an untruthful act. Professor Saltzburg had such concerns in mind when he wrote his often-cited 1993 article approvingly quoted in the Note accompanying the 2003 amendment to Rule 608(b):

> It should be noted that the extrinsic evidence prohibition bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of the impeachment, when that conduct is offered only to prove the character of the witness. See United States v. Davis, 183 F.3d 231, 257 n. 12 (3d Cir. 1999)(emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertions of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). See also Stephen Saltzburg, Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence, 7 Crim.Just. 28, 31 (Wint. 1983)("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 denied the act").[88]

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[86] United States v. Jones, 728 F.3d 763, 767 (8th Cir. 2013), cert.denied, 571 U.S. 1151 (2014).

[87] United States v. Craig, 953 F.3d 898 (6th Cir. 2020)("Inadmissible evidence [can] provide the good-faith basis for cross-examination"); United States v. Courtney, 439 Fed.Appx. 383 (5th Cir. 2011); United States v. Davis, 609 F.3d 663, 680-81 (5th Cir. 2010), cert.denied, 562 U.S. 1290 (2011), cert.denied sub nom. Hardy v. United States, 571 U.S. 831 (2013), ; United States v. McCallum, 885 F.Supp.2d 105, 116-17 (D.D.C. 2012), aff'd, 721 F.3d 706 (D.C.Cir.), cert.denied, 571 U.S. 1003 (2013).

[88] Adv.Comm.Note, 2003 Amendment, Fed.R.Evid. 608(b), 28 U.S.C.A..

Although Professor Saltzburg released his article in 1983 and the Advisory Committee Note approvingly quoted the article in 2003, the controversy has not ended. For example, again there are subsequent decisions that, despite the article and Note, permit references to judge and jury findings during cross-examination.[89]

The possible variations of the problem fall on a spectrum. Consider three points on the spectrum.

One end of the spectrum—independently admissible evidence that the witness lied. At one end of the spectrum, the documentary evidence of the act would be independently admissible but for the prohibition of extrinsic evidence in Rules 608(b). The hypothetical of the accused's letter acknowledging a prior lie may be the most dramatic example, but in truth it is only one illustration of the larger class of cases in which the evidence would be independently admissible but for Rule 608(b). Consider a prior judgment convicting the witness of an offense such as fraud constituting an untruthful act. If the judgment fell within the parameters of Rule 803(22), the judgment would be admissible over a hearsay objection.[90] Furthermore, if a proper chain of attesting and/or authenticating certificates was attached,

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[89] United States v. Jones, 728 F.3d 763, 767 (8th Cir. 2013), cert.denied, 571 U.S. 1151 (2014); United States v. Dawson, 434 F.3d 956 (7th Cir.)(the reference to "tucking a third party's opinion about prior acts into a question" appears only in the reference to the article in the Note; court should not construe the amendment as precluding a question inquiring whether a judge had disbelieved the witness in a previous case; "findings by judges and juries are entitled to more weight than what any old third party might happen to think about a witness's credibility"), cert.denied, 549 U.S. 1101 (2006); United States v. Nelson, 365 F.Supp.2d 381 (S.D.N.Y. 2005).

[90] Fed.R.Evid. 803(22), 28 U.S.C.A. (

Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) The judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
(B) The conviction was for a crime punishable by death or by imprisonment for more than a year;
(C) The evidence is admitted to prove any fact essential to the judgment; and
(D) When offered by the prosecution in a criminal case for a purpose other than impeachment, the judgment was against the defendant).

Subpart II.A.l demonstrated that there is not a complete overlap between Rules 608 and 609. Similarly, there is not a complete overlap between Rules 609 and 803(22). Assume that an accused is charged with a homicide or theft that is felony grade. In any jurisdiction, there is a list of the required legal elements of the offenses. However, at trial the prosecution needs to rely on a more complete, case-specific factual theory. R. Carlson & E. Imwinkelried, Dynamics of Trial Practice: Problems and Materials § 3.2(A) (6th ed. 2020). The theory often includes elements that are not included in the list of required legal elements. For example, with the exception of offenses such as racially motivated hate crimes, most crimes such as homicide or theft do not include motive as a required element. In practice, the prosecution almost always presents motive evidence because jurors want to know *why* the accused committed the actus reus; and in many cases, the existence of a motive becomes the real battleground at trial. Similarly, in a given case the linchpin issue could be whether the accused told a certain lie in the course of committing a homicide or theft. Assume that the accused is convicted of the crime. In some cases, Rule 803(22) would permit proof of the lie even though Rule 609 would not. Assume that a review of the record demonstrates that proof of the lie was an essential element of the prosecution theory of the case that the jury had to believe in order to return a judgment of conviction. In the words of Rule 803(22)(D), in light of the prosecution theory of the case the lie was a "fact essential to the judgment."

To begin with, Rule 803(22) could permit proof of the lie while Rule 609(a)(1) would not. Again, when the proponent relies on Rule 609(a)(1), the proponent is ordinarily limited to the name of the crime, the date and site of the conviction, and the sentence. See notes 51-53 and accompanying text, supra. Unless the very name of the offense contained a reference to a lie, fraud, or falsehood, the proponent would have to invoke Rule 803(22) to permit proof of the lie.

Moreover, Rule 609(a)(2) might not permit proof of the lie. As we have seen, as amended Rule 609(a)(2) includes a unique limitation; the court must be able to "readily determine that establishing the elements of the

the judgment would be self-authenticating under Rules 902(1) or (4).[91] In both respects, this variation of the problem is analogous to the hypothetical discussed in Subpart II.A.2 involving the accused witness's own letter.

The middle of the spectrum—evidence that is not independently admissible but nevertheless is trustworthy enough to support a reliable inference that the witness lied. In the middle of the spectrum there are variations where the evidence might not be independently admissible but it is relatively clear that there has been a reliable determination that the witness committed an untruthful act. By way of example, suppose that the witness is a police officer. The officer previously testified at a Fourth Amendment suppression hearing. The officer was the sole prosecution witness at the hearing. The hearing became a swearing contest. The officer testified flatly that she distinctly recalled her encounter with the accused and adamantly insisted that the accused had expressly consented to a search. For his part, the defendant gave diametrically opposed testimony and vehemently denied consenting; he testified that he repeatedly—and loudly--told the officer that he refused to consent to the search. The denouement was that the presiding judge granted the suppression motion. In these circumstances, it is relatively clear that the judge chose to disbelieve the officer; and, more to the point, there is a powerful inference that the judge found that the officer had lied. Suppose that at the current trial, the officer becomes a witness; and the defense counsel wants to question the officer about the outcome of the earlier hearing. The defense counsel has a transcript of the entire suppression hearing, including all the testimony and the judge's ruling. As in the case of the judgment discussed above, a proper set of attesting and/or authenticating certificates could render the transcript self-authenticating under Rules 902(1) or (4). However, unlike the judgment, the judge's ruling at the suppression hearing would not fall within Rule 803(22)'s exception for judgments. To be sure, the defense counsel might advance the argument that the judge's implied finding that the officer lied is reliable enough to qualify for admission under the residual hearsay exception, Rule 807.[92] The bottom line, though, is that whether or not the information is independently admissible, there is a strong case that the judge's implied finding is reliable enough to be mentioned during cross-examination. As previously stated, it is settled that the information furnishing a cross-examiner's good faith basis for orally inquiring about an untruthful act need not be independently admissible.[93]

The other end of the spectrum—the difficulty of determining whether the prior finder of fact reliably found that the witness had lied. At the other end of the spectrum are variations in which the facts make it exceedingly difficult to determine whether there has been a determination, much less a reliable determination, that the witness committed an untruthful act. The original version of Rule 608(b) referred to "credibility." However, in 2003 the Rule was amended to narrow its scope by substituting "truthfulness" for "credibility." If under the post-2003 version of Rule 608(b) the judge is to permit the cross-examiner to inquire about the witness's testimony in a prior hearing, the judge must conclude that: (1) the jury or judge rejected the witness's testimony; and (2) they rejected the testimony as untruthful, not merely as mistaken. An innocent mistake would reflect adversely on the witness's "credibility," but it

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crime required proving—or the witness's admitting—a dishonest act or false statement." See note 55 and accompanying text. If the judge cannot "readily determine" that the offense involved a lie, Rule 609(a) would be inapplicable. Rule 803(22) does not contain that limitation.

[91] Fed.R.Evid. 902(1), (4).

[92] Id. at Fed.R.Evid. 807.

[93] See authorities cited in note 87, supra.

would not amount to untruthfulness. The previous suppression hearing example was a simplified fact situation. To begin with, it would be easy to conclude that the prior judge had rejected the officer's testimony because the officer was the only prosecution witness at the hearing. Then, given the emphatic nature of the officer's testimony and the stark contrast with the defendant's testimony at the hearing, the judge at the current hearing could easily infer that the judge at the earlier suppression hearing believed that the officer was lying.

In all probability, cases at this end of the spectrum are more common than variations in the middle of the spectrum. There will often be multiple witnesses at a hearing. Moreover, even if the judge concludes that the earlier jury or jury rejected the witness's testimony, it may not be at all clear that the finder did so because the finder concluded the witness was lying. Especially if the witness used any qualifying language such as "possibly" or "approximately" in their prior testimony, it may be more reasonable to assume that the finder concluded that the witness was mistaken. In any event, at this end of the spectrum resolving questions (1) and (2) could necessitate a time-consuming, painstaking review of the record of the prior hearing. That problem harks back to the 2006 amendment to Rule 609(a). As previously stated, that amendment enables the judge to admit a conviction under Rule 609(a)(2) but only when the judge can "readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest or false statement."[94] Here too the Committee might conclude that while at this end of the spectrum inquiry should sometimes be permitted under Rule 608(b), it should be permissible only when the judge at the present hearing can "readily determine" that at the prior hearing the finder rejected the current witness's testimony as untruthful, not merely mistaken. Such cases might be rare.

Just as the factual variations fall on a spectrum, the Committee has a wide range of choices along a spectrum. Assume *arguendo* that the Committee has decided to permit the use of documents during cross-examination in the narrow situation Professor Schmertz identified. In that light, the Committee could:

---oppose any exceptions to the extrinsic evidence ban other than the fact situation that Professor Schmertz contemplated;

---recognize an additional exception for the larger class of cases in which the evidence of the lie would be independently admissible but for Rule 608(b);

---craft an even broader exception applicable whenever the judge determines that the prior finder made a reliable determination, rejecting the witness's earlier testimony as untruthful; or

---analogize to Rule 609(a)(2) and draft a narrower exception permitting the judge to do so only when the record allows the judge to "readily" make that determination. Especially if the Committee believes that the Rule 609(a)(2) amendment inserting "readily" has worked satisfactorily, this last option might be worth exploring.

III. CONCLUSION

[94] Fed.R.Evid. 609(a)(2), 28 U.S.C.A..

The immediate purpose of this presentation has been to highlight the desirability of clarifying some of the outstanding issues under Rule 608(b). In the past, those issues have posed few problems in practice because, quite frankly, prosecutors have not attempted to exploit Rule 608(b) to the extent that they have relied on Rule 404(b). As previously stated, the typical Federal Supplement advance sheet contains several Rule 404(b) opinions but usually at most one Rule 608(b) opinion. However, that may change in the future. Subparts I.A and 1.B discussed the changes in Rule 404(b) substantive standards and related procedures that will likely make it more difficult for prosecutors to successfully navigate Rule 404(b) in the future. Given the vast amount of information about citizens' criminal activity in the possession of law enforcement authorities, there will be pressure on prosecutorial agencies to turn from Door A, Rule 404(b), to Door B, Rule 608(b). That development would magnify the importance of the splits of authority under Rule 608(b). The Committee can help the judiciary stay "ahead of the curve" by addressing these issues before the number of Rule 608(b) cases increases dramatically. The Committee could propose amending Rule 608(b) by incorporating one of the positions listed at the end of Subpart II.C. and elaborating on the amendment in a new Note. Such "words to the wise" judges should suffice.

The broader purpose of this presentation has been to encourage the Committee to view individual Rules in context—as part of the larger Federal Rules framework. Textualism has enhanced the importance of contextual analysis.[95] When they consider new bills, some legislatures have adopted the useful formal practice of attempting to identify the other statutes that would be impacted by the enactment of the pending bill. Doing so reduces the risk that the law of unintended consequences will come into play—with undesirable or even drastic results. In the past, the Committee has done a wonderful job of analyzing the merits of proposals to revise individual Rules. It is submitted that it would be desirable if, going forward, the Committee made it a regular, systematic practice to consider every proposed Rule change in context and make a conscious effort to identify any other Rules that might be impacted by the proposal.[96] The Federal Rules are intended to function as a coherent legislative scheme. The analysis of Rules 404(b) and 609(a) can shed valuable light on Rule 608(b). More broadly, consideration of changes of individual Rules against the backdrop of the larger legislative scheme can enhance the quality of the Committee's work product.

[95] Imwinkelried, supra note 48. Textualists are skeptical of legislative history in part because political science research has demonstrated that special interest groups can sometimes successfully manipulate such extrinsic material. Moreover, material such as committee reports lacks the status of law. In contrast, like text, the context—other statutes that are often part of the same legislative scheme—has the formal status of law.

[96] To its credit, the Committee has sometimes done so in the past. For example, most recently, the Committee considered amending Rule 611(d) (now designated a new, standalone Rule 107) but also gave thought to the impact of such an amendment on Rule 1006.

TAB 1C

Correcting Federal Rule of Evidence 404(b)(2) to Clarify the Inadmissibility of Character Evidence

Hillel J. Bavli*

ABSTRACT

Courts misinterpret Federal Rule of Evidence 404(b)(2) as an *exception* to Rule 404(b)(1)'s prohibition on character evidence rather than a mere clarification that emphasizes the permissibility of other-acts evidence whose relevance does not rely on propensity reasoning. This misinterpretation turns the rule against character evidence on its head by effectively replacing Rule 404 with a Rule-403 balancing—and one that incorrectly treats character inferences as probative rather than prejudicial, thereby favoring admissibility rather than exclusion. Consequently, as currently interpreted, Rule 404(b)(2) generates substantial unpredictability and verdicts based on conduct not at issue in a case.

I therefore propose that the Advisory Committee amend Rule 404(b)(2) to clarify the meaning of this rule as permitting only other-acts evidence whose relevance does not rely on a character inference—that is, whose chain of inferences is free of propensity reasoning. I show how the Advisory Committee can restore Rule 404's logic and effectiveness through a straightforward modification in the language of Rule 404(b)(2). I then address the doctrine of chances—which pertains to a uniquely probative form of character evidence offered to prove the absence of chance or accident—and I explain why it should not cause reluctance to adopt my primary proposal. Then, as a secondary proposal (not required for the adoption of my primary proposal), I recommend amending Rule 404(b)(2) to establish a limited exception to Rule 404 for this type of evidence. I argue that my proposals to amend Rule 404(b)(2) would restore Rule 404's meaning and intention to exclude evidence whose relevance relies on character reasoning and, in turn, would create fairer and more accurate trials.

1. Introduction

Federal Rule of Evidence 404(a)(1) articulates the federal rule against character evidence. It provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[1] Rule 404(b)(1) provides for an important application of this rule: "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."[2] Rule 404(b)(2) then provides a *clarification* of Rules 404(a)(1) and 404(b)(1) that although other-acts evidence is impermissible if its relevance depends on the character reasoning articulated in Rules 404(a)(1) and 404(b)(1), "[t]his evidence may be admissible for

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[1] FED. R. EVID. 404(a)(1).

[2] FED. R. EVID. 404(b)(1).

another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[3]

Notwithstanding Rule 404(b)(2)'s intended meaning as a clarification that other-acts evidence is admissible for other—non-character—purposes, courts frequently misinterpret it as an *exception* to the rule against character evidence.[4] That is, they interpret it as permitting other-acts evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, . . . lack of accident," or another purpose other than to prove guilt or liability directly—*even if such proof involves character reasoning*.[5] However, this interpretation turns Rule 404 on its head: Rule 404 is intended to replace a balancing analysis under Rule 403, which excludes evidence if its probative value is substantially outweighed by its prejudicial effect.[6] It thereby aims to predictably exclude character evidence and its overwhelming influence on a case. However, this interpretation effectively reverts the Rule-404 question back to a Rule-403 balancing analysis. This is because almost all character evidence can be (and is) stated as proof of motive, opportunity, intent, identity, or another intermediary aspect of a case. Moreover, because Rule 404(b)(2) is read as an exception to Rule 404(b)(1)'s ban on character evidence, courts conduct their Rule-403 balancing by incorrectly treating character inferences as probative rather than prejudicial—thus tipping the scale further in favor of admissibility in the already-admissibility-prone Rule-403 balancing analysis.[7]

The consequences of the courts' misinterpretation of Rule 404 cannot be overstated. It has created vast unpredictability in admissibility decisions surrounding character evidence; inconsistency in standards of admissibility across jurisdictions; plea agreements that are driven by uncertainty regarding the admissibility of prior-bad-acts evidence; and guilty verdicts that are based on acts not at issue in a case.

Therefore, to address the widespread misinterpretation of Rule 404(b)(2), I propose two sets of amendments to Rule 404. First (and most importantly), I recommend that the Advisory Committee amend Rule 404(b)(2) to explicitly require a chain of inferences free of propensity reasoning for admissibility under this rule. Specifically, I propose the following language for Rule 404(b)(2):

> **(2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible for a non-character purpose — that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of**

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[3] FED. R. EVID. 404(b)(2).

[4] *See, e.g.*, United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015) ("Rule 404(b)(2) functions as an exception to [Rule] 404(b)(1).").

[5] FED. R. EVID. 404(b)(2); *see, e.g.*, United States v. Sterling, 738 F.3d 228, 237–38 (11th Cir. 2013) ("where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test [i.e., relevance to a matter other than character] is satisfied." (quoting United States v. Zapata, 139 F.3d 1355, 1358 (11th Cir. 1998)).

[6] FED. R. EVID. 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."). I use the terms "prejudice" and "prejudicial" to denote unfairness and to also include other components of Rule 403, such as causing confusion and misleading the jury.

[7] *See, e.g.*, United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (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); *see also* Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 724 (2021) ("[T]his Rule 403 balancing is hopelessly skewed because courts consider the (unrecognized) character propensity-based inference as proper, rather than improper, and so place it on the probative-value side of the scale and not on the unfair-prejudice side.").

mistake, or lack of accident) that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character.

This language modifies the current language of Rule 404(b)(2) in various respects (discussed in detail below), with the aim of clarifying that Rule 404(b)(2)'s permitted uses of other-acts evidence cover only purposes that do not involve propensity reasoning impermissible under Rule 404(b)(1). I argue that this straightforward modification in the language of Rule 404(b)(2) would correct the widespread misinterpretation of this rule and, in turn, restore the critical functioning of Rule 404.

Second, I recommend an amendment that, in one view, would be an important complement to my primary proposal above. Specifically, I address the doctrine of chances—a doctrine that pertains to a uniquely probative form of other-acts evidence that is offered to prove the absence of chance or accident.[8] This evidence—which I call "objective-chance evidence"—is frequently admitted in cases involving drug trafficking, discrimination, fraud, murder, and many other charges.[9] For example, in a murder case in which the defendant claims his spouse died in an accidental fall on a hiking trip, evidence that the defendant's previous two spouses also died in purportedly accidental falls may be admitted to prove that the fall in question was by the defendant's design rather than by chance or accident.[10]

Although this evidence is often understood as a form of character evidence,[11] it is correctly viewed as significantly more compelling than other character evidence—so much so that it is frequently presumed to be legitimate. Indeed, in response to an earlier recommendation to amend Rule 404(b), the Advisory Committee commented:

> [A]n attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference—an example would be use of the well-known "doctrine of chances" to prove the unlikelihood that two unusual acts could have both been accidental.[12]

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[8] *See generally* FED. R. EVID. 404(b)(2); Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N.M. L. REV. 1, 2–12 (2020); Paul F. Rothstein, *Comment: The Doctrine of Chances, Brides of the Bath and a Reply to Sean Sullivan*, 14 LAW, PROBABILITY & RISK 51, 51–54 (2015); *see also* Hillel J. Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 140–43 (2022) [hereinafter *An Objective-Chance Exception*].

[9] *See An Objective Chance Exception*, *supra* note 8, at 130–43, 161–65 (discussing the admission of objective-chance evidence to prove intent, knowledge, and other purposes beyond absence of mistake or accident); Imwinkelried, *supra* note 8, at 9–12 (describing common uses of objective-chance evidence).

[10] *See generally* Rex v. Smith (1915) 84 LJKB 2153 (involving multiple incidents of bathtub drownings).

[11] There is disagreement over whether objective-chance evidence relies on character reasoning. *See An Objective Chance Exception*, *supra* note 8, at 155–57; Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419 (2006); Imwinkelried, *supra* note 8, at 4–9; Sean P. Sullivan, *Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances*, 14 LAW, PROBABILITY & RISK 27 (2015); Rothstein, *supra* note 8, at 54–62; Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259 (1995).

[12] ADVISORY COMM. ON EVIDENCE RULES, JUD. CONF. OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 4–5 (MAY 2018) [hereinafter May 2018 Report].

This reasoning arguably suggests more flexibility than the rule has, and it can unfortunately be read as sanctioning the use of propensity reasoning to prove identity, intent, or another such "permitted use[]" under Rule 404(b)(2). In fact, however, objective-chance evidence stands alone: it is unique in its probative value and ability to improve the accuracy of a verdict notwithstanding its likely reliance on propensity reasoning.[13] As such, allowing Rule 404—perhaps the most critical rule of evidence to a criminal defendant's case—to remain ambiguous and subject to the interpretation of courts with respect to whether it permits propensity reasoning is not only harmful to goals of predictability, accuracy, and achieving verdicts that are based on the act in question, but is also not justified by the doctrine of chances.

I address the doctrine of chances in two ways. I first explain why objective-chance evidence should not cause reluctance to adopt my primary proposal. I argue that amending Rule 404 to address the doctrine of chances is not necessary for courts to admit certain forms of this evidence, and I highlight policy concerns that override its potential accuracy benefits.

I then argue that although not necessary for the adoption of my primary proposal, addressing the doctrine of chances explicitly in Rule 404(b) would create a more predictable and logical rule against character evidence, and it would avoid judicial attempts to find ways around Rule 404 for this uniquely probative form of character evidence.

Therefore, as a secondary proposal, I recommend an amendment to Rule 404(b)(2) to establish a limited exception to Rule 404 for certain evidence falling within the doctrine of chances. Specifically, if the Advisory Committee chooses to amend Rule 404(b)(2) pursuant to my primary proposal, I recommend that it also consider amending this rule to address the doctrine of chances as follows:

> **(2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible only if:**
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> **(A) it is offered for a non-character 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 a person's character to show that on a particular occasion the person acted in accordance with the character; or**
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> **(B) based on specific facts and circumstances, it is offered to prove an element of a claim that requires proving an absence of chance or accident, and its probative value in proving an absence of chance or accident substantially outweighs its prejudicial effect.**

Below, I explain in detail each component of the proposed language, and I argue that this amendment would serve as a beneficial complement to my primary proposal. Combined, my proposed amendments aim to strengthen the rule against character evidence by, on the one hand, clarifying the rule's meaning and intent to exclude all other-acts evidence that involves character reasoning while, on the other hand, creating an exception for a uniquely probative form of character evidence that underlies much of the confusion and unpredictability surrounding applications of Rule 404.

I proceed as follows: In Part 2, I discuss the courts' widespread misinterpretation of Rule 404 and the significant harms that result from it. In Parts 3 and 4, I discuss my primary and secondary proposals for amending Rule 404, and I explain why my proposed amendments would address the source of the

[13] *See* Hillel J. Bavli, *An Aggregation Theory of Character Evidence*, 51 J. LEG. STUD. 39, 54–58 (2022) [hereinafter *An Aggregation Theory of Character Evidence*].

harms described in Part 2 and create a more logical and effective rule against character evidence. In Part 5, I conclude.

2. Unpredictability and Misinterpretation in the Application of Rule 404

Rule 404(b)(1) prohibits other-acts evidence that involves a character inference under Rule 404(a)(1), while Rule 404(b)(2) clarifies that other-acts evidence that does not involve a character inference under Rules 404(a)(1) and 404(b)(1) may be admissible if, under Rule 403, its "probative value is not substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[14]

Rule 404 "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did [and] not *who* he is."[15] It replaces Rule 403's balancing analysis with a *rule* against character evidence because jurors cannot help but to give this evidence undue weight and to punish a defendant based on past bad acts—that is, because the unfair prejudice associated with the evidence is so significant that, as a general matter, it substantially outweighs any probative value of the evidence.[16] As one court has stated, "[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."[17]

2.1. The Courts' Permitted-Purpose Fallacy is Inconsistent with Rule 404's Meaning

The plain meaning of Rule 404(b) makes clear that Rule 404(b)(2) constitutes only a clarification of—and not an exception to—the prohibition on character evidence under Rules 404(a)(1) and 404(b)(1). This interpretation is well-supported by Rule 404's common law and legislative history.[18] Most significantly, however, it is supported by logic and common sense because the prohibition on character evidence under Rule 404(b) is vacant, and arguably even meaningless,[19] if Rule 404(b)(2) is read as an *exception* to Rule 404(b)(1).[20] After all, almost all other-acts evidence can be framed in terms

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[14] FED. R. EVID. 403; *see* FED. R. EVID. 404(a)(1), (b)(1), (b)(2).

[15] United States v Caldwell, 760 F.3d 267, 276 (3d Cir. 2014); United States v. Gomez, 763 F.3d 845, 861 (7th Cir. 2014).

[16] *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997); Michelson v. United States, 335 U.S. 469, 475–76 (1948).

[17] United States v. Burkhart, 458 F.2d 201, 204–05 (10th Cir. 1972); *see also* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018) ("Proof of a criminal defendant's past crimes has a dramatic effect on a jury, almost guaranteeing conviction.").

[18] *See* FED. R. EVID. 404(a)(1), (b)(1), (b)(2); FED. R. EVID. 404 advisory committee's note to proposed rule ("*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 another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition."); FED. R. EVID. 404 advisory committee's note to 2020 amendment ("The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose."); *see also* Dora W. Klein, *"Rule of Inclusion" Confusion*, 58 SAN DIEGO L. REV. 379, 382–83 (2021) ("Prior to the adoption of the Federal Rules of Evidence in 1975, most jurisdictions had developed, either through legislation or judicial decision-making, rules of evidence that prohibited the admission of other acts evidence except if offered for specifically permitted, non-character purposes.").

[19] *See infra* note 23 and accompanying text.

[20] *See* GEORGE FISHER, EVIDENCE 178 (4th ed.) (2023) (emphasizing that references to the enumerated purposes in Rule 404(b)(2) as "exceptions" are in error).

of the purposes listed in Rule 404(b)(2).[21] When character evidence is offered, it is always to prove a relevant fact, such as intent, knowledge, identity or another purpose listed in Rule 404(b)(2). Moreover, Rule 404(b)(2) is "inclusive" in the sense that the purposes listed in the rule are illustrative rather than exhaustive.[22] Therefore, reading this rule as an exception to the prohibition on character evidence eviscerates the rule and effectively replaces Rule 404's strict prohibition on character evidence with judicial discretion under a Rule-403 balancing analysis.

For example, interpreting Rule 404(b)(2) as an exception rather than a clarification, a prosecutor may simply reframe evidence of two prior robberies to prove a robbery in question as evidence that is probative of *identity*. Similarly, a prosecutor can easily reframe two prior drug-distribution convictions to prove the drug crime in question as evidence probative of *intent*. Indeed, courts frequently permit evidence of, e.g., a defendant's prior "drug dealing efforts" to prove knowledge and intent.[23] As the Court of Appeals for the Seventh Circuit stated in *United States v. Gomez*, "if subsection (b)(2) . . . allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless."[24]

Nevertheless, courts regularly interpret Rule 404(b)(2) as an exception to Rule 404(b)(1). Courts frequently begin their analysis by emphasizing that Rule 404(b) is a "rule of inclusion," a confused phrase that courts have mistakenly interpreted to justify a permissive standard for the admissibility of evidence under Rule 404(b)—and even a presumption of admissibility.[25] As one court recently stated, "We have described Rule 404(b) as 'a rule of inclusion, meaning that evidence offered for permissible purposes is presumed admissible absent a contrary determination.'"[26] Other courts indicate that Rule

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[21] *See An Objective-Chance Exception*, *supra* note 8, at 131.

[22] *See infra* notes 25–28 and accompanying text.

[23] United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996); *see also* United States v. Henry, 848 F.3d 1, 8–9 (1st Cir. 2017); United States v. Wilchcobme, 838 F.3d 1179, 1192 (11th Cir. 2016); United States v. Smith, 383 F.3d 700, 706–07 (8th Cir. 2004).

[24] United States v. Gomez, 763 F.3d 845, 855 (7th Cir. 2014).

[25] *See, e.g.*, *Smith*, 383 F.3d at 706 ("Because Rule 404(b) is a rule of inclusion, we presume that evidence of 'other crimes, acts, or wrongs' is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the party seeking its exclusion can demonstrate that it serves only to prove the defendant's criminal disposition."); *see also* United States v. Oaks, 606 F.3d 530, 538 (8th Cir. 2010); Capra & Richter, *supra* note 17, at 787. The phrase "rule of inclusion" seems to have roots in a split among courts in the nineteenth and twentieth centuries as to "whether the list of previously recognized non-propensity purposes was exhaustive (or 'exclusive'), or whether *any* non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the 'inclusive' approach)." United States v. Caldwell, 760 F.3d 267, 275 (3d Cir. 2014) (citing David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 4.3.2, at 224 (2009)); *see also* Capra & Richter, *supra* note 17, at 788. As the Third Circuit has emphasized, "no one doubted that evidence relevant only for the limited purpose of showing a defendant's general propensity to commit the charged offense was inadmissible." *Caldwell*, 760 F.3d at 275. Some courts have incorrectly inferred an "inclusionary" approach to character evidence from Rule 404(b)'s legislative history involving Congress's modification of the Supreme Court's formulation that the rule "does not exclude evidence when offered for other purposes" to a formulation stating that evidence "may, however, be admissible for other purposes," arguably indicating a "greater emphasis on admissibility." United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) (quoting H.R. Rep. No. 650, 93d Cong. 1st Sess. (1973), reprinted in 4 U.S. Code Cong. & Ad. News 7075, 7081 (1974)) (concluding that Rule 404(b) is intended as a rule of inclusion rather than exclusion).

[26] United States v. Johnson, 860 F.3d 1133, 1142 (8th Cir. 2017) (quoting United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005)); *see Klein*, *supra* note 18, at 389 (citing cases).

404(b) "favors admissibility," "emphasizes admissibility,"[27] or otherwise involves a form of presumption in favor of admissibility.[28]

Regardless of the precise language or the precise test used by courts to justify a permissive approach to evidence under Rule 404(b), many—and likely most—courts incorrectly admit evidence offered for a purpose listed in Rule 404(b)(2) even if the evidence relies on character reasoning. For example, it is commonplace for courts to admit evidence of a defendant's prior drug crimes to prove that the defendant had knowledge of drugs or intent to distribute them—even though this evidence generally relies on the character inference that the defendant has committed drug crimes in the past and is therefore likely to act in accordance with a character to commit such acts and to have knowledge or intent for the act in question.[29] In *United States v. Manning*, for instance, the First Circuit upheld the admission of prior drug crimes to prove knowledge and intent, explaining 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."[30] While it is true that this evidence is relevant to the defendant's knowledge and intent, its probative value arises from impermissible character reasoning.

Indeed, many courts *explicitly* refer to Rule 404(b)(2) as an exception to Rule 404(b)(1)'s prohibition on character evidence. For example, the Ninth Circuit has stated that "Rule 404(b)(2) functions as an exception to [Rule] 404(b)(1)."[31] Other courts confusingly interpret Rule 404(b)(2)'s enumerated purposes as involving a list of purposes that are non-propensity by definition.[32] In other words, while many courts apply multifactor admissibility tests that ostensibly require offering the evidence for a "non-propensity purpose," they use this term to mean simply that the *ultimate* purpose for which the evidence is offered is one of the purposes enumerated in Rule 404(b)(2)—*regardless of whether it in fact involves propensity reasoning.*[33] But this interpretation is illogical since parties would not offer other-acts evidence to make character inferences in the abstract; rather, all relevant evidence is offered for a material ultimate purpose.

The flawed reasoning underlying the courts' misinterpretation of Rule 404(b)(2) has been emphasized by a small number of jurisdictions that have recently split from this approach. For example, in *United States v. Gomez*, the Seventh Circuit rejected the lower court's admission of evidence

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[27] *See* Klein, *supra* note 18, at 392–93 (citing Eleventh Circuit and Third Circuit cases).

[28] *See id.* at 395–401.

[29] *See, e.g.*, United States v. Henry, 848 F.3d 1, 8–9 (1st Cir. 2017) ("Rule 404(b)(2) specifically permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute."); United States v. Smith, 383 F.3d 700, 706–07 (8th Cir. 2004) (upholding admission of evidence involving prior drug transactions to prove the defendant's knowledge of drug dealing); United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (upholding admission of evidence involving prior drug dealing to prove the defendant's knowledge and intent).

[30] *Manning*, 79 F.3d at 217.

[31] United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015); *see also* United States v. Sterling, 738 F.3d 228, 237 (11th Cir. 2013) ("Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose."); *see* Dora W. Klein, *The (Mis)Application of Rule 404(b) Heuristics*, 72 U. MIA. L. REV. 706, 716–18 (2018) (describing the courts' tendency to interpret Rule 404(b)(2) as an exception).

[32] *See, e.g.*, *Sterling*, 738 F.3d at 237; United States v. Mathews, 431 F.3d 1296, 1311 (11th Cir. 2005); *see also* Capra & Richter, *supra* note 17, at 789–90 (discussing *Mathews*, 431 F.3d at 1313 n.1 (Tjoflat J. concurring)).

[33] *See, e.g.,* United States v. Dupree, 870 F.3d 62, 76 (2d Cir. 2017); *Henry*, 848 F.3d at 8–9; *Sterling,* 738 F.3d at 237; *Manning*, 79 F.3d at 217; *see also* Turley v. State Farm Mut. Auto. Ins. Co., 944 F.2d 669, 674–76 (10th Cir. 1991).

of a defendant's possession of cocaine to prove his identity as a drug distributor known as "Guero."[34] It held that "Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning."[35] In addition, the court emphasized "that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference."[36]

Further, in *United States v. Caldwell*, the Third Circuit articulated the inadequacy of stating a purported non-propensity purpose under Rule 404(b)(2), holding that, instead, "the government must explain how [the evidence] fits into a chain of inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference."[37] Similarly, in *United States v. Hall*, the Fourth Circuit cited *Caldwell* in rejecting the government's argument that Rule 404(b) is an "inclusive" rule "render[ing] evidence of a defendant's prior convictions presumptively admissible."[38] It clarified that characterizing Rule 404(b) as a "rule of inclusion" refers only to the "determination that the Rule's list of non-propensity uses . . . is not 'exhaustive.'"[39] The court held that, contrary to the government's argument, "under Rule 404(b), evidence of a defendant's prior bad acts is generally inadmissible" unless the government can "present a propensity-free chain of inferences" in support of the purpose for which the evidence is offered.[40]

Unfortunately, notwithstanding a small number of circuits slowly moving in a positive direction to interpret Rule 404(b) in line with its intended meaning and purpose, most courts incorrectly read Rule 404(b) as a "rule of inclusion" that creates a presumption of admissibility for any other-acts evidence that can be characterized as proving one of the broad purposes listed in Rule 404(b)(2)'s non-exhaustive list, regardless of whether the chain of inferences connecting the evidence to this purpose requires propensity reasoning. This misreading of Rule 404(b) is so well-ingrained in the law, it is difficult to reverse absent clarification in the Federal Rules of Evidence. As one court stated, "Although the court is not unsympathetic to [the] argument that Rule 404(b) has been turned on its head by making it a rule of inclusion rather than a rule of exclusion, it is well settled law of this Circuit that Rule 404(b) is a rule of inclusion."[41]

Moreover, compounding the effects of this misinterpretation, courts apply an incorrect Rule-403 balancing that makes it highly unlikely that character evidence would be excluded as unfairly prejudicial. Specifically, because courts read Rule 404(b)(2) as an exception to Rule 404(b)(1)'s ban on character evidence, they incorrectly treat character inferences—which they assume to be permissible—as probative rather than prejudicial. This tips the scale even further in favor of

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[34] United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014).

[35] *Id.* at 856 (internal citations omitted).

[36] *Id.*

[37] United States v. Caldwell, 760 F.3d 267, 276–77 (3d Cir. 2014) (quoting United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013)) (internal quotation marks omitted); *see also* Klein, *supra* note 31, at 726–28.

[38] United States v. Hall, 858 F.3d 254, 276–77 (4th Cir. 2017).

[39] *Id.*

[40] *Id.* at 277.

[41] United States v. Cole, 488 F. Supp. 2d 792, 800 (N.D. Iowa 2007).

admissibility in the already-admissibility-prone Rule-403 balancing.[42] Consequently, the courts' permitted-purpose fallacy—their misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1)—not only has the effect of replacing Rule 404 with a Rule-403 balancing, but it also makes it highly unlikely that the evidence will be excluded as unfairly prejudicial. In this way, as currently interpreted, not only does Rule 404 often fail to protect defendants from false convictions and trial outcomes based on conduct not at issue in a case, but it arguably also puts many defendants in a *worse* position than they would be in if Rule 404 did not exist—that is, if the admissibility of character evidence were determined only through an ordinary Rule-403 balancing.

2.2. The Permitted-Purpose Fallacy is Inconsistent with Good Policy

There is no policy rationale for upholding an *exception* to Rule 404(b)(1) for the purposes enumerated in Rule 404(b)(2). In other words, the important policies that underlie the general rule against character evidence apply equally to other-acts evidence used to prove a purpose listed in Rule 404(b)(2) through character reasoning.

Rationales for the rule against character evidence include the tendency of jurors to afford excessive weight to character evidence and to punish a defendant for past bad acts instead of rendering a verdict based on the act in question.[43] In addition, there are arguments that character evidence encourages jurors to rely heavily on stereotypes and implicit biases in interpreting the evidence and determining a verdict based on character inferences.[44]

These risks are particularly concerning for criminal defendants, for whom the risks translate to false convictions based on acts not at issue in a case. Indeed, courts and scholars have frequently emphasized that introducing evidence of prior convictions or other past bad acts causes "the odds of conviction [to] skyrocket,"[45] "almost guaranteeing conviction."[46] Excluding other-acts evidence offered for character purposes has traditionally been understood as essential to a fair criminal trial: "it

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[42] *See, e.g.*, United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (concluding that "[t]he 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); *see also* Goode, *supra* note 7, at 724 ("[T]his Rule 403 balancing is hopelessly skewed because courts consider the (unrecognized) character propensity-based inference as proper, rather than improper, and so place it on the probative-value side of the scale and not on the unfair-prejudice side.").

[43] Michelson v. United States, 335 U.S. 469, 476 (1948) ("[Character evidence] 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.").

[44] Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1025–26 (2023) (arguing that "when a court admits character evidence through exceptions, it invites jurors to rely on their prior beliefs and prejudices when determining a verdict, and that, consequently, judgments based on character evidence are inherently biased against certain groups of people based on their race, sex, appearance, accent, education, economic status, and other background characteristics.").

[45] Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 780 (2013).

[46] Capra & Richter, *supra* note 17, at 772. It is highly unlikely that such an effect would be grounded in the probative value of the evidence. The evidence relies on a weak circumstantial inference that a prior similar act suggests a character to commit such acts and action in accordance therewith on the occasion in question. This inferential leap alone introduces substantial uncertainty and weakens any probative value of the evidence, even assuming empirical support for the proposition that there is significant behavioral coherence over changing circumstances. Moreover, no empirical evidence clearly supports such coherence, and in any event, examinations of behavioral coherence reflect only population-level tendencies that are problematic when applied to an individual criminal defendant. Instead, as courts and scholars have emphasized, once evidence of prior bad acts is introduced, jurors have difficulty evaluating a case based on the evidence, and "the guilty outcome follows as a mere formality." United States v. Burkhart, 458 F.2d 201, 204–05 (10th Cir. 1972).

reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence."[47]

Moreover, the unpredictability of admissibility decisions under Rule 404 is alone sufficient to undermine the fairness of our criminal justice system. This is because a court's possible admission of past-bad-acts character evidence is sufficient to cause a criminal defendant—and even an innocent criminal defendant—to accept a plea agreement based on the knowledge that a jury is likely to convict a defendant based on past bad acts.

These severe risks of character evidence underlie the rule against character evidence—that is, the replacement of a Rule 403 balancing for character evidence with a *rule* against it. However, all of these risks apply *equally* to other-acts evidence offered to prove a Rule 404(b)(2) purpose through propensity reasoning. For example, assume that in a drug trafficking trial, the prosecutor's case is relatively weak, and that she seeks to introduce evidence that the defendant has twice before been convicted of drug trafficking for the purpose of proving the defendant's propensity to commit this crime and a likelihood that the defendant acted in accordance with this propensity on the occasion in question. This is classic character evidence, and it inheres all of the risks discussed above. Combined with even weak circumstantial evidence, it has a strong potential to persuade a jury of the defendant's guilt beyond a reasonable doubt. It should be excluded from trial under Rule 404(b)(1).

Now, however, assume that the prosecutor seeks to introduce the same prior-conviction evidence but to prove the defendant's *intent* to distribute the drugs. Assume the relevance of the evidence still relies on propensity reasoning. That is, the prosecutor offers the evidence to prove that the defendant has a propensity to commit drug trafficking and is therefore more likely to have had the *intent* to commit the crime in question. Indeed, as discussed above, courts regularly admit other-acts evidence to prove such intent via propensity reasoning.[48]

This evidence is offered specifically to prove intent but involves the same risks as in the previous scenario. Jurors are likely to give excessive weight to the evidence, and they are likely to punish the defendant for past bad acts rather than the act in question. They are also likely to rely on their implicit biases in arriving at a character judgment and assessing the defendant's intent—and ultimately guilt or innocence—based on this judgment. Moreover, even assuming courts conducted an ordinary rather than slanted Rule-403 balancing analysis (they do not, but let's assume otherwise for the moment), the risks of effectively replacing an exclusionary *rule* with a balancing analysis frequently come to fruition even before the trial begins. This is because the defendant will accept a plea agreement (or a worse plea agreement) based on the knowledge that the defendant's prior convictions may be introduced at trial, subject only to Rule 403's high threshold for exclusion.

Further, a limiting instruction does not help. After all, the court is sanctioning precisely what is inherently the problem—the use of propensity reasoning to prove intent, knowledge, or another purpose listed in Rule 404(b)(2). A court may therefore give an instruction that limits a jury's use of other-acts character evidence to infer, e.g., intent, but the limiting instruction does not prohibit impermissible character reasoning. This is distinct from a proper use of Rule 404(b)(2) to prove, e.g., intent, knowledge, or motive through a non-propensity chain of inferences.

For example, consider evidence that a defendant previously burglarized a home with an advanced alarm system to prove that the defendant knew how to circumvent the same alarm system in the

[47] United States v. Dockery, 955 F.2d 50, 53 (1992) (quoting United States v. Daniels, 770 F.2d 1111, 1118 (1985)); *see also Michelson*, 335 U.S. 469, 476 (1948).

[48] *See supra* notes 25–33 and accompanying text.

burglary in question. This evidence does not rely on character reasoning: it allows the inference that the defendant knew how to circumvent the alarm system based on evidence that he has done so in the past. This chain of inferences does not, for example, involve the same risks of excessive weight, punishment based on past bad acts, or a juror's reliance on prior beliefs and prejudices. There is no character reasoning—no unique inferential leap based on a presumed propensity that connects the act in question to prior acts. Rather, it involves an ordinary evidentiary inference: he knew how to do it then and is therefore more likely to know how to do it now. Of course, this evidence still risks impermissible propensity inferences—that the defendant has a propensity to commit burglary and is therefore more likely to have committed the act in question. But the court may be able to address this risk via a limiting instruction because here—as opposed to the drug example above—there is a distinction between a permissible non-character inference and an impermissible character inference. And if the risk is still too great, the court may exclude the evidence via a Rule-403 balancing.

In summary, other-acts evidence can be very helpful or very harmful to our litigation goals. The element that distinguishes harmful from beneficial inferences is whether this evidence relies on propensity reasoning. Unfortunately, this element is not accounted for in most courts' analysis of other-acts evidence under Rule 404(b)(2).

2.3. Previous Notice-Based Measures are Insufficient

In 2020, the Advisory Committee amended Rule 404(b) "principally to impose additional notice requirements on the prosecution in a criminal case."[49] Pursuant to the amendment, Rule 404(b)(3) now requires that the prosecutor "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."[50] The Advisory Committee notes for the 2020 amendment emphasize that based on the amendment, "[t]he prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose."[51] The notes explain:

> The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.[52]

The 2020 amendment is a step in the right direction. However, courts interpret Rule 404(b)(3) in the same way that they interpret Rule 404(b)(2). Therefore, although the amendment is effective in its primary purpose to convey information regarding a prosecutor's intended use of other-acts evidence, it does not address the misinterpretation of Rule 404(b) as a rule of inclusion that permits propensity reasoning as long as it is for an ultimate purpose listed in Rule 404(b)(2), and it has not succeeded in requiring prosecutors to articulate a chain of inferences that is free of propensity reasoning.

The problem is this: Courts and prosecutors identify Rule 404(b)(2) as an exception to the rule against character evidence and therefore view other-acts character evidence as permissible under this rule. Therefore, Rule 404(b)(3)'s requirement that a prosecutor articulate a "permitted purpose" allows

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[49] FED. R. EVID. 404 advisory committee's note to 2020 amendment.

[50] FED. R. EVID. 404(b)(3)(B).

[51] FED. R. EVID. 404 advisory committee's note to 2020 amendment.

[52] *Id.*

notice that involves propensity reasoning—just propensity reasoning that, in the court's view, falls within the purported Rule 404(b)(2) "exception." Moreover, the Advisory Committee notes explaining the requirement to articulate a non-propensity purpose are similarly ineffective in reversing the courts' misinterpretation of Rule 404(b)(2). This is because, as explained above, many if not most courts misinterpret Rule 404(b)(2) to prohibit only an *ultimate* propensity purpose, even if the evidence involves propensity reasoning to show motive, intent, identity, or another purpose listed in Rule 404(b)(2). Therefore, notwithstanding their plain meaning, the Advisory Committee notes that reference a non-propensity purpose are interpreted by courts as consistent with their current misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1).

In simple terms, while Rule 404(b)(3) is beneficial with respect to notice, it does not solve the substantive misinterpretation of Rule 404(b)(2). While Rule 404(b)(3) requires prosecutors to articulate the purpose of their other-acts evidence, in the absence of an appropriate amendment to Rule 404(b)(2), this notice requirement is not effective in requiring a true non-character purpose.[53]

Moreover, the Advisory Committee's comments seeming to sanction an interpretation that permits character reasoning when it is "bound up" with an ultimate "proper" purpose arguably exacerbates the substantive problem and the inability of Rule 404(b)(3)'s notice requirement to address it.[54] This is because the comment made in the May 2018 Report seems inconsistent with the Advisory Committee notes to the 2020 amendment unless the notice requirement permits an articulation of character reasoning that leads to an ultimate purpose listed in Rule 404(b)(2). For example, how would a prosecutor articulate a non-propensity purpose if the purpose is both "proper" and "bound up" with propensity reasoning?

Thus, although Rule 404(b)(3) is both beneficial and a step in the right direction, it does not remedy the widespread misinterpretation of Rule 404(b)(2). Instead, at best, courts require prosecutors to state a Rule 404(b)(2) ultimate purpose while interpreting this purpose as one that permits propensity reasoning. In summary, fulfilling the intended effects of Rule 404(b)(3)—that is, for the prosecution to give notice of the non-propensity purpose underlying its introduction of other-acts evidence under Rule 404(b)(2)—requires amending Rule 404(b)(2) to clarify that it sanctions only the admission of other-acts evidence that does not involve propensity reasoning.

3. A Proposal to Amend Rule 404(b)(2) to Correct its Misapplication

The problem described in Part 2 is not only severe in its consequences but also widespread and well-entrenched in federal caselaw. Correcting it requires amending Rule 404(b)(2).

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[53] The ineffectiveness of Rule 404(b)(3)'s notice requirement with respect to the courts' misinterpretation of Rule 404(b)(2) can also be seen in the cases litigated since the 2020 amendment. For example, *United States v. Duggan* involved a typical scenario in which other-acts character evidence was admitted in a drug case to prove knowledge and intent notwithstanding its reliance on propensity reasoning. United States v. Duggan, No. 19-3220, 2021 WL 5745686, at *1–2 (3d Cir. Dec. 2, 2021). The Third Circuit upheld the Rule 404(b)(3) notice in which the government explained that "evidence that [the defendant] had been convicted of distribution of cocaine makes [his] knowledge of the presence of the heroin more probable than it would have been without the evidence as it indicates that [the defendant] had knowledge of drugs and drug distribution, and thus that it was less likely that he was simply in the wrong place at the wrong time." *Id*; *see also* United States v. Ward, 638 F. Supp. 3d 686, at 692–93 (S.D. Miss. 2022) (holding that "[w]hen a criminal defendant pleads not guilty to a charge of possession with intent to distribute, he necessarily places his knowledge of the drugs found and his intent to distribute at issue," emphasizing Fifth Circuit precedent that the probative value of similar-crime evidence exceeds its prejudicial effect, and finding that the prosecution gave reasonable notice under Rule 404(b)(3), noting that the prosecution gave notice eight days before trial).

[54] May 2018 Report, *supra* note 12, at 4-5.

Rule 404(b)(2) provides as follows: "(2) *Permitted Uses*. 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."[55] As discussed above, the only sensible reading of this rule—and the only interpretation that does not altogether negate Rule 404(b)(1)—is as permitting only purposes that do not involve propensity reasoning. Nevertheless, most courts interpret Rule 404(b)(2) to allow other-acts evidence for any purpose listed in Rule 404(b)(2), regardless of whether it involves propensity reasoning. That is, courts treat this rule as an exception to, rather than a clarification of, Rule 404(b)(1).

To correct this misinterpretation, I recommend that the Advisory Committee amend Rule 404(b)(2) to require explicitly a propensity-free chain of inferences for admissibility under this rule. Specifically, I propose the following language for Rule 404(b)(2):

> **(2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible for a non-character 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 a person's character to show that on a particular occasion the person acted in accordance with the character.**

The proposed amendment has one important aim—to clarify that Rule 404(b)(2)'s permitted uses of other-acts evidence cover only purposes that do not involve propensity reasoning impermissible under Rule 404(b)(1). Toward this goal, the proposed amendment makes various revisions. It replaces the phrase "may be admissible for another purpose" with the phrase "may be admissible for a non-character purpose" and then defines a "non-character purpose" as "a purpose . . . that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character."

To the extent that the term "another purpose" in Rule 404(b)(2)'s current language is ambiguous, the amendment replaces it with the term "non-character purpose." "Non-propensity" purpose is also a good option; however, "non-character purpose" is arguably more precise because, as some authors have highlighted, "propensity" can refer to non-character propensities, such as those arising from habit or skill.[56] Moreover, because many courts have misinterpreted Rule 404(b)(2) to allow character reasoning as long as the *ultimate* purpose of the evidence is to prove motive, opportunity, or another purpose enumerated in the rule, the proposed amendment defines a non-character purpose in line with Rule 404(b)(1), as one "that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character."

Importantly, the proposed amendment avoids defining a non-character purpose as "a purpose other than to prove a person's character . . . .," instead using "a purpose . . . that does not involve inferring a person's character . . . ." The chosen language seeks to avoid judicial misinterpretation: "a purpose other than to prove a person's character" arguably permits the current incorrect interpretation that only the *ultimate* purpose of the evidence matters, whereas "a purpose . . . that does not involve inferring a person's character" emphasizes that Rule 404(b)(2) permits other-acts evidence only if the evidence is permissible under Rule 404(b)(1)—that is, only if it does not rely on a chain of inferences that involves character-propensity reasoning.

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[55] FED. R. EVID. 404(b)(2).

[56] *See* Rothstein, *supra* note 11, at 1264–65.

In addition, the proposed amendment places the listed purposes (including motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, and lack of accident) in parentheses to emphasize the rule's purpose of clarifying the permissibility of other-acts evidence that does not rely on propensity reasoning rather than enumerating exceptions to the rule against character evidence. It retains the "such as" language preceding the listed purposes and indicating that such purposes are illustrative and not exhaustive. Similarly, I recommend replacing the first two words of Rule 404(b)(2)—"This evidence"—with the term "Evidence of any other crime, wrong, or act." Again, the purpose of this revision is to avoid a possible misinterpretation of "This evidence" as referring to evidence falling under Rule 404(b)(1), thereby suggesting an exception to that rule. Instead, the revision clarifies that Rule 404(b)(2) refers to "[e]vidence of any other crime, wrong, or act" and not to evidence covered by Rule 404(b)(1).

If adopted, this amendment would curb the prevalent misinterpretation of Rule 404(b) as a rule of inclusion that favors the admissibility of other-acts evidence through purported exceptions enumerated in Rule 404(b)(2). This would have widespread benefits for civil and criminal trials and for the broader U.S. justice system.

First, the amendment would lead to greater predictability. Current misinterpretations of Rule 404 effectively replace the rule against character evidence with an uncertain balancing of probative value and unfair prejudice under Rule 403. This leads to unpredictability in the admissibility of evidence of a defendant's past misdeeds. Because this evidence is so impactful on the outcome of a case, this translates directly to unpredictability in the outcome of a case. Moreover, unpredictability surrounding the admission of other-acts character evidence places pressure on criminal defendants to enter plea agreements regardless of whether a defendant is guilty or innocent. The knowledge that a jury may hear evidence regarding the defendant's past misdeeds—subject only to a skewed Rule-403 balancing—is often sufficient to compel the acceptance of a plea agreement. This pressure on criminal defendants may also translate to harsher plea offers.

By correcting the misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1), the proposed amendment restores Rule 404 as a *rule* against character evidence rather than just a loose policy statement that courts should consider in their Rule-403 balancing analysis. It thereby creates predictability in a critical component of a case, leading to fairer plea agreements, better case strategy, more predictable verdicts, and ultimately, greater accuracy in case outcomes.

Second, consistent with Rule 404's meaning and purpose, the proposed amendment ensures a greater focus on the act in question, and it dramatically lowers the risk of verdicts based on a defendant's character or past misdeeds. As discussed above, the common misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1) sanctions precisely the type of evidentiary inferences that Rule 404 is intended to prevent. It detracts from evidence regarding the act in question and shifts focus to a defendant's character and past misdeeds—although for the specific purpose of proving identity, intent, or another important factual element of a case. For example, when a court permits other-acts *character* evidence to show intent under Rule 404(b)(2) in a drug case, the jury's determination to convict or acquit may well hinge on impermissible propensity reasoning.

The proposed amendment avoids this misinterpretation. It clarifies that other-acts evidence is inadmissible for any purpose that involves character reasoning—that is, a chain of inferences that involves an impermissible propensity inference under Rules 404(a)(1) and 404(b)(1)—while permissible for purposes that do not. This clarification returns the rule to its intended meaning in line with its critical policy objectives. Indeed, it is precisely character reasoning that generates the severe risks that Rule 404 aims to protect against. For example, other-acts evidence offered for a non-

propensity purpose does not carry the same risks of a jury excessively weighting the evidence, punishing a defendant for past misdeeds, or relying on implicit biases in determining a verdict. But propensity reasoning creates these dangers wherever it exists in a chain of inferences—whether as the ultimate purpose or an intermediary purpose. The proposed language thus preserves the admissibility of other-acts evidence offered for non-propensity purposes while clarifying and emphasizing the inadmissibility of character reasoning. In turn, by ensuring a greater focus on the act in question and reducing the risk of verdicts based on a defendant's character or past misdeeds, the proposed amendment will improve accuracy, prevent false convictions, and protect the other critical policies underlying Rule 404.

4. Addressing the Doctrine of Chances

Under the "doctrine of chances," courts admit evidence of other similar acts to prove that the act in question did not occur by chance or accident. This evidence—objective-chance evidence—can be described as "evidence regarding events of the same general kind as the event at issue, offered to prove that the event at issue, in light of the number of similar events evidenced, did not occur randomly but rather occurred in accordance with the events evidenced."[57] It may be offered for any of the purposes listed in Rule 404(b)(2)—most prominently, to prove absence of mistake or lack of accident, but also to prove motive, opportunity, intent, preparation, plan, knowledge, or identity. For example, in a murder case in which the defendant claims that his spouse died in an accidental fall on a hiking trip, evidence that the defendant's previous two spouses also died in purportedly accidental falls may be admitted to prove that the fall in question was by the defendant's design rather than by chance or accident.

There is debate over whether objective-chance evidence involves character reasoning.[58] Either way, however, it is generally viewed as valuable evidence and significantly more probative than ordinary character evidence.[59] Indeed, objective-chance evidence is often presumed to be admissible under Rule 404, and as I've argued previously, it may be a root cause of confusion and misinterpretation surrounding the rule against character evidence.[60] Specifically, its highly probative nature seems to place significant pressure on courts to admit it notwithstanding Rule 404.[61] This, in turn, erodes the rule against character evidence and promotes further exceptions and departures in the federal common law.[62] Moreover, the presumed acceptability of this evidence, and its complex relationship to character reasoning, may have caused previous reluctance to clarify Rule 404(b)(2)'s meaning. Specifically, in response to earlier proposals, the Advisory Committee commented that such clarification "ignor[es] that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference—an example would be use of the well-known 'doctrine of chances' to prove the unlikelihood that two unusual acts could have both been accidental."[63]

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[57] *An Aggregation Theory of Character Evidence*, *supra* note 13, at 54–55.

[58] *See supra* note 11.

[59] *See An Aggregation Theory of Character Evidence*, *supra* note 13, at 57–58; Imwinkelried, *supra* note 8, at 3–9; Rothstein, *supra* note 11, at 1259–70.

[60] *See An Aggregation Theory of Character Evidence*, *supra* note 13 at 41; *An Objective-Chance Exception*, *supra* note 8, at 125.

[61] *An Aggregation Theory of Character Evidence*, *supra* note 13 at 58.

[62] *An Objective-Chance Exception*, *supra* note 8, at 125.

[63] May 2018 Report, *supra* note 12, at 4-5.

This comment (discussed above) seems to sanction the common misinterpretation of Rule 404(b) as one that permits character reasoning when the underlying evidence is offered for an ultimate purpose enumerated in Rule 404(b)(2). More than just an example, however, the doctrine of chances seems to be the primary—if not the sole—driver of this position. Indeed, it stands alone as a category of uniquely probative evidence that arguably involves character reasoning.[64]

In this Part, I address the doctrine of chances in two ways. First, I explain why the amendment proposed in Part 3 does not require also explicitly addressing the doctrine of chances. Second, although not necessary for my primary proposal, I recommend an amendment that creates a limited exception to Rule 404 for objective-chance evidence.

4.1. Correcting the Permitted-Purpose Fallacy Does Not Require Addressing the Doctrine of Chances

As suggested above, there is debate surrounding whether objective-chance evidence involves propensity reasoning. For example, Professor Imwinkelried has argued that the improbability of multiple accidents of a certain kind leads to the conclusion that at least one of the incidents was not an accident, an inference that does not require reference to the "accused's personal, subjective bad character."[65] On the other hand, Professor Rothstein has argued that this evidence involves propensity reasoning because the improbability of multiple accidents or random occurrences suggests guilt "only because a guilty person would have the *propensity* to repeat the crime."[66]

I have argued that objective-chance evidence should be understood as involving propensity reasoning because although it involves one chain of inferences that does not rely on propensity reasoning, its unique probative value arises from a second chain of inferences that does. Specifically, the improbability of multiple improbable events occurring randomly leads to the more probable conclusion that at least one of the events was by design and therefore that the event at issue is more likely to be by design rather than accidental. Pursuant to a propensity chain of inferences: at least one of the improbable events is by the defendant's design; therefore, the events are better explained by the defendant's propensity to commit such acts than by randomness; therefore, the defendant is more likely to have acted in accordance with this propensity and to have committed the act in question. For example, evidence that the defendant's two previous spouses also died in falls on hiking trips with the defendant screams that these incidents are due to the defendant's *propensity* to murder rather than due to chance and that the defendant is therefore more likely to have committed the crime in question.[67]

However, there is also a non-propensity chain of inferences: at least one event is likely by the defendant's design; therefore, as a member of the class of events, at least one of which is likely by design rather than random, the event in question has a greater likelihood of being by the defendant's design.[68] In other words, without relying on the defendant's propensity, because it is more probable that at least one of the improbable events was due to the defendant's design rather than chance, the event in question has a greater probability of being due to the defendant's design rather than chance. Although I argue that this non-propensity chain of inferences is greatly overshadowed by the substantial probative value of the propensity chain of inferences, it may provide flexibility for courts

[64] *See An Aggregation Theory of Character Evidence*, *supra* note 13, at 54–58.

[65] Imwinkelried, *supra* note 8, at 7.

[66] Rothstein, *supra* note 11, at 1261.

[67] *An Objective-Chance Exception*, *supra* note 8, at 155–57.

[68] *Id.* at 156.

to weigh the probative value and the risk of unfair prejudice (and with respect to the propensity chain of inferences in particular) in limited circumstances involving objective-chance evidence.[69] This is not to say that courts should necessarily admit this evidence: in light of a weaker non-propensity chain of inferences and a more dominant propensity chain of inferences, it is crucial for a court to determine the admissibility of objective-chance evidence under Rule 403. However, the Advisory Committee could adopt the amendment proposed in the previous Part while preserving judicial discretion under a Rule-403 balancing to analyze the admissibility of objective-chance evidence.[70]

Moreover, to the extent that the proposed amendment forecloses the admission of objective-chance evidence in certain cases, the policies underlying the rule against character evidence, as well as the law's interest in preventing false convictions, arguably supersede the potential accuracy benefits of the evidence.

4.2. Amending Rule 404(b) to Address the Doctrine of Chances: A Secondary Proposal

As discussed above, my primary proposal does not require addressing the doctrine of chances explicitly. The benefits of the proposal for civil and criminal cases follow from the recommended clarification regardless of whether the Advisory Committee decides also to adopt the secondary proposal in the current section regarding the doctrine of chances.

However, the admission of evidence under the doctrine of chances has caused significant problems for the rule against character evidence, and although not necessary to achieve the benefits of my primary proposal, amending Rule 404(b) to address the doctrine of chances would improve accuracy and reduce the unpredictability of all admissibility decisions under Rule 404.[71] First, objective-chance evidence is more common than is currently recognized. It includes not only evidence that is offered for the ultimate purpose of proving absence of mistake or lack of accident but also many other forms of evidence offered under Rule 404(b)(2) to prove motive, intent, knowledge, or another purpose that may provide an alternative explanation to an event occurring by chance or accident.[72] For example, in addition to the lack-of-accident evidence in the hiking example above, objective-chance evidence may include evidence of prior drug convictions offered to prove that the defendant had the requisite knowledge and intent rather than simply being in the wrong place at the wrong time by chance. It may also include, for example, anecdotal evidence involving similar prior acts in an intentional discrimination case to prove that a defendant had discriminatory intent rather than an act that was only incidentally, or randomly, consistent with such intent.[73]

Second, objective-chance evidence is often highly valuable for achieving an accurate case outcome. Specifically, I have argued that two features of this evidence make it uniquely valuable: First, it generally speaks to matters for which there is little other evidence.[74] Because objective-chance evidence involves rejecting a hypothesis of chance in favor of one of design (of some sort), it is often

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[69] *Id.*

[70] Under a Rule-403 balancing, a court may, for example, be more likely to admit objective-chance evidence in cases in which the evidence does not necessarily involve past misdeeds of a defendant but rather only past misfortunes that may be due to chance.

[71] *See An Objective-Chance Exception*, *supra* note 8, at 157–65.

[72] *See id.* at 130–43, 161–65 (discussing the admission of objective-chance evidence to prove intent, knowledge, and other purposes beyond absence of mistake or accident); Imwinkelried, *supra* note 8, at 9–12 (describing common uses of objective-chance evidence).

[73] *See An Objective-Chance Exception*, *supra* note 8, at 158.

[74] *An Aggregation Theory of Character Evidence*, *supra* note 13, at 57.

offered to prove a mental state, such as intent, knowledge, motive, or purpose—a notoriously difficult thing to prove.[75] Moreover, even when it is offered to prove conduct—e.g., that a victim's fall was the result of a push by the defendant rather than an accidental slip—it often relates not to who committed a crime but rather to the more difficult-to-prove question of whether there was a crime in the first instance.[76] Second, relative to other forms of character evidence, it is generally highly probative of the matter in question. This is because it involves events that are often relatively rare or uncommon, discrete (and often binary), uniform relative to the event in question, multiple in number, and easily ascertained.[77]

For example, in a case involving an allegation that the defendant's home burned down due to arson rather than by accident, evidence that the defendant's two previous homes burned down under similar circumstances is highly valuable in that (1) it speaks to a matter that is difficult to prove, and (2) it is highly probative of that matter.[78] Specifically, it is relevant to the defendant's intent, which requires understanding the defendant's state of mind, a notoriously difficult element to prove. Moreover, it is highly probative of the defendant's intent. Because the evidence involves multiple rare events that are uniform, discrete (and binary), and easily ascertained—that is, they are similar to each other and to the event in question, they either happened or they didn't, and there is little or no uncertainty surrounding the events' occurrence—it is highly probative in that it conveys a precise informational signal regarding the probability that the events, and the event in question in particular, occurred by the defendant's design rather than by accident.[79]

I have argued that the combination of these two features of objective-chance evidence—its highly probative value for matters for which there is otherwise scarce evidence—makes it seem counterintuitive (and sometimes patently incorrect) to exclude this evidence. In turn, this has placed pressure on courts to create ways to admit objective-chance evidence notwithstanding Rule 404.[80] Indeed, for some types of objective-chance evidence—such as anecdotal evidence in antidiscrimination cases—courts resort to common law to admit it, and they rarely acknowledge Rule 404.[81] In addition, the probative force of this evidence often lends to a presumption that it is admissible notwithstanding Rule 404. Such a presumption may have led to the Advisory Committee's comment that evidence of a past misdeed may be "legitimately offered for a proper purpose" even though it is "bound up with a propensity inference."[82]

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[75] *Id.*

[76] *Id.* When objective-chance evidence is offered to prove identity, it often involves unique circumstances in which there is similarly a dearth of other evidence.

[77] *Id.* at 58.

[78] *Id.*

[79] There may also be valuable evidence rebutting objective-chance evidence—for example, evidence that the defendant has a bad habit of falling asleep with a lit cigarette in hand.

[80] *An Aggregation Theory of Character Evidence*, *supra* note 13, at 58.

[81] *See* Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1065–66, 1071–74 (2005); *see also An Objective-Chance Exception*, *supra* note 8, at 58–65. *See generally* Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285–86 (11th Cir. 2008) (upholding other-acts evidence to prove intent); Fudali v. Napolitano, 283 F.R.D. 400, 402–03 (N.D. Ill. 2012) ("The cases are basically uniform in holding as a general principle that discriminatory intent or the pretextual nature of an employment related decision may be proven by 'other acts' of discrimination or retaliation.").

[82] May 2018 Report, *supra* note 12, at 4–5.

Thus, because of the unique accuracy benefits of objective-chance evidence, courts regularly depart from Rule 404 to admit this evidence. Courts rely on a combination of Rule 404(b)(2) and common law to find ways around Rule 404. In turn, such departures erode Rule 404's exclusionary force—and not only for objective-chance evidence but for character evidence more broadly.

Therefore, as a secondary proposal, although addressing the doctrine of chances is not necessary for the adoption of my primary proposal above, I recommend that if (and only if) the Advisory Committee adopts my primary proposal, it should also consider establishing an explicit exception to Rule 404 for objective-chance evidence. To make admissibility decisions under Rule 404 more logical and predictable, my proposal aims to simultaneously strengthen Rule 404's exclusionary force for most types of character evidence while creating a limited exception for a category of character evidence—objective-chance evidence—that is uniquely valuable and underlies many of the current departures from Rule 404.

To accomplish this, I recommend that if the Advisory Committee decides to amend Rule 404(b)(2) to explicitly require a propensity-free chain of inferences for admissibility under this rule, it should also consider creating a limited exception to Rules 404(a)(1) and 404(b)(1) for objective-chance evidence using the following form and language for Rule 404(b)(2):[83]

> **(2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible only if:**
>
> **(A) it is offered for a non-character 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 a person's character to show that on a particular occasion the person acted in accordance with the character; or**
>
> **(B) based on specific facts and circumstances, it is offered to prove an element of a claim that requires proving an absence of chance or accident, and its probative value in proving an absence of chance or accident substantially outweighs its prejudicial effect.**

The aim of the proposed amendment is to establish an "objective-chance exception" to Rule 404, but one that does not open the door for courts to admit ordinary character evidence (i.e., character evidence that does not constitute objective-chance evidence). Toward this goal, the proposed amendment to Rule 404(b)(2) creates two avenues of admissibility. First, Rule 404(b)(2)(A) provides that other-acts evidence may be admissible for non-character purposes. Pursuant to my primary proposal in Part 3, the language of the rule makes clear that Rule 404(b)(2)(A) is a clarification of Rule 404(b)(1) and not an exception to it. That is, it explicitly requires a non-propensity chain of inferences for admissibility under this rule.[84] Second, Rule 404(b)(2)(B) establishes an *exception* to Rule 404(b)(1) for other-acts evidence offered to prove an absence of chance or accident.

Thus, Rule 404(b)(2)(B) creates an objective-chance exception to Rule 404(b)(1). At the same time, however, it includes two safeguards against its misuse to admit ordinary character evidence. First, the

[83] In a series of recent articles, I recommend such an exception for objective-chance evidence and describe its benefits with respect to accuracy and other policies. *See An Objective-Chance Exception*, *supra* note 8, at 155–68; *An Aggregation Theory of Character Evidence*, *supra* note 13, at 58–61.

[84] The proposed rule includes a reference to evidence offered to prove absence of mistake or lack of accident, but under Rule 404(b)(2)(A) in particular, only to the extent that it does not involve propensity reasoning.

exception requires that the element for which the evidence is offered to prove must involve proving an absence of chance or accident. This requirement significantly limits the breadth of the exception and protects against its misuse. For example, it would permit evidence in the arson illustration above because inherent in proving the intent element of the arson claim, a prosecutor must show that the fire did not occur by chance or accident but rather occurred by the intent of the defendant.

On the other hand, consider an example in which a prosecutor attempts to incorrectly frame ordinary character evidence as evidence offered to prove absence of chance or accident. Suppose a prosecutor in a robbery case attempts to introduce evidence of two separate incidents in which the defendant was accused of and arrested for robbery.[85] This is classic character evidence: it is offered to prove that the defendant has a propensity to commit such acts and is therefore more likely to have committed the robbery in question. However, what if the prosecutor frames the evidence as tending to prove absence of chance or accident in that the probability of being accused of robbery three times would be very low if the defendant is not in fact committing robbery. The language of the proposed Rule 404(b)(2)(B) prevents the admissibility of this evidence under the objective-chance exception. Specifically, although disguised as objective-chance evidence, the evidence is not offered to prove an element of a claim that requires proving an absence of chance or accident. Instead, it is offered to prove identity only through ordinary character reasoning: that because the defendant has been suspected of robbery in the past, he is more likely to have committed the robbery in question.[86]

Importantly, the proposed rule does not limit the applicability of the exception to evidence that is offered to prove an element that explicitly requires a showing of absence of chance or accident. Rather, it permits a court to decide based on the facts and circumstances of a case. Proving absence of accident in the arson illustration is required to prove intent because proving intent in this case is one and the same as proving the absence of accident. This is not so in the robbery illustration: proof of the robber's identity can come in many forms (e.g., forensic evidence or eyewitness testimony) and does not require proving an absence of chance or accident.

Second, the proposed amendment requires that the evidence satisfy a "reverse-403 balancing" to be admissible under Rule 404(b)(2)(B)'s objective-chance exception. This safeguard reflects a combination of two considerations. First, in light of the history of courts misinterpreting Rule 404(b)(2) and expanding the meaning of its permissible purposes (especially for evidence that seems like objective-chance evidence), this safeguard protects against a high danger of courts and attorneys misusing the proposed objective-chance exception to admit ordinary character evidence. Second, it reflects the recognition that true objective-chance evidence that is both highly probative and probative of a matter for which there is otherwise scarce evidence will satisfy a reverse-403 balancing test.

This safeguard aims to protect against the admission of ordinary character evidence disguised as objective-chance evidence while allowing for the admission of true objective-chance evidence that involves the features discussed above. Specifically, in conducting a reverse-403 balancing, a court should consider the following features of the prior-events evidence in determining its probative value for the absence of chance or accident: (1) the number of prior events; (2) their improbability; (3) their uniformity with respect to each other and the event in question; (4) the certainty with which they occurred; and (5) the scarcity of alternative evidence regarding the absence of chance or accident.[87] As

[85] *See An Objective-Chance Exception, supra* note 8, at 162–63.

[86] *See id.*

[87] The probative value of the evidence in light of the *number* of prior events in particular should be evaluated based on the improbability (and uniformity) of the events. For example, one prior house fire may be weak evidence of absence

discussed above, these features are central to the evidence's unique probative value arguably justifying an exception to Rule 404.[88]

On the other hand, in determining the evidence's prejudicial effect, the court should consider, among other things, the extent to which the jury is likely to use the prior-events evidence to make ordinary character inferences (as opposed to inferring absence of chance or accident in particular), to punish a defendant based on prior events, or to rely on stereotypes or preconceptions to interpret the evidence. For example, evidence that involves a defendant's prior drug crimes to prove that the defendant had knowledge and intent to distribute drugs in the event in question would likely involve significantly more prejudice than evidence involving prior fires in the defendant's homes to prove absence of accident in the fire in question. This is because the drug-events evidence involves prior bad acts of the defendant while the fire-events evidence only involves prior fires that may or may not be due to an accident.

Indeed, under a reverse-403 balancing, objective-chance evidence that involves the prior bad acts of a defendant is inherently more prejudicial than objective-chance evidence that involves prior improbable misfortunes or accidents that seem like prior bad acts only when combined with other such improbable events. Objective-chance evidence that consists of the prior bad acts of a defendant should often be excluded based on a court's reverse-403 balancing analysis.

Thus, the reverse-403 balancing is intended to serve as a safeguard that aims to prevent the admission of ordinary character evidence disguised as objective-chance evidence and even some forms of weaker objective-chance evidence. However, true objective-chance evidence that involves the hallmark features of this evidence of the absence of chance or accident—including multiple, improbable, uniform, and distinct prior events, as well as scarce alternative evidence for the matter in question—is uniquely valuable. It is highly probative and arguably involves a relatively low degree of unfair prejudice, and it is therefore unlikely to fail a reverse-403 balancing analysis.

5. Conclusion

Rule 404's exclusion of other-acts character evidence is central to a fair trial, to achieving accurate verdicts, and to preventing false convictions based on the prior acts of a defendant. However, Rule 404 no longer serves these purposes. This is because it is misinterpreted in a way that replaces the rule against character evidence with a Rule-403 balancing—and one that treats character inferences in favor of admissibility rather than exclusion. Consequently, courts routinely admit character evidence, and criminal defendants are left unable to predict with any degree of certainty whether a court will exclude their prior bad acts from trial. In addition to harming the fairness and accuracy of a trial, the courts' regular admission of character evidence creates uncertainty in a highly impactful aspect of the trial, which places undue pressure on defendants to avoid trial by accepting a plea agreement.

To correct this central misinterpretation in evidence law, I propose an amendment to Rule 404(b)(2) to clarify the meaning and intention of the rule as permitting only other-acts evidence that does not involve character reasoning. In other words, it clarifies that Rule 404(b)(2) simply indicates the permissibility of non-propensity other-acts evidence not banned under Rule 404(b)(1) rather than

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of accident; however, one prior event involving a bathtub drowning of a spouse is rarer and arguably stronger evidence of absence of accident, notwithstanding evidence involving only a single prior event.

[88] I considered the possibility of proposing *requirements* to qualify for the objective-chance exception in line with these features. However, a reverse-403 balancing based on these features is simpler and permits an appropriate level of judicial discretion to consider them in the context of the specific facts and circumstances of a case.

creating an exception to Rule 404(b)(1). The proposed amendment is simple and clear, and it has the potential to correct a major source of inaccuracy, unfairness, and inequality in civil and criminal cases.

Further, as a secondary proposal, I address the doctrine of chances. This is important because the doctrine of chances may have caused past reluctance to amend Rule 404(b)(2) to clarify its meaning. Specifically, objective-chance evidence is often seen as more valuable than other forms of character evidence—so much so that it is often presumed to be legitimate and admissible notwithstanding Rule 404. Indeed, as discussed above, there is a logical basis for this distinction between ordinary character evidence and objective-chance evidence.

Therefore, I address the doctrine of chances in two ways. First, I explain why amending Rule 404 to address the doctrine of chances is not necessary for courts to admit certain forms of objective-chance evidence, and that, in any event, there are policy concerns that override the potential accuracy benefits of this evidence. I emphasize that my primary proposal herein is not dependent on the adoption of my secondary proposal regarding the doctrine of chances. Correcting the routine misinterpretation of Rule 404(b)(2) would carry very substantial benefits for the accuracy and fairness of trials regardless of whether the Advisory Committee also decides to amend Rule 404 to address explicitly the doctrine of chances.

Second, however, I argue that addressing the doctrine of chances explicitly in Rule 404(b), if done correctly, would create a more predictable and logical rule against character evidence. I therefore propose a second amendment to Rule 404(b)(2) to establish an exception to Rule 404 for objective-chance evidence that satisfies a reverse-403 balancing analysis. The proposed amendment aims to create a stronger rule against character evidence by, on the one hand, creating a clear general rule that prohibits character reasoning while creating an exception for a form of character evidence—objective-chance evidence—that is uniquely probative and underlies many of the courts' current departures from Rule 404.

Rule 404 is central to preserving a system of justice that produces outcomes based on evidence regarding the act in question and not on a jury's impression of a defendant's character or past acts. As numerous courts and scholars have highlighted, disclosing a defendant's past bad acts to a jury often determines the case in favor of the prosecution. But courts have misinterpreted Rule 404 to permit other-acts character evidence for any purpose other than the most blatant use of it to infer character and action in accordance therewith. Consequently, it has effectively been replaced with a skewed Rule-403 balancing. My proposal to amend Rule 404(b)(2) seeks to restore Rule 404 to its proper meaning and purpose to exclude evidence whose relevance relies on character reasoning. It thereby promotes evidence-based verdicts and the evidentiary goals of accuracy, fairness, and equality.

TAB 1D

Evidence of alleged prior false accusations of sexual assault

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Issue: How should the rules treat evidence of a complainant's alleged prior false accusations of sexual assault?

Background: In recent years, greater attention has focused on the problem of sexual harassment, sexual assault, and child sexual assault. At the same time, the proliferation of digital records and social media have made evidence of a complainant's prior history, including prior accusations of sexual assault alleged to be false, increasingly available to the parties in a civil or criminal case. Both federal and state courts have struggled with whether, how, and when to permit a defendant to introduce evidence a complainant's alleged prior false accusation of sexual assault.

Evidence of a prior false accusation typically is not considered covered under the federal rape shield rule, FRE 412. As a matter of logic, a false accusation is not "sexual behavior" or "sexual predisposition." The Advisory Committee notes also expressly state that: "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." At least eight states address false accusations in their rape shield rules, but that treatment varies.[1]

There are several different rules, and different purposes, that a defendant might cite in seeking to introduce evidence of an alleged prior accusation, including:

- **FRE 608(b).** Rule 608(b) permits a party to cross-examine a testifying witness about specific instances of a witness's conduct in order to attack character for truthfulness, although extrinsic evidence is not permitted.[2] Typically, a party must have a good faith basis in the foundation supporting the question.

- **FRE 404(b).** Rule 404(b) permits a party to introduce evidence, including extrinsic evidence, of prior acts for a non-propensity purpose. Defendants have sought to introduce prior false accusations under Rule 404(b) (as "reverse 404(b)") using several theories, including as evidence of a common scheme or plan or intent[3] or just as a general attack on credibility.[4] Applying *Huddleston,*[5] courts typically assess Rule 404(b) evidence using a sufficiency standard.

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[*] Norman Dorsen Professor of Civil Liberties, NYU School of Law and Associate Reporter for the American Law Institute's revision of Article 213 (Sexual Assault) of the Model Penal Code.

[1] See Ariz. Rev. Stat. § 13-1421(A)(5); Colo. Rev. Stat. Ann. § 18-3-407(2)); Idaho R. Evid. § 412(b)(2)(C); Minn. Stat. § 609.347(3)(a)(i); Miss. R. Evid. 412(b)(2)(C); 12 Okl. Stat. Ann. § 2412(B)(2); Wisc. Rev. Stat. § 11(b)(3)); 13 Vt. Stat. Ann. § 3255(a)(1)(C).

[2] See, e.g. United States v. Velarde, 485 F.3d 553 (10th Cir. 2007).

[3] United States v. Stamper, 766 F. Supp 1396 (W.D.N.C. 1991); United States v. Lukashov, 694 F.3d 1107 (9th Cir. 2012).

[4] See, e.g., United States v. Griffith, 65 F.4th 1216 (10th Cir. 2023).

[5] United States v. Huddleston, 485 U.S. 681 (1988).

- **FRE 404(a)(2)(B) or 608(a).** In theory, a defendant might seek to introduce prior false accusation evidence by asserting that "false accuser" is a "pertinent trait" of the complainant or as basis of an affirmative attack for character for untruthfulness. In such cases, the evidence should be offered as general reputation or opinion evidence rather than specific instance evidence. But if the the government offered a rebuttal witness in response, the specific instance of the prior false accusation might then be probed on cross-examination of that witness under FRE 405.

- **Constitutionally required.** At times, defendants have simply cited the constitutional right of Confrontation, whether packaged as an attack on bias[6] or just general credibility, as requiring the admission of such evidence.[7] This is particularly the case, for obvious reasons, in a large number of cases brought into federal court via a writ of habeas corpus.

The Supreme Court has weighed in on related issues in two cases:[8] *Olden v. Kentucky*[9] and *Nevada v. Jackson*.[10] In *Olden,* the Court held that the Confrontation Clause was violated by the application of a state rape shield rule that foreclosed a line of questioning intended to expose the witness's bias and motive to fabricate.[11] In *Jackson*, the Court held in a habeas matter that an evidence rule akin to FRE 608(b) prohibiting the introduction of extrinsic evidence of a prior false accusation did not constitute an unreasonable application of clearly established federal law. In its opinion, the Court distinguished between the line of cases rejecting restrictions on the right of cross-examination from the asserted (and rejected) broader right to introduce extrinsic evidence.[12]

Discussion.

The question of how and when to admit evidence of an alleged prior false accusation is delicate and controversial for obvious reasons. On the one hand, the historical mistreatment of complainants in sexual assault cases, and the associated faulty inferences permitted by courts, precipitated the enactment of the rape shield rule. The recent political movements in support of greater accountability for sexual harassment and sexual violence have also propelled calls to "believe all women" and produced empirical support undermining claims that sexual assault claims are especially likely to be fabricated.[13] On the other hand, there is a troubling history of unchecked false

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[6] Olden v. Kentucky, 488 U.S. 227 (1988).

[7] See, e.g., United States v. A.S., 939 F.3d 1063 (10th Cir. 2019); United States v. Tail, 459 F.3d 854 (8th Cir. 2006); White v. Coplan, 399 F.3d 18 (1st Cir. 2005). *Compare* Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001) (granting habeas petition after finding constitutional violation) *with* Cookson v. Schwartz, 5556 F.3d 647 (7th Cir. 2009) (denying petition after finding no violation).

[8] A third sexual-history related case, Michigan v. Lucas, 500 U.S. 145 (1991), upheld the constitutionality of pretrial notice provisions.

[9] Olden v. Kentucky, 488 U.S. 227 (1988).

[10] Nevada v. Jackson, 133 S. Ct. 1990 (2013).

[11] Olden v. Kentucky, 488 U.S. 227, 231-33 (1988).

[12] Nevada v. Jackson, 133 S. Ct. 1990 (2013) (citing Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam) for the principle that "this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes.").

[13] Empirical work studying the prevalence of false accusations produces broad ranges, largely because of methodological differences in how falsehood is assessed. For instance, some studies count a recantation as a false accusation, without considering external factors that might have motivated that recantation or the existence of corroborating evidence. Other studies consider an accusation false simply if police failed to

accusations of sexual assault, including the moral panic that led to a series of overturned convictions in the "day-care cases" in the 1980s[14] and the legal and extralegal lynching of Black men accused of sexual offenses against white women.[15]

In the absence of clear guidance regarding the admissibility of such evidence, both federal and state courts have varied in their reasoning and approach. Most pertinently, there is little clarity on questions, including:

- the standard for judging when a complain is "false" (which has ranged from mere sufficiency through "demonstrable falsehood" or clear and convincing evidence);
- whether there is a requirement of pre-trial notice as is the case for sexual behavior evidence;
- whether extrinsic evidence is permissible;
- whether the prior accusation must be "substantially similar" or against the same accused;
- how to weight the existence of other evidence;
- whether to differentiate between introduction of such evidence in the case-in-chief versus for impeachment purposes, and if only for impeachment then whether for general impeachment of credibility or only after a door is opened in some form;
- whether and when a constitutional right of confrontation requires admission of such evidence.

This presentation will address these issues and propose a uniform standard for the treatment of alleged prior false accusations of sexual assault.

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pursue or substantiate it. The most reliable quantitative studies suggest that false reports are a small percentage of total cases, ranging around 6% to 10%. See e.g., David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) Violence Against Women 1318 (2010) (finding after independent investigation that 5.9 percent of sexual-assault allegations were false). In another careful study, Cassia Spohn and Katherine Tellis found that over a five-year period, the Los Angeles Police Department classified 11 percent of the reported rapes and attempted rapes as "unfounded," but that many of these classifications involved judgments about inadequate evidence or complainants who recanted for reasons consistent with a valid initial complaint. After thorough review of the case files, the authors concluded, however, that 68 percent of the "unfounded" classifications (thus roughly 7.6 percent of the initial reports) involved "false allegations in which complainants deliberately lied about being raped." Cassia Spohn & Katherin Tellis, Policing and Prosecuting Sexual Assault 102, 140, 164 (2014). The authors, while arguing that rape allegations must be taken more seriously and prosecuted more vigorously, nonetheless cautioned: "It is clear . . . that some girls and women do lie about being sexually assaulted. [Such allegations] lead to cynicism and frustration among detectives tasked with investigating sexual assaults. They also undermine the credibility of genuine victims and divert scarce resources from the investigation of the crimes committed against them." Id. at 164.

[14] See, e.g. Debbie Nathan & Michael R. Snedeker, Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt 2-4 (1995).

[15] See, e.g., Philip Dray, At the Hands of Persons Unknown: The Lynching of Black America (2003).

FRE 404 Character Evidence; Other Crimes, Wrongs, or Act

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

…

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

…

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) ***Prohibited Uses.*** 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.

(2) ***Permitted Uses.*** 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.

…

FRE 608 A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(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; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

TAB 1E

Proposal to the Advisory Committee on Rules of Evidence:
Rule Changes to Address Machine-Generated Proof Beyond Authentication

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ABSTRACT

In my presentation to the Committee, I will suggest changes to the rules of evidence to better address concerns raised about parties' ability to meaningfully scrutinize the claims of machines.

Types of machine-generated proof currently used. Machine-generated proof is increasingly used in trials, including: Google Earth location estimates, driving time estimates, likelihood ratios for potential DNA mixture contributors generated by probabilistic genotyping software, blood-alcohol concentrations from software-driven machines, conclusions of machine-learning algorithms as to authorship attribution (e.g. of social media posts), results of automated forensic software for face and voice recognition, Find My iPhone features used to track phone theft, Fitbit data offered to determine whether someone was sleeping at a particular time, time-stamp data on photographs, license plate readers, address logs purporting to list IP addresses of users who have visited a particular website, and Event Data Record information. Many of these algorithms are proprietary, and some either explicitly decline to offer licenses to independent researchers (TrueAllele) or effectively deny such licenses by imposing conditions that cannot possibly be met by any researcher intending to publish their findings (STRMix). Many proprietors decline to disclose source code, arguing that the code is protected by a trade secret privilege.

Limited opportunity under existing rules for adversarial testing of machine-generated conveyances of information. Some forms of machine-generated proof raise potential reliability concerns with little chance of the type of adversarial testing offered for human testimony and hearsay. For example, imagine a criminal defendant charged with a crime, where the primary evidence of guilt is the following conclusion of a DNA software program: "There are 3 contributors to the DNA mixture on the gun, and based on the DNA typing results obtained, it is at least 49 Million times more likely if the observed profile from the swabs of the textured areas of GUN-001 originated from [Defendant] and two unrelated, unknown contributors than if the data originated from three unrelated, unknown individuals." If this statement were offered into evidence without a human witness, it would be subject only to requirements of relevance (FRE 402) and authenticity, to ensure the reported software result is what it purports to be (FRE 901, 902). These are easily met requirements that can even be shown without a live witness. *See, e.g.*, FRE 902(13). If the statement were offered into evidence with a human expert relying on it to render an opinion, then the expert's opinion would also be subject to the requirements of FRE 702 and *Daubert*, and the software program that produced the expert's testimony would have to be shown by a preponderance of the evidence to be a "reliable . . . method[]." FRE 702(c). *Daubert* hearings on machine-generated proof generally boil down to examination of existing validation studies and competing affidavits or testimony from experts as to the potential problems with the software. Validation studies typically speak to the potential for false positives (because they are studies conducted with a known ground truth), but not so much to the reliability of the program's reported "scores" (such as likelihood ratios).

The primary gaps in the rules of evidence with respect to machine-generated proof, then, are:

1. Little to no scrutiny of the reliability of machine-generated proof when it is not accompanied by an expert witness's testimony (and thus not subject to FRE 702);
2. Limited scrutiny of the reliability of machine-generated proof when it is the method underlying an expert witness's testimony (and thus subject to FRE 702), because the primary evidence relied on is often validation studies conducted by the software proprietor;
3. No rights of impeachment analogous to such rights with respect to human assertions.

Possible changes to the FRE. I will suggest language to the Committee that would do the following, should the Committee deem these appropriate (some changes would be conditioned on cooperation of another government entity, like NIST):

1. Extend FRE 702 to machine-generated output that, if testified to by a human expert, would be subject to FRE 702. This change will ensure that *Daubert* still applies to expert systems even in the absence of a human interlocutor.
2. Amend Rules 613, 608, and 806 to allow impeachment of machine-generated assertions by prior inconsistent statements and prior false statements or other specific instances of conduct involving falsehood or deception, to the same extent admissible for impeachment under 613 or 608 if the statement were uttered by a human declarant or witness.
3. Consider conditioning the admissibility of a "machine-generated assertion" (a conveyance of information that would be a statement for FRE 801 purposes if uttered by a human) on one or more of the following:
    a. Disclosure to the opposing party (or in a repository accessible to the opposing party) of all prior assertions (including test runs) of the machine on the same subject-matter as the machine assertion being admitted, as well as the version of the software used to generate the assertion being admitted, and internal testing plans and results;
    b. Granting to the opposing party a temporary license to run the software upon request;
    c. Prior testing of the software by an entity that is financially independent of the proprietor of the software and that meets the standards under IEEE for stress testing "high stakes" algorithms;
    d. Access to (or disclosure to NIST of) training data sets, for assertions of machine-learning algorithms;
    e. Timely answers to a certain reasonable number of interrogatories (cf. Fed. R. Civ. Proc. 33) submitted by the opposing party regarding the machine-generated assertion, that would be appropriate if asked on cross-examination if the assertion were made by a human witness;
    f. For algorithms used as proof in a criminal case, disclosure by the proprietor of its source code to the National Institute of Standards and Technology (NIST) to allow independent audits by NIST.

While my presentation will focus on machine-generated proof, the gaps that exist in testing machines also exist in testing other sources of information that cannot be cross-examined at trial; namely, animals and absent hearsay declarants. I would urge an **amendment to Rule 801** to require that, as a condition of admissibility of any hearsay statement, the proponent disclose the prior statements of that declarant on the same subject-matter as the declarant's hearsay assertion, akin to the Jencks Act. There is no reason the Act should not apply to hearsay declarants.

TAB 2

TAB 2A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: "Deepfakes" and Possible Amendments to Article 9 of the FRE
Date: October 1, 2021

A number of articles have been written in the last couple of years about the evidentiary challenges posed by "deepfakes" --- inauthentic videos and audios generated by artificial intelligence in such a way as to appear to be genuine. You are probably aware of some of the widely distributed examples, such as: 1. Pope Francis wearing a Balenciaga jacket; 2. Jordan Peele's video showing President Obama speaking and saying things that Obama never said; 3. Nancy Pelosi speaking while appearing to be intoxicated; and 4. Robert DeNiro in *The Irishman.*

The evidentiary risk posed by deepfakes is that a court might find a deepfake video authentic under the mild standards of Rule 901, then the jury may think it authentic because of the difficulty of uncovering deepfakes, and all this will lead to an inaccurate result at trial. The question for the Committee is whether Rule 901 in its current form is sufficient to guard against the risk of admitting deepfakes (with the understanding that no rule can guarantee perfection), or whether the rules should be amended to provide additional and more stringent authenticity standards to apply to deepfakes.

At the Fall, 2023 Committee meeting, Dr. Maura Grossman and Hon. Paul Grimm (former U.S. District Judge and now the Director of the Bolch Institute at Duke) will be making a presentation on deepfakes.[1] This memo is not intended to steal their thunder. But it does provide:

1) A brief introduction to deepfakes;

[1] Dr. Grossman and former Judge Grimm have written several important articles about deepfakes and about artificial intelligence more broadly. *See* Grimm, Grossman, and Cormack, *Artificial Intelligence as Evidence,* 19 Nw. J. Tech. & Intell. Prop. 9, 84 (2021) (included as an attachment in this agenda book)*;* Grossman, Grimm, and Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*. Vol. 107, Iss. 2 of Judicature (Oct. 2023); Grossman, Grimm, Brown and Xu, *The GPT Judge: Justice in a Generative AI World,* Duke Law & Technology Review, Vol. 23, No. 1, 2023 (included as an attachment in this agenda book).

2) A short description of how Rule 901 operates;

3) A description of the Committee's review of the previous technological development that challenged the evidence rules on authentication: social media and digital communication; and

4. A description of the Grimm-Grossman proposal to add a new Rule 901(b)(9) to provide a procedure for assessing deepfakes, as well as two suggestions for change made in recent law review articles.

I. The Problem of Deepfakes

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect.[2] Software for creating deepfakes is already freely available online and fairly easy for anyone to use.[3] As the software's usability and the videos' apparent genuineness keep improving over time, it will become harder for computer systems, much less lay jurors, to tell real from fake.[4]

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[2] Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,* 107 Calif. L. Rev. 1753, 1760 (2019). Some of the famous deepfakes are pretty easy to root out with minimal inquiry. The Nancy Pelosi video was debunked simply by playing it slower. The Pope picture, upon scrutiny, shows up as a fake because his medal is not sitting on his chest, and his fingers are not accurate. But it is very likely that future developments will make deepfakes harder to detect.

[3] See *12 Best Deepfake Apps and Websites That You Can Try for Fun,* https://beebom.com/best-deepfake-apps-websites.

[4] MIT has provided a checklist that can be used to help detect a deepfake, though MIT makes no promises:

> When it comes to AI-manipulated media, there's no single tell-tale sign of how to spot a fake. Nonetheless, there are several DeepFake artifacts that you can be on the lookout for:
>
> 1. Pay attention to the face. High-end DeepFake manipulations are almost always facial transformations.
> 2. Pay attention to the cheeks and forehead. Does the skin appear too smooth or too wrinkly? Is the agedness of the skin similar to the agedness of the hair and eyes? DeepFakes may be incongruent on some dimensions.
> 3. Pay attention to the eyes and eyebrows. Do shadows appear in places that you would expect? DeepFakes may fail to fully represent the natural physics of a scene.
> 4. Pay attention to the glasses. Is there any glare? Is there too much glare? Does the angle of the glare change when the person moves? Once again, DeepFakes may fail to fully represent the natural physics of lighting.
> 5. Pay attention to the facial hair or lack thereof. Does this facial hair look real? DeepFakes might add or remove a mustache, sideburns, or beard. But, DeepFakes may fail to make facial hair transformations fully natural.
> 6. Pay attention to facial moles. Does the mole look real?
> 7. Pay attention to blinking. Does the person blink enough or too much?
> 8. Pay attention to the lip movements. Some deepfakes are based on lip syncing. Do the lip movements look natural?
>
> https://www.media.mit.edu/projects/detect-fakes/overview/

Generally speaking, there is an arms race between deepfake technology and the technology that can be employed to detect deepfakes. Deepfakes involve machine learning algorithms that are simultaneously pitted against one another.[5] One of these programs is a generative model that creates new data samples; the other, known as a discriminator model, evaluates this data against a training dataset for authenticity. The discriminator model estimates the probability that the sample came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model program is learning to create false data, and the discriminator model is learning to identify whether the data is artificial. The generative model constantly improves its ability to create data sets that have a lower probability of failing the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So anytime new software is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models. A New York Times reporter reviewed some of the currently available programs that try to detect deepfakes. The programs varied in accuracy. None was accurate 100% of the time.[6]

It should be noted that various digital tools have been introduced for authenticating video recordings that a party has prepared. These tools allow the proffering party to vouch for video recordings' authenticity through an electronic seal of approval.[7] While the use of such methods increases the costs of litigation, they do appear to answer any "deepfake" claim from the opponent. The limitation on the software is that the electronic stamp of genuineness occurs during the process in which the video is being generated; it does not work with videos, say, taken off the internet.[8]

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[5] Chris Nicholson, *A Beginner's Guide to Generative Adversarial Networks (GANs),* PATHMIND, https://pathmind.com/wiki/generative-adversarial-network-gan [https://perma.cc/JEY9-K283].

[6] See *Another Side of the A.I. Boom: Detecting What A.I. Makes,* https://www.nytimes.com/2023/05/18/technology/ai-chat-gpt-detection-tools.html ("Detection tools inherently lag behind the generative technology they are trying to detect. By the time a defense system is able to recognize the work of a new chatbot or image generator, like Google Bard or Midjourney, developers are already coming up with a new iteration that can evade that defense. The situation has been described as an arms race or a virus-antivirus relationship where one begets the other, over and over.").

[7] *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia,* at 6, WITNESS (December 2019), https://lab.witness.org/ticks-or-it-didnthappen/ ("The idea is that if you cannot detect deepfakes, you can, instead, authenticate images, videos and audio recordings at their moment of capture."); Riana Pfefferkorn, *Deepfakes in the Courtroom,* 29 Public Interest Law Journal 245, 259 (2020) ("So-called verified media capture technology can help to ensure that the evidence users are recording is trusted and admissible to courts of law. For example, an app called eyeWitness to Atrocities allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and can secondly confirm that the footage was not altered, all while the company's transmission protocols and secure server system create a chain of custody that allows this information to be presented in court. That information, paired with the app-maker's willingness to provide a certification to the court or send a witness to testify if needed, could satisfy a court that the video is admissible, even if the videographer is unavailable.").

[8] See, e.g., *A New Tool Protects Videos From Deepfakes and Tampering,* https://www.wired.com/story/amber-authenticate-video-validation-blockchain-tampering-deepfakes/ ("Called Amber Authenticate, the tool is meant to run in the background on a device as it captures video. At regular, user-determined intervals, the platform generates 'hashes'—cryptographically scrambled representations of the data—that then get indelibly recorded on a public blockchain. If you run that same snippet of video footage through the algorithm again, the hashes will be different if anything has changed in the file's audio or video data—tipping you off to possible manipulation.").

Besides the challenge of determining whether a video is faked, some commentators are concerned about a "reverse CSI effect." Jurors, knowing about deepfakes, "fake news", etc., may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake.[9] The other concern expressed is that over time, skepticism over video evidence may undermine the use of perfectly authentic videos --- though how that concern is to be addressed in an Evidence Rule is a mystery.

II. Basic Rules on Authenticity

Under Rule 901(a), the standards for authenticity are low. The proponent must only "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Under the rule, the question of authenticity is one of conditional relevance—an item of evidence is not relevant unless it is what the proponent purports it to be. (For example, a sexually harassing statement in an email, purportedly sent from the plaintiff's supervisor, is probative only if it is the supervisor who sent it). As a question of conditional relevance, the admissibility standard under Rule 901 is the same as that provided by Rule 104(b): Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a mild standard—favorable to admitting the evidence. The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be.

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity—enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides certain situations in which the proffered item will be considered self-authenticating—no reference to any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must itself be admissible. If the opponent still contests authenticity at trial, the proponent will need to present admissible evidence of the authenticity of the challenged item. This means that the judge's role when an authentication issue arises differs from the judge's role when other issues arise involving the admissibility of evidence at a Rule 104(a) hearing (under which the rules of evidence other than privilege are inapplicable). When authentication evidence is offered, a jury must be provided sufficient admissible evidence for it to find that it is what the proponent claims, or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.

[9] Rebecca Delfino, *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 (2023).

Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.

II. Prior Committee Decision on Special Authentication Rules for Electronic Evidence.

The rise of deepfakes is not the only technological advancement that has challenged the existing rules on authentication. In 2014, the Advisory Committee undertook a project to consider whether rules should be added to Article 9 to address digital communications and social media postings. The proposal considered was to have special rules on authenticating emails, texts, social media postings, and so forth. After significant discussion, the Committee decided not to proceed with the project. According to the Minutes of the Fall, 2014 meeting, the reasons for rejection were as follows:

1. The current rules are flexible enough to handle questions about the authenticity of digital communications. For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result). These rules give the court all the tools it needs to determine the authenticity of digital evidence.

2. Any rules directed specifically toward digital communications would likely overlap with the provisions already in Rule 901(b). Certainly distinctive characteristics would be important for authenticating digital evidence; and authentication of, say, email would use analogous principles of authenticating telephone conversations. This overlap, between new and old rules, would likely cause confusion.

3. Listing factors relevant to authentication would run the risk of misleading courts and litigators into thinking that all of the listed factors can or should be weighed equally, when in fact a case-by-case approach is required.

4. Given the deliberateness of rulemaking --- three years minimum --- there was a risk that any rule on digital communications could be dead on arrival. I called it the MySpace problem.[10]

In hindsight, it is fair to state that the Committee's decision to forego amendments setting forth specific grounds for authenticating digital evidence was the prudent course. Courts have sensibly, and without extraordinary difficulty, applied the grounds of Rule 901 to determine the

[10] It should be noted that the Committee did propose two new rules to deal with authenticating digital evidence --- Rules 902(13) and (14), which became effective in 2017. But these rules do not add or change any grounds of authentication for digital evidence. Rather they allow the existing grounds to be established by a certificate of a person with knowledge, thus dispensing with the requirement of in-court testimony.

authenticity of digital evidence.[11] Courts have specifically rejected blanket claims like "my account was hacked" --- because such an argument can always be made. Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information. Thus, courts have consistently held that "the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents."[12]

It is true that litigators have to know what they are doing when they try to authenticate digital evidence, and it is also true that authenticating digital evidence can be costly, but no rule of evidence would change that.[13] Moreover, some costs of proving authenticity can be saved by the affidavit procedures established for authentication of digital evidence in Rules 902(13) and (14).[14]

The fact that the Committee decided not to promulgate special rules on digital communication is a relevant data point, but it is not necessarily dispositive of amending the rules to treat deepfakes.[15] While a special rule setting forth the grounds for possible authentication of audiovisual evidence runs a similar risk of overlap, perhaps a rule of procedure (such as the

[11] See, e.g., United States v. Fluker, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)); United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence"); United States v. Lundy, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); United States v. Needham, 852 F.3d 830, 836 (8th Cir. 2017) ("Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content. Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content. . . [The witness] testified that he personally viewed the [webpages] and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots."); United States v. Recio, 884 F.3d 230 (4th Cir. 2018) (the government sufficiently tied the "Facebook User" to the defendant by showing that: (1) the user name associated with the account was Larry Recio; (2) one of the four email addresses associated with the account was larryrecio20@yahoo.com; (3) more than 100 photos of Recio were posted to the account, and (4) one of the photos posted to the user timeline was accompanied by the text "Happy Birthday Larry Recio").

[12] United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[13] *See* Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age,* 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is … an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.").

[14] Tara Vassefi, "*A Law You've Never Heard of Could Help Protect Us From Deceptive Photos and Videos,"* UC Berkeley School of Law Human Rights Center (Nov. 30, 2018), https://medium.com/humanrightscenter/a-law-youve-never-heard-of-could-help-protect-usfrom-fake-photos-and-videos-df07119aaeec. (noting that Rules 902(13 and (14) "streamlin[e] authentication for those with limited legal resources").

[15] For one thing, it is not stare decisis. The Committee has proposed amendments to rules that it rejected in the first instance. The amendments to Rule 106 and new Rule 107 are just two examples. Also, perhaps the dangers of fakery are greater with respect to deepfakes than were presented by digital evidence in 2014.

requirement of a special showing made to the court, or a notice requirement), or a higher standard of proof, could be useful. It is for the Committee to determine whether it is interested in exploring such a procedural alternative.

IV. Calls for Change

There are several calls for change to the authenticity rules to deal with the rise of deepfakes. This section discusses two suggestions made in law review. The third suggestion is from Dr. Grossman and Judge Grimm.

1. Allocating Responsibility to the Court:

Professor Delfino argues that the danger of deepfakes demands that the judge decide authenticity, not the jury. She contends that "[c]ountering juror skepticism and doubt over the authenticity of audiovisual images in the era of fake news and deepfakes calls for reallocating the factfinding authority to determine the authenticity of audiovisual evidence." She contends that jurors cannot be trusted to fairly analyze whether a video is a deepfake, because deepfakes appear to be genuine, and "seeing is believing." Professor Delfino suggests that Rule 901 should be amended to add a new subdivision (c), which would provide:

901(c). Notwithstanding subdivision (a), to satisfy the requirement of authenticating or identifying an item of audiovisual evidence, the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b). The court must decide any question about whether the evidence is admissible.

She explains that the new Rule 901(c) "would relocate the authenticity of digital audiovisual evidence from Rule 104(b) to the category of relevancy in Rule 104(a)" and would "expand the gatekeeping function of the court by assigning the responsibility of deciding authenticity issues solely to the judge."

The proposed rule would operate as follows: After the pretrial hearing to determine the authenticity of the evidence, if the court finds that the item is more likely than not authentic, the court admits the evidence. The court would instruct the jury that it *must accept as authentic* the evidence that the court has determined is genuine. The court would also instruct the jury not to doubt the authenticity, simply because of the existence of deepfakes. This new rule would take the jury out of the business of determining authenticity, "thereby avoiding the problems invited by juror distrust and doubt." Finally, "the court would address the threat of counsel exploiting juror doubts over the authenticity of evidence using the deepfake defense by ordering counsel not to make such arguments."

It should be noted that the Delfino proposal applies to *all* audiovisual evidence --- including the video evidence that courts have been dealing with for about 100 years. Query whether the threat of deepfakes warrants such a dramatic change with respect to all video evidence. Assuming that any amendment is necessary, perhaps the goal is to set out procedures, and higher standards, when the opponent specifically brings a credible deepfake argument.

Another concern is about how the jury will react when it is instructed to presume authenticity. Given the presence of deepfakes in society, it may well be that jurors will do their own assessment, regardless of the instruction --- and that juror assessment will be done without the foundation for authenticity laid by the proponent in the admissibility hearing. It could become especially confusing when the jury is told that authenticity is a question primarily for jurors when it comes to telephone calls, diaries, and physical evidence, but when it comes to videos --- hands off.

One can argue that the Delfino proposal could productively be cut in half. That is, apply the Rule 104(a) standard to the authenticity of visual evidence, but then allow the jury to make its own assessment --- in other words, to treat the authenticity of visual evidence the same way we treat expert testimony. Delfino would object, though, due to her belief that jurors will not be able to assess the genuineness of the evidence, given that deepfakes are getting better and better. But this half-proposal would at least address arguments that deepfakes will be too easily admitted under the mild standard for showing authenticity to the court.

One final point on the Delfino proposal. Delfino's idea is that the court is to use the Rule 104(a) standard --- a preponderance of the evidence. Assuming that is appropriate, it should be added to the text of the rule. That is a lesson learned by the Committee in the amendment to Rule 702. This means that the last sentence of the proposal should read something like:

"The court must decide whether it is more likely than not that the item is authentic."

2. A Corroboration Requirement

John Lamonica argues for a more stringent standard of authenticity with respect to deepfakes.[16] He contends that the traditional means of authentication --- by a person with knowledge under Rule 901(b)(1) --- will no longer work with deepfakes because a witness cannot reliably testify that the video accurately represents reality. He states that "[b]ecause witnesses will no longer be able to meet the legacy standard of Rule 901(b)(1)'s knowledgeable witness by attesting that a video is a fair and accurate portrayal, courts need to look elsewhere for a sufficient finding that photographic evidence is what its proponent claims it is." He argues for a proposed new Rule 901(b)(11) that would specifically govern "the unique challenges that digital photography in the modern age present."

The new Rule 901(b)(11) would provide:

Before a court admits photographic evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources.

Lamonaca explains that the new rule "essentially codifies an existing means of authentication and requires it for photographic evidence." There is no proposal to change the existing allocation

[16] John P. Lamonaca, *A Break from Reality: Modernizing Authentication Standards for Digital Video Evidence in the Era of Deepfakes,* 69 Am. U.L. Rev. 1945, 1984 (2020).

of authority between the court and the jury. Rather, what it essentially does is 1) change the "distinctive characteristics" ground of Rule 901(b)(4) into a foundation *requirement;* and 2) state that the classic ground of authentication under Rule 901(b)(1) --- that the video accurately represents what it purports to show --- is never a sufficient ground of admissibility. Lamonaca concludes that "a preliminary hearing process [requiring corroboration] would bolster the confidence in video evidence for a jury to consider, rather than allowing all photographic evidence to pass the foundational stage with a testimonial witness who lacks the requisite personal knowledge to attest to the evidence's validity."

This is an interesting proposal, in that one of the major ways that deepfakes can be debunked is actual evidence casting doubt on what is portrayed --- e.g., "the video shows me at the bank but I was in the hospital that day." So it might not be asking too much for a proponent to provide some corroboration of the event, if there is a legitimate question of authenticity. But one major problem is that, like the Delfino proposal, it applies to *all* visual evidence, including video evidence that has been well-handled by the courts for 100 years. It seems unwarranted to require the proponent to go to the expense of providing corroboration for every surveillance video and every wedding photograph, simply because of the potential risk of deepfakes. Courts have not required an advance showing of corroboration for digital evidence, and while deepfakes present new challenges, the case has not been made as yet to justify an automatic corroboration requirement for all photographic evidence.

The better solution is the reverse --- that the court should enter a deepfake inquiry only when the proponent provides some evidence indicating the possibility of a deepfake: either some electronic analysis or a showing through evidence that the event presented is implausible. And then, at that point, the proponent would be required to provide corroboration or some other additional showing before the court can find it authentic. That reverse solution is essentially employed today with regard to electronic evidence--- the "it is hacked" claim is not treated seriously until the opponent comes up with something to indicate that an inquiry is warranted.[17] And that solution --- placing the burden of going forward on the opponent--- is what was employed in one of the few court cases that have discussed the deepfake possibility. The Colorado state appeals court in *People v. Gonzales*, 2019 COA 30, ¶ 29 opined that while software has made it easy for laypeople to manipulate recordings, "the fact that the falsification of electronic recordings is always possible does not, in our view, justify restrictive rules of authentication that must be applied in every case *when there is no colorable claim of alteration*." The court explained that "[w]hen a plausible claim of falsification is made by a party opposing the introduction of a recording, the court may and usually should apply additional scrutiny" to determine whether a reasonable jury could conclude that the item is what it purports to be.

Two more rulemaking points about the Lamonica proposal:

1. It should not be placed as a new Rule 901(b)(11). Rule 901(b) provides examples of authenticated items. This new provision is requiring an extra admissibility requirement for

[17] See Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) ("A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it 'might' have been created.").

evidence that will be offered under an existing rule --- such as 901(b)(9). It is not a new example of authentication. So it is better placed as an addition to 901(b)(9) --- as is the Grimm-Grossman proposal --- or as a separate subdivision, such as Rule 901(c).

2. The proposed rule refers to "photographic" evidence, which seems too narrow to cover all deepfakes. A term such as "audiovisual" is preferable. The Grimm-Grossman proposal simply ties into Rule 901(b)(9) --- items resulting from a process or system, which is probably the best tie-in to deepfakes.

3. The Grimm-Grossman Proposal.

Judge Grimm and Dr. Grossman conclude that the existing authenticity rules are flexible enough to address any problems arising from deepfakes. They see no need for a higher standard of proof at the admissibility level. They do believe, however, that the difficulty in determining the authenticity of deepfakes justifies some procedural structure and protection at an admissibility hearing. They propose an amendment to Rule 901(b)(9) that would provide 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 proponent 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.

This proposal provides a helpful way to structure an authenticity question in light of deepfakes. It imposes no safeguards in the first instance when a proponent seeks to admit an audiovisual item --- meaning that the mere fact that the opponent claims "deepfake" is treated as a non-event. However, if the opponent provides a factual basis for believing that there is a deepfake, or if the proponent concedes that AI has been used, the proponent must describe how the item was prepared, and show that it is a reliable account of what it portrays.

The proposed procedural requirements are placed in Rule 901(b)(9), which will be the rule under which an audiovisual presentation made with AI will probably have to be authenticated. Though another possibility is to have a freestanding Rule 901(c), labeled something like "Procedures for Items Generated by Artificial Intelligence."

The proposal is also useful in emphasizing that the search is for *reliability*. The term "reliability" is used in Rule 702, and the same types of concerns posed by experts arise when an item is prepared with AI --- i.e., the jury will not be able to determine that a deepfake is inauthentic,

so procedural safeguards are required at the admissibility level. Moreover, the essential problem of AI is that it leads to an unreliable presentation of an event.

The possibility of a combination should be noted --- the procedural requirements of the above proposal, with the addition of a heightened standard of proof, i.e., a preponderance of the evidence. Obviously, the piling on of safeguards is dependent on the perceived degree of risks posed by deepfakes.

4. Another View: No Change is Necessary.

Not all commentators believe that a change to the rules is necessary for dealing with deepfakes. Riana Pfefferkorn notes that the courts have previously handled technological changes under the existing rules, and deepfakes can be handled in the same way.[18] She asserts that the courts are "no stranger to doctored photographs" and that "generations of technologies with truth-subversive potential have become commonplace in society over the years. While the resulting fakes have inevitably gained traction at times in the public consciousness, the sky has not fallen." She states that "[t]he existence of the mere possibility of manipulation, without more, does not call for a high bar of authentication today any more than it did 150 years ago." She concludes that "the nation's courts are robust institutions that have shown themselves capable of handling each new variant of the age-old problem of fakery" and that the courts' "track record of resilience should assuage" much of the concerns about deepfakes.[19] Pfefferkorn's view is that the rise of deepfakes will probably increase the costs of authentication, perhaps by requiring expert testimony in more cases than previously. But that does not mean that the rules need to be amended.

Similarly, Grant Fredericks, the president of Forensic Video Solutions and a pioneer in the field of deepfake technology, is confident that fake videos will be kept out of evidence, both because they can be discovered using the advanced tools of his trade and because the video's proponent would be unable to answer basic questions to authenticate it (who created the video, when, and with what technology).[20]

V. Conclusion

It is for the Committee to decide whether it is necessary to develop a change to the Evidence Rules in order to deal with deepfakes. If some rule is to be proposed, it probably should not be a specific rule setting forth the methods in which visual evidence can be authenticated --- as those

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[18] Riana Pfefferkorn, *Deepfakes in the Courtroom,* 29 Public Interest Law Journal 245, 259 (2020)

[19] See also Russell Brandom, Deepfake Propaganda is not a Real Problem, THE VERGE (Mar. 15, 2019), https://www.theverge.com/2019/3/5/18251736/deepfake-propaganda-misinformation -troll-video-hoax ("We've had the tools to fabricate videos and photos for a long time. . . . AI tools can make that process easier and more accessible, but it's easy and accessible already. . . . [D]eepfakes are already in reach for anyone who wants to cause trouble on the internet. It's not that the tech isn't ready yet. It just isn't useful."); Jeffrey Westling, Deep Fakes: Let's Not Go Off the Deep End, TECHDIRT (Jan. 30, 2019), https://www.techdirt.com/articles/20190128/13215341478/deep-fakes-lets-not-gooff-deep-end.shtml.

[20] Mark J. Pescatore, Forensic Video Experts: Fake Videos Not Threat to Courtroom Evidence, PIPELINE COMM. (June 24, 2019), https://www.pipecomm.com/2019/06/24/forensic-video-experts-fake-videos-not-threat-to-courtroom-evidence/.

methods are already in Rule 901, and the overlap would be problematic. Possibly more productive solutions include heightening the standard of proof, or requiring a heightened showing, but only after some showing by the opponent has been made. But any possible change must be evaluated with the perspective that the authenticity rules are flexible, and have been flexibly and sensibly applied by the courts to treat other forms of technological fakery.

TAB 2B

Proposed Modification of Current Rule 901(b)(9) to address authentication issues regarding Artificial Intelligence evidence

By Paul W. Grimm and Maura R. Grossman

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

> **(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 proponent 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.

Rationale for the Proposed Rule

The proposed rule would amend current Rule 901(b)(9) to help attorneys and courts deal with the many evidentiary challenges presented by the authentication of evidence that is generated by artificial intelligence ("AI") software applications, including, but not limited to, generative AI applications such as ChatGPT and Dalle-E 2. *See generally* Paul W. Grimm, Maura R. Grossman, and Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 Nw. J. Tech. & Intell. Prop. 9 (2021), and Maura R. Grossman, Paul W. Grimm, Daniel G. Brown, and Molly (Yiming) Xu, *The GPTJudge: Justice in a Generative AI World*, 23:1 Duke Law & Tech. Rev. __ (forthcoming Oct. 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4460184. Counsel and the courts will soon be confronted by cases the resolution of which will depend on AI evidence, as AI software applications are now in widespread use by individuals, organizations, companies, and government entities.

The proposed rule would amend Rule 901(b)(9) to include a new provision relating to artificial intelligence evidence as a subset of evidence that is the product of a system or process that produces accurate results. However, the proposed rule replaces the word "accurate" with "reliable" throughout Rule 901(b)(9), making

reliability the standard for *all* evidence generated by a system or process, regardless of whether it is computer-generated artificial intelligence or not. This change is more than mere semantics. The word "reliable," when used by computer and data scientists, encompasses two distinct, yet complementary concepts: *validity* and *reliability*. A system or process produces results that are *valid* when the results are accurate (*i.e.*, when the system or process properly measures or predicts what it is supposed to). But accuracy alone is not enough to ensure authenticity. The results produced by the system or process must also be *reliable*—meaning that the system or process consistently produces results that are valid (accurate) when applied to a variety of different data sets under substantially similar circumstances. *See* Grimm, Grossman, & Cormack, *AI as Evidence*, *supra* at 48; Grossman, Grimm, Brown & Xu, *The GPT Judge: Justice in a GenAI World*, *supra* at 14 & n.48. A system or process may produce a valid result when applied in certain circumstances, but not in others. For example, AI facial-recognition software programs that have been trained primarily on images of light-skinned males will typically produce accurate results when applied to photos of light-skinned men. But the same software may not produce accurate results when applied to a photo that is not of a light-skinned male. For that reason, the proposed rule substitutes the term "reliability" for "accuracy," and also requires that the proponent of the AI evidence demonstrate that the software or program produces reliable results in general, as well as with respect to the particular evidence being offered. This is similar to the requirements of Rule 702(c) and (d)—which require that expert opinion testimony be based on both reliable principles and methods, but also requires a showing that the reliable methodology reliably has been applied to the facts of the particular case.

The proposed rule, like all authentication rules, must be employed in tandem with other evidence rules that affect the process of authentication. Thus, trial judges must exercise their gatekeeping role under Rule 104(a) in assessing whether the proponent of AI evidence has shown that it is more likely than not authentic. Similarly, when the authenticity of AI evidence is challenged by facts that undermine its authenticity, the resolution of the disputed facts that will determine authenticity must be made by the jury pursuant to Rule 104(b).

Deepfake evidence may present particularly challenging issues with respect to demonstrating (or challenging) authenticity. When the proponent of AI-generated evidence of an aural, visual, textual, or other depiction of an event or thing that has been fabricated offers it as genuine proof of the event or thing, it may appear so realistic that demonstrating that it is a fake may be quite difficult to show. For example, research has demonstrated that humans are unable to reliably distinguish AI-generated faces from real faces in photographs and find AI-generated faces to be

more trustworthy. *See* Grossman, Grimm, and Brown, *supra* at 19 & n.54. Audiovisual evidence is particularly troublesome in this regard. Studies have shown that "jurors who hear oral testimony along with video testimony are 650% more likely to retain the information," and that "video evidence powerfully affects human memory and perception of reality." *Id.* at 19 & n.55. Thus, even when jurors are aware that audiovisual evidence could be fake, it can still have an undue impact on them because they tend to align their perceptions and memories to coincide with what they saw and heard on the recording despite their skepticism. *Id.* at 19-20 & n.56.

As an initial matter, it will fall upon the party against whom the purportedly deepfake evidence is offered to raise this issue with the court, and to come forward with facts to challenge its authenticity. At that point, the trial judge, acting pursuant to Rule 104(a), must make a preliminary determination whether the proponent has met its burden of authenticating the evidence. It is then when the requirement that the proponent demonstrate that the software or program that created the AI-generated evidence produces reliable results in general, and specifically with regard to the challenged evidence, is most important. Whether this showing has been made will be determined by the totality of the circumstances, including whether there are corroborating facts to support the claim of authenticity, as well as facts that show that the AI-generated evidence has been designed and tested sufficiently to demonstrate that it is both valid and reliable in general, and with respect to the circumstances of the particular case. Where those facts are disputed, Rule 104(b) will require the jury to determine whether the proponent has demonstrated the authenticating facts are more likely so than not so.

Finally, it is recommended that Rule 902(13) also be amended to replace "accurate" with "reliable", for the same reasons stated above.

Respectfully submitted:
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TAB 2C

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Artificial Intelligence as Evidence

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ARTIFICIAL INTELLIGENCE AS EVIDENCE

Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack

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ARTIFICIAL INTELLIGENCE AS EVIDENCE[1]

Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack

ABSTRACT— This article explores issues that govern the admissibility of Artificial Intelligence ("AI") applications in civil and criminal cases, from the perspective of a federal trial judge and two computer scientists, one of whom also is an experienced attorney. It provides a detailed yet intelligible discussion of what AI is and how it works, a history of its development, and a description of the wide variety of functions that it is designed to accomplish, stressing that AI applications are ubiquitous, both in the private and public sectors. Applications today include: health care, education, employment-related decision-making, finance, law enforcement, and the legal profession. The article underscores the importance of determining the *validity* of an AI application (*i.e.*, how accurately the AI measures, classifies, or predicts what it is designed to), as well as its *reliability* (*i.e.*, the consistency with which the AI produces accurate results when applied to the same or substantially similar circumstances), in deciding whether it should be admitted into evidence in civil and criminal cases. The article further discusses factors that can affect the validity and reliability of AI evidence, including bias of various types, "function creep," lack of transparency and explainability, and the sufficiency of the objective testing of AI applications before they are released for public use. The article next provides an in-depth discussion of the evidentiary principles that govern whether AI evidence should be admitted in court cases, a topic which, at present, is not the subject of comprehensive analysis in decisional law. The focus of this discussion is on providing a step-by-step analysis of the most important issues, and the factors that affect decisions on whether to admit AI evidence. Finally, the article concludes with a discussion of practical suggestions intended to assist lawyers and judges as they are called upon to introduce, object to, or decide on whether to admit AI evidence.

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[1] Hon. Paul W. Grimm is a United States District Judge for the District of Maryland, and an adjunct professor at both the University of Maryland Carey School of Law and the University of Baltimore School of Law. Maura R. Grossman, J.D., Ph.D., is a Research Professor, and Gordon V. Cormack, Ph.D., is a Professor, in the David R. Cheriton School of Computer Science at the University of Waterloo. Professor Grossman is also an affiliate faculty member at the Vector Institute for Artificial Intelligence. Her work is funded, in part, by the National Sciences and Engineering Council of Canada ("NESERC"). The opinions expressed in this article are the authors' own, and do not necessarily reflect the views of the institutions or organizations with which they are affiliated.

INTRODUCTION

We live in an increasingly automated world. We use search engines to find much of the information we need for work and leisure, navigate our way to work using Waze or Google Maps, bank electronically without even the thought of entering an actual bank, instruct voice-activated personal assistants like Alexa or Siri to help us in countless ways, and socialize online without the inconvenience of having to actually be social. Soon, we hear, our cars will be driving themselves, and it is only a matter of time before airplanes will be able to fly themselves from one place to another without the need for human pilots.

Software applications, powered by seemingly omniscient and omnipotent "artificial intelligence" algorithms,[2] are used to diagnose and treat patients,[3] evaluate applicants for employment or promotion,[4] determine who is a good risk for a bank loan or credit card,[5] determine where police departments should deploy officers to most effectively prevent and respond to crime,[6] recognize faces in a photograph or video and match them to a real person,[7] forecast which offenders will recidivate,[8] and even predict an

[2] An algorithm is defined as "a procedure for solving a mathematical problem . . . in a finite number of steps that frequently involves repetition of an operation . . . [and more broadly as] a step-by-step procedure for solving a problem or accomplishing some end." *Algorithm*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/algorithm [https://perma.cc/93SR-MGM7].

[3] *See, e.g.*, Jonathan G. Richens, Clarán M. Lee & Saurabh Johri, *Improving the Accuracy of Medical Diagnosis with Causal Machine Learning*, 11 NATURE COMMUNICATIONS Article No. 3921 (2020), https://www.nature.com/articles/s41467-020-17419-7 [https://perma.cc/VU5Y-PNZQ]; Thomas Davenport & Ravi Kalakota, *The Potential for Artificial Intelligence in Health Care*, 6 FUTURE HEALTH J. 94-98 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6616181 [https://perma.cc/42CM-JFVN].

[4] *See, e.g.*, Kumba Sennaar, *Machine Learning for Recruiting and Hiring – 6 Current Applications*, EMERJ (last updated May 20, 2019), https://emerj.com/ai-sector-overviews/machine-learning-for-recruiting-and-hiring [https://perma.cc/RY7R-WBMH]; Ann Fisher, *An Algorithm May Decide Your Next Pay Raise*, FORTUNE (July 14, 2019), https://fortune.com/2019/07/14/artificial-intelligence-workplace-ibm-annual-review [https://perma.cc/2QSV-DMBF].

[5] *See, e.g.*, Dinesh Bacham & Janet Zhao, Machine Learning: Challenges, Lessons, and Opportunities in Credit Risk Modeling, IX Moody's Analytics Risk Perspectives | Managing Disruption (July 2017), https://www.moodysanalytics.com/risk-perspectives-magazine/managing-disruption/spotlight/machine-learning-challenges-lessons-and-opportunities-in-credit-risk-modeling [https://perma.cc/2537-C7RJ]; Rahul Shukla, *Prediction of Loan Approval with Machine Learning* (Sept. 19, 2020), https://medium.com/@rahulshuklawork/prediction-of-loan-approval-with-machine-learning-539cbd2aad31 [https://perma.cc/ZQ6H-H5MR] (last visited Nov. 15, 2021).

[6] *See, e.g.*, Steven L. Ostrowski, *How Machine Learning Can be a Force Multiplier for Public Safety*, POLICE1 BY LEXIPOL (Apr. 2, 2020), https://www.police1.com/police-products/police-technology/articles/how-machine-learning-can-be-a-force-multiplier-for-public-safety-30AaqNplj9Hq95ap [https://perma.cc/G378-KL3K]; Jonathan Chase et al., *Improving Law Enforcement Daily Deployment Through Machine Learning-Informed Optimization Under Uncertainty*, PROC. OF THE 28TH INT'L JOIN CONF. ON AI (IJCAI-19) 1-7 (2019), https://www.ijcai.org/proceedings/2019/0806.pdf [https://perma.cc/B3UV-FUVL].

[7] *See, e.g.*, Ewan, *What is Image Recognition?*, DEEPOMATIC (January 8, 2019), https://deepomatic.com/what-is-image-recognition [https://perma.cc/U68V-SDCD]; James Vincent, *FBI Used Facial Recognition to Identify Capitol Rioter From His Girlfriend's Instagram Posts*, THE VERGE (Apr. 21, 2021), https://www.theverge.com/2021/4/21/22395323/fbi-facial-recognition-us-capital-riots-tracked-down-suspect [https://perma.cc/R58L-5L3N].

[8] *See, e.g.*, Mirilla Zhu, *An Algorithmic Jury: Using Artificial Intelligence to Predict Recidivism Rates*, YALE SCIENTIFIC (May 15, 2020), https://www.yalescientific.org/2020/05/an-algorithmic-jury-using-artificial-intelligence-to-predict-recidivism-rates/ [https://perma.cc/CGA4-MZ9Q]; Mehdi Ghasemi et al., *The Application of Machine Learning to a General Risk-Need Assessment Instrument in the Prediction of Criminal Recidivism*, 48 CRIM. JUSTICE & BEHAVIOR 518–38 (Apr. 2020), https://journals.sagepub.com/doi/full/10.1177/0093854820969753 [https://perma.cc/ZYX9-VWTG];

attorney's chance of winning a lawsuit by analyzing data gathered about the presiding judge and opposing counsel.[9]

References to Artificial Intelligence are now so ubiquitous that we no longer need to use more than the abbreviation "AI" to understand what is meant. But there is something inscrutable about AI. We understand it to involve software programs powered by complicated mathematical rules called "algorithms," but most of us have never met anyone who has ever created a computer algorithm, or who can tell us how they actually work. We hear references to "machine learning," by which we understand that software applications are either entirely self-taught or trained—initially by humans—but eventually are able to teach themselves, and perform tasks far more complex than humans can, in but a fraction of the time.

However mysterious this may be to most of us, AI algorithms are no longer the stuff of science fiction or the imagination of high-tech brainiacs. They are being used right now, in countless software applications, and in increasingly expansive ways, in our personal undertakings, and by businesses and governments. For many AI applications, however, very little is known about the data they are fed, how they are developed and trained, or whether they produce consistently accurate results. And despite the generic phrase "artificial intelligence," this technology is hardly monolithic; there are many variants. Some AI applications are "trained" using supervised machine learning; others are self-taught through unsupervised machine learning, and there are still others that use reinforcement learning.[10] Some can be differentiated by what they are programmed to do, such as classifying or ranking data by its value or relationship to other data, versus others, which do regression analysis, by attaching specific values or weight to data in a large data set.

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[9] *See, e.g.*, LEX MACHINA.COM, https://lexmachina.com [https://perma.cc/F43A-LJDM](AI tool to "[p]redict the behavior of courts, judges, lawyers, and parties with Legal Analytics"); Masha Medvedeva, Michael Vol & Martijn Wieling, *Using Machine Learning to Predict Decisions of the European Court of Human Rights*, 8 AI AND LAW 237–266 (2020), https://link.springer.com/article/10.1007/s10506-019-09255-y [https://perma.cc/YS87-JBLJ].

[10] In reinforcement learning, an AI system "learns to achieve a goal in an uncertain and potentially complex environment. The AI faces a game-like situation. [It] employs trial and error [methods] to come up with a solution to the problem. To get the machine to do what the programmer wants, the [AI system] gets either rewards or penalties for the actions it performs. Its goal is to maximize the total reward [and to minimize the total penalties]. Although the designer sets the reward policy—[in other words, devises] the rules of the game—[the designer] gives the model no hints or suggestions about how to solve the game. It's up to the model to figure out how to perform the task to maximize the reward, starting from totally random trials" and learn as it goes. *See* Błażej Osiński & Konrad Budek, *What Is Reinforcement Learning? The Complete Guide*, DEEPSENSE.AI (July 5, 2018), https://deepsense.ai/what-is-reinforcement-learning-the-complete-guide [https://perma.cc/3USA-7ZGV].

And if AI applications now dominate our lives, it is unavoidable that the evidence that will be needed to resolve civil litigation and criminal trials will include facts that are generated by this enigmatic technology. Whether they want to or not, lawyers seeking to introduce or object to AI evidence, and judges who must rule on its admissibility, need to have a working knowledge of what AI is and how it works, what it does accurately and reliably, and what it does not. Yet, there are few, if any, published court opinions that consider the issues regarding AI admissibility in any depth. And while there are many articles that raise concerns about privacy, bias in data or algorithms, lack of transparency, and the absence of accepted governance standards[11] with regard to AI evidence, there is a need for a practical (*i.e.*, not overly technical or esoteric) overview of both the technical and evidentiary issues implicated by AI evidence that is understandable to lay persons, lawyers, and judges alike, describing (i) what AI is, (ii) the factors that should be considered in evaluating its validity and reliability, and (iii) setting forth a systematic framework for addressing the evidentiary issues that must be considered when AI evidence is used in court. We have written this article from the perspective of two computer scientists (one of whom also is an experienced lawyer) and a trial judge. It is our hope that it will serve as a useful primer and prove helpful to lawyers and judges who must tackle the challenges associated with admissibility of AI evidence.

We begin by discussing what AI is and provide an overview of its origins. We discuss the different types of AI applications and the different functions they are designed to accomplish. Next, we illustrate the various ways in which AI technology is already in use today and some of the concerns about how it is deployed, including the frequent lack of transparency in how it was developed and tested. We explain how concerns about how programmatic bias and inaccurate assumptions may undermine or

[11] *See generally* Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553 (2019); Patrick W. Nutter, Comment, *Machine Learning Evidence: Admissibility and Weight*, 21 U. PA J. CONST. L. 919 (2019); Jeff Ward, *10 Things Judges Should Know About AI*, 103 JUDICATURE 12 (Spring 2019); Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972 (2017); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653 (2017); Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871 (2016); Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87 (2014); Pamela S. Katz, *Expert Robot: Using Artificial Intelligence to Assist Judges in Admitting Scientific Expert Testimony*, 24 ALB. L.J. SCI. & TECH. 1 (2014); John Nawara, *Machine Learning: Face Recognition Technology Evidence in Criminal Trials*, 49 U. LOUISVILLE L. REV. 601 (2011). It should be noted that one of the authors of this article (Judge Grimm) previewed some of the ideas and discussion found in this paper in two pieces published in early 2021: The Sedona Conference, *Commentary on ESI Evidence & Admissibility, Second Ed.*, 22 SEDONA CONF. J. 83, 183–90 & n.237 (2021), and Paul W. Grimm, *Practical Considerations for the Admissibility of Artificial Intelligence Evidenc*e, 2 MD. B.J. 39 (2021). Both pieces reference this article, which was already in draft form, as the original source for the ideas and discussion herein.

taint the appropriateness of its use. In the process, we stress the importance of two related concepts: *validity* (or accuracy in performance of the functions the technology was programmed to undertake), and *reliability* (the consistency with which the technology produces similar results when used in similar circumstances). Next, we discuss the evidentiary rules that must be considered in assessing the admissibility of AI evidence in court proceedings, and, finally, we conclude with some practical suggestions for lawyers and judges.

I. WHAT IS "ARTIFICIAL INTELLIGENCE"?

Artificial Intelligence is the hypothetical ability of a computer to match or exceed a human's performance in tasks requiring cognitive abilities, such as perception, language understanding and synthesis, reasoning, creativity, and emotion.[12] For some specific tasks, such as playing games like chess, Jeopardy, or Go, purpose-built computer systems have achieved performance rivaling or bettering the world's best experts, [13] while free or consumer-priced commodity chess-playing systems are at least as good as the average player.[14] For other tasks, such as voice or facial recognition and language translation, commonly deployed systems today are arguably as good as most people, and possibly better.[15] Complex tasks, such as driving an automobile or flying an airplane, can now—or will in the near future—be accomplished as well by computers as by licensed drivers or pilots.[16]

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[12] *See* A.M. Turing, *I.—Computing Machinery and Intelligence*, 59 MIND 433, 460 (1950); John McCarthy et al., *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, August 31, 1955, reprinted in 27 AI MAG. 12 (2006).

[13] *See Deep Blue versus Gary Kasparov*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Deep_Blue_versus_Garry_Kasparov&oldid=990729889 [https://perma.cc/CA39-K92E]; Jo Best, *IBM Watson: The Inside Story of How the Jeopardy-Winning Supercomputer Was Born, and What It Wants to Do Next*, TECHREPUBLIC (Sept. 9, 2013), https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next [https://perma.cc/YQC6-FZSC]; *AlphaGo*, DEEPMIND, https://deepmind.com/research/case-studies/alphago-the-story-so-far [https://perma.cc/DER7-NC5L].

[14] *See, e.g.*, *Top 6 Best Chess Engines in the World in 2021*, ICHESS.NET (June 3, 2021), https://www.ichess.net/blog/best-chess-engines [https://perma.cc/BLG2-LZQU].

[15] *See* Norberto Andrade, *Computers Are Getting Better Than Humans at Facial Recognition*, THE ATLANTIC (June 9, 2014), https://www.theatlantic.com/technology/archive/2014/06/bad-news-computers-are-getting-better-than-we-are-at-facial-recognition/372377 [https://perma.cc/88L7-GAJH]; Vanessa Bates Ramirez, *A Computer Can Now Translate Languages as Well as a Human*, SINGULARITYHUB (Oct. 4, 2016), https://singularityhub.com/2016/10/04/a-computer-can-now-translate-languages-as-well-as-a-human [https://perma.cc/L2U3-356Z].

[16] *See, e.g.*, Chris Isidore, *Self-Driving Cars Are Already Really Safe*, CNN BUS. (Mar. 21, 2018, 12:07 PM ET), https://money.cnn.com/2018/03/21/technology/self-driving-car-safety/index.html [https://perma.cc/ZA7W-E72U]; Eric R. Teoh & David G. Kidd, *Rage Against the Machine? Google's Self-Driving Cars Versus Human Drivers*, 63 J. SAFETY RSCH. 57, 59 (2017); Aaron Pressman, *An F-16*

Computers can generate original music that is pleasant to the ear,[17] as well as artificial or altered images, videos, social media personas, and even news articles that humans have difficulty distinguishing from ones that are real.[18] Computers can also predict the near future; in many instances better than humans.[19] What computers cannot *yet* do is autonomously mine the energy and resources they need to feed themselves and to reproduce.[20]

The term "artificial intelligence" or "AI" refers to an aspirational goal (or the dystopian outcome) of exploring the limits of computation. The examples above of what computers can now do are generally referred to as "narrow" or "weak" AI, because they use purpose-built hardware and/or software systems that seek to emulate (or better) human performance at a single, well-defined task.[21] "General" or "strong" AI refers to a computer's ability to rival or exceed human performance at a full complement of cognitive tasks, including but not limited to, the ability to sustain itself (*i.e.*, the task of *go forth and multiply*).[22] At the time of this writing, the domain of

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Pilot Took on A.I. in a Dogfight. Here's Who Won, FORTUNE (Aug. 20, 2020, 4:40 PM CDT), https://fortune.com/2020/08/20/f-16-fighter-pilot-versus-artificial-intelligence-simulation-darpa [https://perma.cc/LK6N-WLXD]; Arash Heydarian Pashakhanlou, *AI, Autonomy, and Airpower: The End of Pilots?*, 19 DEF. STUD. 337 (Oct. 12, 2019).

[17] Listen to some of the musical creations of AIVA at https://www.aiva.ai/creations [https://perma.cc/Y7FB-Y9VC].

[18] *See, e.g.*, Sophie J. Nightingale et al., *Can People Identify Original and Manipulated Photos of Real-World Scenes?*, 2 COGNITIVE RSCH. 30 (2017); Oscar Schwartz, *You Thought Fake News Was Bad? Deep Fakes Are Where Truth Goes to Die*, GUARDIAN (Nov. 12, 2018, 05.00 EST), https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth [https://perma.cc/9KZY-EQY3]; Camila Domonoske, *Students Have 'Dismaying' Inability to Tell Fake News from Real, Study Finds*, NPR (Nov. 23, 2016, 2:44 PM ET), https://www.npr.org/sections/thetwo-way/2016/11/23/503129818/study-finds-students-have-dismaying-inability-to-tell-fake-news-from-real [https://perma.cc/GG5J-HEMN].

[19] *See* Berkeley J. Dietvorst et al., *Algorithm Aversion: People Erroneously Avoid Algorithms After Seeing Them Err*, 144 J. EXPER. PSYCH. 114 (2015), at 1 ("Research comparing the effectiveness of algorithmic and human forecasts shows that algorithms consistently outperform humans. In his book *Clinical Versus Statistical Prediction: A Theoretical Analysis and Review of the Evidence*, Paul Meehl (1954) reviewed results from 20 forecasting studies across diverse domains, including academic performance and parole violations, and showed that algorithms outperformed their human counterparts"; citing additional studies and meta-analyses and concluding that "across the vast majority of forecasting tasks, algorithmic forecasts are more accurate than human forecasts").

[20] *See* Kenneth Chang, *Can Robots Rule the World? Not Yet*, N.Y. TIMES (Sept. 12, 2000), https://www.nytimes.com/2000/09/12/science/can-robots-rule-the-world-not-yet.html [https://perma.cc/N6MP-S6XT]. *But see* Big Think, *AI Can Now Self-Reproduce—Should Humans Be Worried? | Eric Weinstein*, YOUTUBE (May 22, 2017), https://www.youtube.com/watch?v=Wu8s0tp9yzY [https://perma.cc/G6FY-KRHY].

[21] *See* Jake Frankenfield, *Weak AI*, INVESTOPEDIA (Feb. 25, 2021), https://www.investopedia.com/terms/w/weak-ai.asp [https://perma.cc/87LF-3RVD].

[22] *See Strong AI*, IBM Cloud Education (Aug. 31, 2020), https://www.ibm.com/cloud/learn/strong-ai [https://perma.cc/ZNQ4-RUTM]. Some futurists recognize a category of AI that exceeds strong AI, referred to as "artificial superintelligence" or "super AI," which "surpasses human intelligence and ability

tasks to which computers have been successfully applied—weak AI—along with their effectiveness at those tasks, has grown and continues to grow apace. Whether or when strong AI will be achieved in the future, and its possible consequences, is the subject of vigorous debate among experts,[23] a subject which is beyond the scope of this paper. Here, we are concerned with how the law should analyze and treat (i) the use of computers to perform or to assist in specific tasks that were heretofore the purview of human intellect, and (ii) the evidence derived from those computer systems.

As a term of art in computer science, "artificial intelligence" is an umbrella term for a number of research topics and underlying technologies aimed at furthering the application of computers to intellectual tasks, as well as the tasks themselves. It is not a single technology or function. "Rule-bases," "language models," and "machine learning" are common underlying technologies, while "chess playing," "question answering," and "automobile driving" are common applications. Various related applications are often considered together as fields of study, such as game playing, natural language processing ("NLP"),[24] computer vision,[25] information retrieval ("IR"), and robotics.

In common parlance, "artificial intelligence" is often little more than a synonym for either the latest, greatest technology, the technology of science fiction, or simply, a reference to a computer system that can somehow learn.

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in all respects. . . . It's the best at everything – maths, science, medicine, hobbies, you name it. Even the brightest minds cannot come close to [its] abilities. . . ." *Types of AI: Distinguishing Weak, Strong, and Super AI*, THINKAUTOMATION, https://www.thinkautomation.com/bots-and-ai/types-of-ai-distinguishing-between-weak-strong-and-super-ai [https://perma.cc/S9TM-BZ8C]. At least for now, this type of AI remains in the realm of science fiction. *Id.* Nonetheless, for a dystopian view on what may be coming our way in the future, *see* Maureen Dowd, *A.I. Is Not A-OK*, NEW YORK TIMES (Oct. 30, 2021), https://www.nytimes.com/2021/10/30/opinion/eric-schmidt-ai.html [https://perma.cc/574T-74SQ].

[23] *See, e.g.*, Ragnar Fjelland, *Why General Artificial Intelligence Will Not Be Realized*, 7 HUMAN. & SOC. SCI. COMM. 10 (2020). *But see* VINCENT C. MÜLLER & NICK BOSTROM, *Future Progress in Artificial Intelligence: A Survey of Expert Opinion*, *in* FUNDAMENTAL ISSUES OF ARTIFICIAL INTELLIGENCE (Vincent C. Müller ed., Springer 2014). For an early take on this subject, *see* IRVING JOHN GOOD, *Speculations Concerning the First Ultraintelligent Machine*, in* 6 ADVANCES IN COMPUTER 31, 31–33 (1966).

[24] *See* Michael J. Garbade, *A Simple Introduction to Natural Language Processing*, BECOMING HUMAN: A.I. MAG. (Oct. 15, 2018), https://becominghuman.ai/a-simple-introduction-to-natural-language-processing-ea66a1747b32 [https://perma.cc/45GN-S9KB] ("Natural Language Processing, usually shortened as NLP, is a branch of [AI] that deals with the interaction between computers and humans using the natural language. The ultimate objective of NLP is to read, decipher, understand, and make sense of the human language. . . ."); *see also Natural Language Processing*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Natural_language_processing&oldid=1001740510 [https://perma.cc/ 8GJ6-WDEU].

[25] *See Computer Vision*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Computer_vision&oldid=1000754216 [https://perma.cc/VZH4-N2JN] ("Computer vision is an interdisciplinary scientific field that deals with how computers can gain high-level understanding from digital images or videos.").

Arguably, once an application of technology becomes well established, it becomes engineering,[26] rather than AI. For example, spam filters and computerized systems that can compare two documents and identify their differences were both once considered AI, but today are simply referred to as "software." This has led some commentators to conclude that AI is "whatever computers cannot do . . . until they can."[27] Thus, part of the challenge in defining AI is that its goal posts are constantly changing.

For our purpose, it is useful to outline the common technologies and tasks of AI, but not to be overly concerned with whether any particular technology—or any particular combination of technologies—constitutes AI, or merely reflects the products of engineering.

II. WHY AI HAS COME TO THE FOREFRONT TODAY

Although the term "artificial intelligence" appears to have been coined in 1956 by the organizers of the Dartmouth Summer Research Project on Artificial Intelligence,[28] the idea coincides with the invention of the modern computer. In 1948, Alan Turing, who had previously described mathematical problems that no computer could solve, wrote the manuscript "Intelligent Machinery,"[29] outlining the prospect that digital computers could "show intelligent behavior." In 1950, Turing proposed "The Imitation Game,"[30] now commonly known as the "Turing Test," to illustrate the question: "Can machines think?" The Imitation Game was somewhat more complicated than it is commonly paraphrased today. It involved three players: a woman ("A"), a man or a computer disguising itself as a woman ("B"), and a human interrogator of either sex ("C"), who could ask written questions and receive written answers from A and B, anonymized as X and Y. The interrogator would then guess which of X or Y was A, and which was B. If the computer

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[26] Engineering is defined as "the application of science and mathematics by which the properties of matter and the sources of energy in nature are made useful to people [such as through] the design and manufacture of complex products." *Engineering*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/engineering [https://perma.cc/V3FR-Q4ZT].

[27] Kathryn Hume, *Five Distractions in Thinking About AI*, QUAM PROXIME | AS NEAR AS MAY BE (Mar. 25, 2017), https://quamproxime.com/2017/03/25/five-distractions-in-thinking-about-ai [https://perma.cc/7Y2Q-TF6N]. *Cf. Artificial Intelligence is What We Can Do That Computers Can't . . . Yet*, SELFAWAREPATTERNS.COM (Feb. 27, 2014), https://selfawarepatterns.com/2014/02/27/artificial-intelligence-is-what-we-can-do-that-computers-cant-yet [https://perma.cc/7GA8-KHY2].

[28] *See* McCarthy et al., *supra* note 12.

[29] A.M. TURING, INTELLIGENT MACHINERY, NAT'L PHYSICAL LAB. (1948), *reprinted in* THE ESSENTIAL TURING: SEMINAL WRITINGS IN COMPUTING, LOGIC, PHILOSOPHY, ARTIFICIAL INTELLIGENCE, AND ARTIFICIAL LIFE: PLUS THE SECRETS OF ENIGMA 395–432 (B. Jack Copeland ed., 2004).

[30] Turing, *supra* note 12.

could fool the interrogator as often as the man, it could be said to display intelligent behavior.

Arguably, state-of-the-art technology today could be mustered to pass this test of weak AI, which would illustrate not only the computer's ability to emulate one human, but also to fool another. To be reasonably convincing, however, the test would need to be conducted according to a valid scientific protocol; most likely a randomized, controlled, double-blind trial.

In 1951, Claude Shannon, who had shared ideas with Turing since 1943, demonstrated a robotic mouse named Theseus that could find its way out of a maze, learning the layout of the maze in the process.[31] Theseus could remember the maze and find its way out a second time without making a wrong turn, but could also adapt its understanding if it discovered the maze had been changed. Theseus' logic was implemented by a large computer built from switching circuits, which communicated with the mouse using magnetic and electrical signals. Theseus illustrates many aspects of modern AI systems: perception, memory, problem solving, and active interaction with its environment.

Turing died tragically in 1954; Shannon, in collaboration with Marvin Minsky, John McCarthy, and Nathaniel Rochester organized the Dartmouth Project in 1956.[32] The Project identified several aspects of the "artificial intelligence problem," including the speed and memory capacities of computers, efficient and effective algorithms, programming a computer to use language, employing neural nets to represent concepts, abstraction from raw data, and harnessing randomness and creativity.[33]

The research community has made steady progress on these foundational technologies, as well as their application to particular narrow AI tasks. Arguably, we are just beginning to round the "Peak of Inflated Expectations,"[34] but this should not obscure the explosive progress that has

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[31] *See* Robert G. Gallager, *Claude E. Shannon: A Retrospective on His Life, Work, and Impact*, 47 IEEE TRANSAC. ON INFO. THEORY 2681 (2001); *see also* Nokia Bell Labs Archives and the AT&T Archives and History Center, *Where Did Digital Communication Begin? Curated Highlights of "Theseus," Circa 1950s*, YOUTUBE (June 10, 2015), https://www.youtube.com/watch?v=nS0luYZd4fs [https://perma.cc/M47U-S6E7].

[32] *See* McCarthy et al., *supra* note 12.

[33] *See id.*

[34] The "Peak of Inflated Expectations" is the phase of the Gartner technology hype lifecycle where "[e]arly publicity produces a number of success stories—often accompanied by scores of failures. Some companies take action; many do not." *Gartner Hype Cycle*, GARTNER, https://www.gartner.com/en/research/methodologies/gartner-hype-cycle [https://perma.cc/Z2EA-JKTF]. *See also* Laurence Goasduff, *2 Megatrends Dominate the Gartner Hype Cycle for Artificial Intelligence, 2020* (Sept. 28, 2020), https://www.gartner.com/smarterwithgartner/2-megatrends-dominate-the-gartner-hype-cycle-for-artificial-intelligence-2020 [https://perma.cc/6RE8-QCB5] ("If AI as a general concept was positioned on this year's Gartner Hype Cycle, it would be rolling off the Peak of Inflated

been made and will continue to be made in this century, notwithstanding and throughout the ensuing "Trough of Disillusionment."[35]

Progress in AI can, in large part, be attributed to advances in the ability to gather and store vast amounts of raw data.[36] Where computers of Turing's and Shannon's day were severely limited by their memory capacity, today's computer systems are limited, not so much by their ability to gather or store data, but by their ability to make sense of it.[37] The transition from scarcity to glut has occasioned the use of machine-learning algorithms—both old and new—to achieve remarkable progress in many AI tasks.

The speed of computer processors has increased dramatically to the point that a typical processor at the turn of the century was about a million times faster than the processors available at the time of the Dartmouth Project.[38] Since that time, the speed of individual processors has plateaued due to the limitations of physics, and increased computational power has come by placing several processors ("cores") into a common device, or by connecting many discrete computer systems together in a communication network to form a cluster. Graphics processing units ("GPUs")[39] contain hundreds or thousands of cores; the clusters maintained by cloud service providers contain thousands of interconnected discrete computer systems. To harness the computing power afforded by multiple processors, algorithms

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Expectations," meaning that "AI is starting to deliver on its potential and its benefits for businesses are becoming a reality.").

[35] The "Trough of Disillusionment" is the phase of the Gartner technology hype lifecycle where "[i]nterest wanes as [technological] experiments and implementations fail to deliver. Producers of the technology shake out or fail. Investments continue only if the surviving providers improve their products to the satisfaction of early adopters." *Gartner Hype Cycle*, GARTNER, https://www.gartner.com/en/research/methodologies/gartner-hype-cycle [https://perma.cc/Z2EA-JKTF].

[36] For example, the average consumer today carries more computing power in their pocket than that which landed a satellite on the moon. *See* Tibi Puiu, *Your Smartphone Is Millions of Times More Powerful than the Apollo 11 Guidance Computers*, ZME SCI. (May 13, 2021).

[37] *See* F.J. BURKOWSKI ET AL., A GLOBAL SEARCH ARCHITECTURE, Technical Report CS-95-12 (Dep't of Computer Sci., Univ. Waterloo, Mar. 15, 1995), https://cs.uwaterloo.ca/research/tr/1995/12/mt.pdf [https://perma.cc/EC7P-8VVJ].

[38] *See* Jonathan G. Koomey et al., *Implications of Historical Trends in the Electrical Efficiency of Computing*, 33 IEEE ANNALS OF THE HISTORY OF COMPUTING 46 (2011).

[39] A graphics processing unit ("GPU") is a "specialized, [programmable,] electronic circuit designed to rapidly . . . accelerate the creation [and rendering] of images" on a computer screen or other display device. "GPUs are used in embedded systems, mobile phones, personal computers, workstations, and game consoles. Modern GPUs are very efficient at manipulating computer graphics and image processing. Their highly parallel structure makes them more efficient than general-purpose central processing units (CPUs) for algorithms that process large blocks of data in parallel," as used for example, in the smoot decoding and rendering of 3D animations and video. The more sophisticated the GPU, the higher the resolution and the faster and smoother the motion. *See Graphics Processing Unit*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Graphics_processing_unit&oldid=1000546516 [https://perma.cc/KSE2-H4P7]; *GPU*, PCMAG ENCYCLOPEDIA, https://www.pcmag.com/encyclopedia/term/gpu [https://perma.cc/CQ8D-YHAC].

must split the problem up into pieces, each of which is solved by a separate processor. Specialized software tools like Google's TensorFlow[40] facilitate the implementation of machine-learning algorithms on GPUs, while tools like Apache Hadoop®[41] and Apache Spark™[42] facilitate the use of clusters.

The ready availability of commodity computers, Internet access, and open-source software has spawned a plethora of high-quality tools like TensorFlow, Hadoop, and Spark, as well as the Linux® operating system,[43] the Android mobile operating system,[44] and implementations of state-of-the-art learning algorithms like logistic regression, support vector machines ("SVM"), random forests, and artificial neural networks ("ANN"). Commercial enterprises like Google, Amazon, Microsoft, Oracle, Yandex, Baidu, and Huawei, as well as professionals, hobbyists, and hackers throughout the world are members of the open-source ecosystem, using and contributing to a global body of software, often stored in freely accessible repositories like Github.[45] This low barrier to entry allows almost anyone to build AI. Much, if not most commercial software relies, at least in part, on open-source software, even if it is not itself open-source.

Crowd-sourcing platforms, gamification, and instrumentation of search engines, application software, and "smart" appliances provide vast amounts of raw data for use as input to machine-learning systems. Perhaps the largest source is the Web itself, and other data sources, private and public, available through the Internet. Yet access to some data—including medical data, certain personal information (*e.g.*, bank records[46]), and government

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[40] *See An End-To-End Open Source Machine Learning Platform*, TENSORFLOW, https://www.tensorflow.org [https://perma.cc/72ST-ZZRQ]; s*ee also* Martín Abadi, *TensorFlow: Learning Functions at Scale*, 51 PROC. OF THE 21ST ACM SIGPLAN INT'L CONF. ON FUNCTIONAL PROGRAMMING 1 (2016).

[41] *See* APACHE HADOOP, https://hadoop.apache.org [https://perma.cc/TU3S-AVM9]; s*ee also* Konstantin Shvachko et al., *The Hadoop Distributed File System*, 2010 IEEE SYMP. ON MASS STORAGE SYST. & TECH. 1 (2010), https://storageconference.us/2010/Papers/MSST/Shvachko.pdf [https://perma.cc/HG8F-GT65].

[42] *See Unified Engine for Large-Scale Data Analytics: What is Apache Spark™?*, APACHE HADOOP, https://spark.apache.org [https://perma.cc/AY24-E5P5]; *see also* MATEI ZAHARIA ET AL., SPARK: CLUSTER COMPUTING WITH WORKING SETS 1 (EECS Dep't, Univ. of Cal., Berkeley 2010), https://www.usenix.org/legacy/event/hotcloud10/tech/full_papers/Zaharia.pdf [https://perma.cc/NC7E-F92J].

[43] *Understanding Linux*, REDHAT (March 19, 2018), https://www.redhat.com/en/topics/linux [https://perma.cc/5QWU-BYBA].

[44] *See Introducing Android 11.*, ANDROID, https://www.android.com/intl/en_ca [https://perma.cc/TU9Y-QZPE]; *see also Android (Operating System)*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Android_(operating_system)&oldid=1001663336 [https://perma.cc/TDF3-LX45].

[45] *See* GITHUB, https://github.com [https://perma.cc/UZ69-C9CS].

[46] "Financial privacy laws regulate the manner in which financial institutions handle the nonpublic financial information of consumers. In the United States, financial privacy is regulated through laws

records—remains heavily restricted, especially to impartial observers. Corporations that collect data, particularly in the United States, are subject to less onerous restrictions than university researchers subject to ethics oversight; hackers who acquire or deduce unauthorized data are essentially unconstrained in their use of it for nefarious purposes.

Organized evaluation efforts with multiple participants have been instrumental in advancing the state of the art in AI. The National Institute of Technology's (NIST's) Text REtrieval Conference (TREC),[47] for example, poses annual information-retrieval tasks which are undertaken by academic and non-academic teams throughout the world. At TREC's inception in 1992, the challenge was to find relevant information in a corpus of one-half million documents, which was distributed on two compact discs.[48] At that time—the dawn of information abundance—that was the largest controlled evaluation of information-retrieval systems ever undertaken, by more than an order of magnitude.[49] 1992 also saw explosive growth of the World Wide Web, originally conceived in 1989,[50] followed a few years later by the first

enacted at the federal and state level. Federal regulations [include] the Bank Secrecy Act, Right to Financial Privacy Act, the Gramm-Leach-Bliley Act, and the Fair Credit Reporting Act. Provisions within other laws like the Credit and Debit Card Receipt Clarification Act of 2007, as well as the Electronic Funds Transfer Act also contribute to financial privacy in the United States. State regulations vary from state to state. While each state approaches financial privacy differently, they mostly draw from federal laws and provide more stringent outlines and definitions. Government agencies like the Consumer Financial Protection Bureau and the Federal Trade Commission provide enforcement for financial privacy regulations." *Financial Privacy Laws in the United States*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Financial_privacy_laws_in_the_United_States&oldid=994468039 [https://perma.cc/9JMD-UKPD].

[47] NIST was founded in 1901 and is a part of the United States Department of Commerce. Its website describes it as "one of the nation's oldest physical science laboratories. Congress established the agency to remove a major challenge to U.S. industrial competitiveness at the time—a second-rate measurement infrastructure that lagged behind the capabilities of the United Kingdom, Germany, and other economic rivals." *About NIST*, NIST, https://www.nist.gov/about-nist [https://perma.cc/3RU7-ASNX]. "The Text REtrieval Conference (TREC), co-sponsored by [NIST] and [the] U.S. Department of Defense, was started in 1992 as part of the TIPSTER Text program. Its purpose was to support research within the information retrieval community by providing the infrastructure necessary for large-scale evaluation of text retrieval methodologies." *Overview*, TREC, https://trec.nist.gov/overview.html [https://perma.cc/2Y9P-GQWL].

[48] *See* Donna Harman, *Overview of the First Text REtrieval Conference (TREC-1)*, NIST SPECIAL PUB. 500-207 1 (1993), https://trec.nist.gov/pubs/trec1/papers/01.txt [https://perma.cc/G4LS-YTJL]; Donna K. Harman, *Overview of the First TREC Conference*, PROC. OF THE 16TH ANN. INT'L ACM SIGIR CONF. ON RSCH. AND DEV. IN IR 36–47 (1993), https://dl.acm.org/doi/10.1145/160688.160692 [https://perma.cc/MC2Z-K4PQ].

[49] *See* Donna K. Harman, *The TREC Test Collections*, in TREC: EXPERIMENT and EVALUATION IN INFORMATION RETRIEVAL 21–52 (Ellen M. Voorhees and Donna K. Harman eds., MIT Press 2005).

[50] *A Short History of the Web*, CERN, https://home.cern/science/computing/birth-web/short-history-web [https://perma.cc/2P93-KKE6].

Web search engines, arguably influenced by TREC.[51] By 2009, TREC used a corpus of 500 million documents.[52] Meanwhile, Google eclipsed this total, announcing in 2008 that it could search 1,000 billion (*i.e.*, one trillion) documents.[53]

The annual TREC challenges continue to this day, focused on more sophisticated tasks rather than sheer volume. Notable tracks have included "Question Answering," which arguably spawned IBM's Watson;[54] "Legal,"[55] which demonstrated the efficacy of technology-assisted review ("TAR")[56] in electronic discovery; and "Total Recall,"[57] which demonstrated the efficacy of Continuous Active Learning® ("CAL®")[58] on sensitive clinical and

[51] *See The History of Search Engines*, WORDSTREAM, https://www.wordstream.com/articles/internet-search-engines-history [https://perma.cc/L8ZT-8ZC3]; *see generally* BRENT R. ROWE ET AL., ECONOMIC IMPACT ASSESSMENT OF NIST'S TEXT RETRIEVAL CONFERENCE (TREC) PROGRAM: FINAL REPORT, RTI PROJ. NO. 0211875 (2010), https://trec.nist.gov/pubs/2010.economic.impact.pdf [https://perma.cc/X8K6-RAXL].

[52] *See The ClueWeb09 Dataset*, THE LEMUR PROJECT, https://lemurproject.org/clueweb09 [https://perma.cc/8GYS-JB8F].

[53] Jesse Alpert & Nissan Hajaj, *We Knew the Web Was Big . . .* , GOOGLE OFFICIAL BLOG (July 25, 2008), https://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html [https://perma.cc/CBX7-8KS9].

[54] *See Question Answering Track*, NAT. INST. STANDARDS TECH., https://trec.nist.gov/data/qamain.html [https://perma.cc/PGP2-JBJW]; *see also* John Prager, *The TREC Question Answering Track and IBM Watson*, Celebrating 25 Years of TREC, Webcast Part 3 at mins. 24:00 to 50:00, NAT. INST. STANDARDS TECH. (Nov. 18, 2016), https://www.nist.gov/news-events/events/2016/11/webcast-text-retrieval-conference [https://perma.cc/52HE-UZ8Q].

[55] *See About the Legal Track*, TREC LEGAL TRACK, https://trec-legal.umiacs.umd.edu [https://perma.cc/8K44-FGR4].

[56] "Technology-Assisted Review (TAR) [is a] process for Prioritizing or Coding a Collection of Documents using a computerized system that harnesses human judgments of one or more Subject Matter Expert(s) on a smaller set of Documents and then extrapolates those judgments to the remaining Document Collection. Some TAR methods use Machine Learning Algorithms to distinguish Relevant from Non-Relevant Documents, based on Training Examples Coded as Relevant or Non-Relevant by the Subject Matter Experts(s), while other TAR methods derive systematic Rules that emulate the expert(s)' decision-making process. TAR processes generally incorporate Statistical Models and/or Sampling techniques to guide the process and to measure overall system effectiveness." Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 32 (2013).

[57] *See TREC 2016 Total Recall Track*, UNIV. OF WATERLOO (May 23, 2016), https://plg.uwaterloo.ca/~gvcormac/total-recall [https://perma.cc/GK6X-6YBC].

[58] Continuous Active Learning® and CAL® refer to a particular TAR protocol. *See* Maura R. Grossman & Gordon V. Cormack, *Continuous Active Learning for TAR*, PRAC. L.J. (2016). For a more technical discussion of CAL®, *see* Gordon V. Cormack & Maura R. Grossman, *Evaluation of Machine-Learning Protocols for Technology-Assisted Review in Electronic Discovery*, PROC. 37TH INT'L ACM SIGIR CONFR. ON RSCH. & DEV. INFO. RETRIEVAL, 153, 153–62 (2014), https://dl.acm.org/doi/10.1145/2600428.2609601 [https://perma.cc/3MAE-PVD4]. Continuous Active Learning® and CAL® are registered trademarks of Maura R. Grossman and Gordon V. Cormack. *See CONTINUOUS ACTIVE LEARNING – Trademark Details*, JUSTIA TRADEMARKS, https://trademarks.justia.com/866/34/continuous-active-86634255.html [https://perma.cc/N3Z4-4JM9];

government data. The datasets and evaluation tools for the various TREC tracks remain available for the purpose of evaluating new approaches as they are invented.[59]

TREC is but one of many evaluation forums. The Defense Advanced Research Projects Agency ("DARPA") Grand Challenge[60] kick-started progress in the development of autonomous vehicles. In 2004, no participant was able to complete the specified route.[61] By 2005, five teams completed the route, deploying an impressive array of innovative combinations of technology.[62]

The Knowledge Discovery and Data Mining competition ("KDD Cup") is an on-line competition that has run since 1997.[63] Since then, hundreds, if not thousands, of similar competitions have been held in which participants are given a task and submit their results or their software to a server that evaluates their submissions.[64] Netflix offered a $1M prize to participants who could build the best recommender system for movies.[65] Kaggle[66] runs a commercial platform that clients can use to host similar competitions.

The confluence of increased data capacity, processing power, the Internet, low barriers to entry, innovation, and community evaluation have undoubtedly spurred the progress of AI. So, too, has advertising had a significant influence on it. The primary impetus for the providers of search engine or social media platforms is to entice users to click on ads; a secondary goal may be to collect information about them, so as to use that information to entice users, along the way, to click on more ads, or to sell the

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CAL – Trademark Details, JUSTIA TRADEMARKS, https://trademarks.justia.com/866/34/cal-86634265.html [https://perma.cc/TAR8-LTZV].

[59] TREC Research Collections Volumes 1–5 (English-language data) can be found at *Data – English Documents*, NIST, https://trec.nist.gov/data/docs_eng.html [https://perma.cc/AT76-UHS4]. Other collections are available through websites devoted to particular TREC Tracks. S*ee, e.g.*, *Data*, NIST, https://trec.nist.gov/data.html [https://perma.cc/R6DL-C8PZ]; s*ee generally* Harman, *supra* note 49.

[60] *The Grand Challenge*, DEFENSE ADVANCED RESEARCH PROJECTS AGENCY, https://www.darpa.mil/about-us/timeline/-grand-challenge-for-autonomous-vehicles [https://perma.cc/27HB-D2EY].

[61] *Id.*

[62] *See id.*

[63] *KDD Cup Archives*, KDD, https://www.kdd.org/kdd-cup [https://perma.cc/G87N-XWVX].

[64] *See, e.g.*, *Analytics, Data Science, Data Mining Competitions*, KDNUGGETS™, https://www.kdnuggets.com/competitions [https://perma.cc/6X8A-U45C]; Benedict Neo, *11 Data Science Competitions for You to Hone Your Skills for 2020*, TOWARDS DATA SCI. (Dec. 2, 2019), https://towardsdatascience.com/10-data-science-competitions-for-you-to-hone-your-skills-for-2020-32d87ee19cc9 [https://perma.cc/M6CQ-YM56]; Parul Pandey, *Top Competitive Data Science Platforms Other Than Kaggle*, TOWARDS DATA SCI. (Apr. 7, 2019), https://towardsdatascience.com/top-competitive-data-science-platforms-other-than-kaggle-2995e9dad93c [https://perma.cc/82YJ-NN5J].

[65] *Netflix Prize*, NETFLIX, https://www.netflixprize.com [https://perma.cc/2N44-UZW2].

[66] *Competitions*, KAGGLE, https://www.kaggle.com/competitions [https://perma.cc/6RFM-SA7F].

users' information to other enterprises wishing to get such users to purchase their wares, to vote for their candidate, to write a product review, to participate in an opinion poll, or to otherwise influence the users' behavior. Fulfilling the users' explicit needs is an incentive for the service provider only insofar as it furthers their own ends. Even Uber—the ride-sharing service—was developed, in part, to generate data to be used for the autonomous vehicles that the company was developing, as well as for other uses.[67]

III. THE AI TECHNOLOGY LANDSCAPE

Foundational AI technologies may be classified according to a set of abstract problems they are designed to solve, and the methods they employ to solve those problems. One of the most fundamental abstract problems is that of *classification*: determining whether a plant is edible or inedible, whether evidence is relevant or not, whether a potential juror will vote to convict or acquit, and so on. A related problem is one of *ranking*: ordering plants according to their food value, or evidence according to its weight, or jurors according to how likely they are to vote to convict. A third related problem is one of *regression*: rendering a quantitative estimate of a specific value, such as the caloric value of a plant, the probative value of a particular piece of evidence, or the probability that an individual juror will vote to convict. The solutions to all three problems can be used to summarize existing data and/or to predict future outcomes.

The problems of classification, ranking, and regression are commonly addressed by supervised machine-learning algorithms, such as Naïve Bayes, Nearest Neighbor, Perceptron, Random Forests, Logistic Regression, Support Vector Machines ("SVM"), and Artificial Neural Networks ("ANN"), including Convolutional Neural Networks ("CNN") and

[67] *See* Prableen Bajpai, *How Uber Uses Your Ride Data*, INVESTOPEDIA (Sept. 20, 2021), https://www.investopedia.com/articles/investing/030916/how-uber-uses-its-data-bank.asp [https://perma.cc/T3NU-MNWM]; Neil Patel, *How Uber Uses Data to Improve Their Service and Create the New Wave of Mobility*, NEILPATEL BLOG, https://neilpatel.com/blog/how-uber-uses-data [https://perma.cc/DM8H-AU9W]. The Uber example epitomizes the umbrella concept of "data monetization," *i.e.*, "the process of using data to obtain quantifiable economic benefit. Internal or indirect methods include using data to make measurable business performance improvements and inform decisions. External or direct methods include data sharing to gain beneficial terms or conditions from business partners, information bartering, selling data outright (via a data broker or independently), or offering information products and services (for example, including information as a value-added component of an existing offering)." *Data Monetization*, GARTNER, https://www.gartner.com/en/information-technology/glossary/data-monetization [https://perma.cc/6B8H-W4CP]; s*ee also Data Monetization*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Data_monetization&oldid=984813795 [https://perma.cc/K4BJ-GG5D].

Recurrent Neural Networks ("RNN"). The latter three algorithms are often referred to as "Deep Learning."[68]

A supervised machine-learning algorithm is trained to make distinctions in the same way that a child is taught to learn by showing the child examples, along with the correct answer: This is a cat, and that is a dog. Essentially, a supervised machine-learning algorithm infers mathematical functions from old, labeled data to make guesses about new, unlabeled data. So, for example, a classification algorithm might be shown examples of foods and poisons, of relevant and non-relevant evidence, or of jurors who have voted in the past to convict or to acquit. Based on this training, the learning algorithm builds a model, which is used to classify new examples for which it has not been given the correct answer. Many models, rather than yielding a categorical answer, in fact perform regression, estimating the likelihood, the probability, or a confidence score that the new example belongs to a particular category. This score is transformed into a categorical result by setting a threshold and deeming all examples above the threshold to be, for example, edible, and all others to be inedible. The scores can similarly be used for ranking or ordering a list of examples by their scores.

Some AI applications are fairly straightforward instances of the abstract problems of classification, ranking, and regression. A spam filter quarantines or deletes email that it classifies as inappropriate or malevolent. A Web Search engine ranks Web pages according to the likelihood they will satisfy the user's request, yielding a results page containing the 10-best hits, in order, from billions of potential candidates. Regression methods—some of which have been in use since before the invention of modern computers—can be used to estimate the probability of disease given certain risk factors, the maximum safe speed for maneuvering a vehicle over a particular terrain, the value of a particular property, or the grade to assign to an essay. Other AI applications, such as speech recognition, language translation, and autonomous vehicles, must address a complex web of interdependent AI problems.

Active learning and reinforcement learning are supervised machine-learning strategies in which the machine-learning algorithm selects its own training examples from which to best learn. In so doing, the algorithm must balance two objectives: *exploration*, in which it learns as much as it can, and

[68] Aravind Pai, *CNN vs. RNN vs. ANN – Analyzing 3 Types of Neural Networks in Deep Learning*, ANALYTICS VIDHYA (Feb. 17, 2020), https://www.analyticsvidhya.com/blog/2020/02/cnn-vs-rnn-vs-mlp-analyzing-3-types-of-neural-networks-in-deep-learning [https://perma.cc/V3FP-USDX]; *see* Abhishek Gupta, *Difference Between ANN, CNN and RNN*, GEEKSFORGEEKS (July 17, 2020), https://www.geeksforgeeks.org/difference-between-ann-cnn-and-rnn [https://perma.cc/Q78G-MKS2].

exploitation, in which it employs what it has learned thus far to address the problem at hand.[69]

Unsupervised machine-learning algorithms, in contrast, are not given the correct answer for any of their training examples. Instead, they look for patterns, groupings, or anomalies that might be of interest—either to the end user or as fodder for a supervised machine-learning algorithm.[70] The most common abstract problems to which unsupervised learning are applied are clustering and latent feature analysis. Clustering groups together things that the algorithm considers to be similar.[71] For example, given a deck of playing cards, it might consider the red cards to be one cluster, and the black to be another. Or it might consider the face cards to be one cluster, the numbered cards to be a second cluster, and the aces to be a third. Or it might consider spades, hearts, and clubs to be a cluster because their suit icons are curvy, and diamonds to be a separate cluster, because they are not. Clustering can be a useful aid in exploration of new or unknown data sets, either by a human or by a supervised machine-learning algorithm.

Feature analysis decomposes the input for classification, ranking, or regression systems into components ("features") for analysis by a supervised machine-learning algorithm.[72] In many cases, features are identified by a manual process known as feature engineering.[73] The features of a document written in English, for example, may be the words or phrases that it contains.

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[69] *See, e.g.*, THOMAS OSUGI ET AL., BALANCING EXPLORATION AND EXPLOITATION: A NEW ALGORITHM FOR ACTIVE MACHINE LEARNING, (CSE Conference and Workshop Papers 2005), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1141&context=cseconfwork [https://perma.cc/628P-ZM9N].

[70] *See Unsupervised Learning*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Unsupervised_learning&oldid=1001697007 [https://perma.cc/4H8U-3PGV].

[71] *Cluster Analysis*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Cluster_analysis&oldid=1001573349 [https://perma.cc/6UZY-88CQ].

[72] "In machine learning . . . a feature is an individual measurable property or characteristic of a phenomenon being observed. Choosing informative, discriminating and independent features is a crucial step for effective algorithms in pattern recognition, classification and regression." *Feature (Machine Learning)*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Feature_(machine_learning)&oldid=993569874 [https://perma.cc/5TM9-FNAW].

[73] "Feature engineering is the process of using domain knowledge to extract features from raw data via data mining techniques. These features can be used to improve the performance of machine learning algorithms." *Feature Engineering*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Feature_engineering&oldid=996982436 [https://perma.cc/N2L2-GZTM]; *see also* Will Koehrsen, *Feature Engineering: What Powers Machine Learning - How to Extract Features from Raw Data for Machine Learning*, TOWARDS DATA SCI. (Nov. 12, 2018), https://towardsdatascience.com/feature-engineering-what-powers-machine-learning-93ab191bcc2d [https://perma.cc/3WKF-ZTB2].

But many words have similar underlying meanings, and unsupervised methods like latent semantic indexing ("LSI") or latent semantic analysis ("LSA"),[74] probabilistic latent semantic indexing ("PLSI") or probabilistic latent semantic analysis ("PLSA"),[75] and latent Dirichlet analysis ("LDA")[76] identify combinations of words that are used in similar contexts, under the theory that they are likely to represent similar concepts. For example, the terms "bat," "baseball," "pitcher," and "glove," might be grouped together to represent one concept, as might "bat," "Halloween," vampires," and "blood" to represent another. The words in the document are transformed into a list of concept weights, denoting the extent to which each is represented in the document. It is important to note that latent feature analysis does not itself do classification, ranking, or regression, but may be used to create features that are used as input to a supervised machine-learning algorithm that performs those tasks.

Feature engineering for English text is relatively easy because it can be split into words using simple lexical rules. But languages like Chinese, Japanese, and Korean have no lexical cues that split the text into "words." An even more challenging issue arises for images, as well as audio and video

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[74] "Latent semantic analysis (LSA) is a technique in natural language processing . . . of analyzing relationships between a set of documents and the terms they contain by producing a set of concepts related to the documents and terms. . . . In the context of its application to information retrieval, it is sometimes called latent semantic indexing (LSI)." *Latent Semantic Analysis*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Latent_semantic_analysis&oldid=1001352831 [https://perma.cc/K768-GTAQ]. For a more technical discussion of LSI/LSA, see Susan T. Dumais, *Latent Semantic Analysis*, 38 ANN. REV. INFO. SCI. & TECH 188 (2005); Scott Deerwester et al., *Indexing by Latent Semantic Analysis*, 41 J. AM. SOC. INFO. SCI. 391 (1990).

[75] "Probabilistic latent semantic analysis (PLSA), also known as probabilistic latent semantic indexing (PLSI, especially in information retrieval circles) is a statistical technique for the analysis of two-mode and co-occurrence data. In effect, one can derive a low-dimensional representation of the observed variables in terms of their affinity to certain hidden variables, just as in latent semantic analysis, from which PLSA evolved." *Probabilistic Latent Semantic Analysis*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Probabilistic_latent_semantic_analysis&oldid=993310631 [https://perma.cc/6C5G-JD4R]. For a more technical discussion of PLSA/PLSI, see Thomas Hofmann, *Probabilistic Latent Semantic Indexing*, PROC. 22ND ANN. INT'L ACM SIGIR CONF. ON RSCH. & DEV. IN IR, 50–57 (1999), http://cis.csuohio.edu/~sschung/CIS660/PLSIHoffman.pdf [https://perma.cc/A49W-Q6X8].

[76] "In natural language processing, the latent Dirichlet allocation (LDA) is a generative statistical model that allows sets of observations to be explained by unobserved groups that explain why some parts of the data are similar. For example, if observations are words collected into documents, it posits that each document is a mixture of a small number of topics and that each word's presence is attributable to one of the document's topics. LDA is an example of a topic model and belongs to the machine learning toolbox and in wider sense to the artificial intelligence toolbox." *Latent Dirichlet Allocation*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Latent_Dirichlet_allocation&oldid=1000686922 [https://perma.cc/VVK5-SHWM]. For a more technical discussion of LDA, see generally David M. Blei et al., *Latent Dirichlet Allocation*, 3 J. MACH. LEARNING. RSCH. 993 (2003).

recordings, where there are no easily identified features that can be used for classification, ranking, or regression.

"Deep Learning" refers to the combination of two or more learning algorithms which, in combination, perform feature analysis as well as an abstract task such as classification, ranking, or regression.[77] Typically, these algorithms are implemented as multi-layered neural networks, which, given enough training examples, can perform remarkably well. The first layer takes raw data as input, and combines it in various ways, passing the result on to another layer, and so on. Each layer analyzes different features and adjusts its model in response to training data so as to improve the overall effectiveness. Eventually, the combined models yield superior results for the task at hand.[78]

Deep Learning has led to breakthroughs in speech and image recognition, as well as fact-based question answering.[79] What these problems have in common is the availability of a vast number of training examples from which to derive models.

While machine learning represents the current state of the art for the three abstract AI problems outlined above, other approaches have been used—and continue to be used and promoted—as AI. In particular, a *rule base* is simply a set of rules or patterns designed to specify the outcome for all possible inputs.[80] A rule base may take the form of a decision tree or a flowchart working through the possibilities in a systematic fashion. The possible outcomes at each level are enumerated by subject-matter experts ("SMEs") in collaboration with rule-base experts, often statisticians or linguists. A rule base may take the form of a number of "patterns" designed—again by SMEs in collaboration with technical experts—to recognize the features that distinguish one class from another.[81] Flowcharts or patterns may be augmented with scores—again manually determined—that may be used for ranking or regression.[82]

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[77] For a more technical discussion of deep learning, see Yann LeCun et al., *Deep Learning*, 521 NATURE 436, 436–42 (2015).

[78] *See* LeCun et al., *supra* note 77.

[79] *See id*. *See also* Yashvardhan Sharma & Sahil Gupta, *Deep Learning Approaches for Question Answering System*, 132 PROCEDIA COMPUT. SCI. 785, 786 (2018).

[80] *See* Frederick Hayes-Roth, *Rule-Based Systems*, 28 COMMC'N OF THE ACM 921, 921–22 (1985). *See generally* Randall Davis & Jonathan J. King, *The Origin of Rule-Based Systems in AI*, *reprinted in* RULE-BASED EXPERT SYSTEMS: THE MYCIN EXPERIMENTS OF THE STANFORD HEURISTIC PROGRAMMING PROJECT (Addison-Wesley Pub. Co. 1984), http://digilib.stmik-banjarbaru.ac.id/data.bc/2.%20AI/2.%20AI/1984%20Rule-Based%20Expert%20Systems.pdf [https://perma.cc/AP2A-SM94].

[81] *See* Hayes-Roth, *supr*a note 80.

[82] *See* Penka Georgieva, *Fuzzy Rule-Based Systems for Decision-Making*, 53 J. BULGARIAN ACAD. SCI. 5, 10–14 (2016).

Familiar examples of rule bases include the flow charts used by a call center, the scoring systems used by Consumer Reports, or the complex Boolean searches used to identify potentially relevant documents in a responding party's email during the process of electronic discovery. Because they are familiar, they typically offer comfort—often undeserved—from the sense that we can understand how they operate. But rule bases, and all attempts to codify human behavior, have unintended consequences, and absent formal evaluation, are of questionable effectiveness.

In a seminal 1985 study,[83] Blair and Maron had lawyers and paralegals construct Boolean queries and then review the resulting documents until they believed they had found at least 75% of those that were relevant to each of 51 different aspects (*i.e.*, essentially topics or requests for production) related to a San Francisco Bay Area Rapid Transit ("BART") train accident. These search and retrieval efforts found, on average, only 20% of the documents relevant to each aspect. This result indicates that humans are not nearly as good at constructing Boolean queries—or any other sort of rules—as they may think they are. That is why rule-base approaches are typically time consuming and require experts and validation processes.

But manually constructed rules offer transparency that machine-learned models do not; particularly the models that result from Deep Learning, which are generally not well understood by their developers, if at all. Users can observe and understand the mechanics of how rules work, from which it is all too easy for them to draw specious conclusions regarding how *effectively* they achieve their intended purposes. Often, however, it is the less transparent algorithms that have better predictive power.[84]

Some automated learned models are more transparent than others, for example, if the feature engineering is straightforward and the method of combining evidence from the features is not too complicated. We can easily comprehend the process of dividing text into words, and even without understanding the formula, we can understand that each word might have a score indicating the weight of evidence that it conveys. We can display the top-scoring words that contribute to the classification or ranking of a document. Some learned models are in essence decision trees or Boolean queries. These models closely resemble rule bases that might be constructed manually, offering a measure of transparency. But they are typically more

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[83] David C. Blair & M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 COMM'NS ACM 289, 289 (1985).

[84] *See, e.g.*, Grant Duwe and Kim KiDeuk, *Sacrificing Accuracy for Transparency in Recidivism Risk Assessment: The Impact of Classification Method on Predictive Performance*, 1 CORRECTIONS 155, 155–76 (2016), https://www.tandfonline.com/doi/pdf/10.1080/23774657.2016.1178083 (last visited Nov. 15, 2021).

complex and so, notwithstanding their apparent transparency, they are not as easily understood as more straightforward manually constructed rule bases.

Other learned models, including those underlying state-of-the-art image recognition, voice recognition, and translation methods, are inscrutable to humans. In face recognition, for example, several layers will group together increasingly abstract features, which only vaguely correspond to features a human would recognize, such as eyes, ears, and hair color.[85] The issues that arise are illustrated by those that arise in DNA analysis—a high-profile classification problem.[86] No human can work through the operation of the classification algorithm, but after many years, the results have been shown to be much more reliable than more "transparent" alternatives.

Closely associated with the current wave of AI enthusiasm are the notions of "big data," "data analytics," "data mining," and "data science." "Big data" refers to the algorithms and techniques used to harness a massive glut of raw data, as opposed to the carefully curated information stored in a structured database.[87] "Data analytics"[88] and "data mining"[89] refer to processes for harvesting previously unknown information from a vast sea of raw data, while "data science" refers to the practice of performing data analytics or data mining.[90] Arguably, public-health researchers and meteorologists have been doing "data science" for years without labeling their efforts as such, but as for DNA testing, whether or not these pursuits are AI is a distinction without a difference. Data analytics in law is typically used to respond to questions facing lawyers that ought to have data-driven

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[85] *See* OMAR M. PARKHI ET AL., DEEP FACE RECOGNITION 1, 2, 5–8 (Xianghua Xie et al. eds., BMVA Press 2015).

[86] DNA analysis is not commonly referred to as AI, but it addresses a classification problem that at one time was considered the exclusive domain of human perception and intellect. The same can be said for weather forecasting.

[87] *See* Troy Segal, *Big Dat*a, INVESTOPEDIA (Jan. 1, 2021), https://www.investopedia.com/terms/b/big-data.asp [https://perma.cc/EV97-NVC2]; s*ee also Big Data: What It Is and Why It Matters*, SAS, https://www.sas.com/en_ca/insights/big-data/what-is-big-data.html [https://perma.cc/46RN-6TCG]; *see also What is Big Data?*, ORACLE CANADA, https://www.oracle.com/ca-en/big-data/what-is-big-data.html [https://perma.cc/WSH3-4PXT].

[88] *See* Jake Frankenfield, *Data Analytics*, INVESTOPEDIA (Sept. 4, 2021), https://www.investopedia.com/terms/d/data-analytics.asp [https://perma.cc/SFQ5-NV29]; *Big Data Analytics: What It Is and Why It Matters*, SAS, https://www.sas.com/en_ca/insights/analytics/big-data-analytics.html [https://perma.cc/K8AE-DJ8T].

[89] *See* Alexandra Twin, *Data Mining*, INVESTOPEDIA (Sept. 17, 2021), https://www.investopedia.com/terms/d/datamining.asp [https://perma.cc/Z225-6DM2]; *see also Data Mining: What It Is & Why It Matters*, SAS, https://www.sas.com/en_ca/insights/analytics/data-mining.html [https://perma.cc/Q3J9-V6GX].

[90] *See* Caroline Banton, *Data Science*, INVESTOPEDIA (Sept. 12, 2021), https://www.investopedia.com/terms/d/data-science.asp [https://perma.cc/N2BH-KWSG]*; see also What Is Data Science?*, ORACLE CANADA, https://www.oracle.com/ca-en/data-science/what-is-data-science.html [https://perma.cc/6598-8UYU].

answers, such as: "What is the market for this [product or service]?"; "How long is this going to take and what will it cost?"; "Which [jurisdiction/court/judge/argument] is most likely to result in a favorable outcome?"; "What has [our firm/opposing counsel/the judge] done in the past?; "How big is the risk?"

To the extent that AI techniques are used to do classification, ranking, or regression, their effectiveness can be measured and compared to current best practice, given enough examples representative of best practice.[91] If, on the other hand, the techniques are used to cluster data, to detect anomalies, or to predict exceedingly rare events, it is quite difficult to establish their efficacy and reliability.

One of the authors of this paper (Cormack) had an unfortunate interaction with two anomaly detection algorithms. After using his credit card at New York's JFK airport in the afternoon, at Los Angeles' LAX airport in the evening, and at Brisbane's BNE airport the following morning, his credit card ceased working, because the issuing bank's fraud-detection software flagged it. At the same time, the bank left a phone message on the author's voicemail, but the email notification of that message was flagged as spam and was not delivered by the email provider (who was one and the same as the voicemail provider). As a result, the credit card could not be used for the duration of the author's trip to Australia. After contacting the bank and learning of their attempt to call him, the author also discovered several voicemail messages from the Canada Revenue Agency ("CRA"), which were also flagged as spam. Arguably, neither blocking the credit card nor blocking the messages from the bank and the government would be considered reasonable human errors. Whether or not the fraud-detection and email-filtering AI methods would be considered reasonable would depend on their overall accuracy: How often do they make such errors versus how often do they not? It would also depend on their reliability with respect to similar situations: A fraud-detection method that flagged every trip to Australia would not be considered reasonable, even though trips to Australia for the author are rare events; a spam filter than blocked all voicemail messages from CRA would not be considered reasonable, even if CRA rarely calls the author.

[91] *See generally* ALICE ZHENG, EVALUATING MACHINE LEARNING MODELS: A BEGINNERS GUIDE TO KEY CONCEPTS AND PITFALLS (O'Reilly Media 2015), https://www.scribd.com/document/465392869/Evaluating-Machine-Learning-Models [https://perma.cc/E9G3-DPLY].

While issues concerning the validity and reliability[92] of AI methods for their intended purposes are addressed in more detail later this paper, they are often eschewed in the rush to market,[93] even though they are critical to assessing AI technologies and, in particular, the value of the output as evidence in litigation. We will discuss this issue further in section VII below.

IV. USES OF AI IN BUSINESS AND LAW TODAY

In recent years, AI has made major inroads in many fields, including health care, education, employment, banking and finance, policing, and the criminal justice system, to name but a few. Before the COVID 19 pandemic hit, a Canadian-based company, BlueDot, used AI to identify an emerging health risk in China on December 31, 2019, and subsequently, to predict the global spread of the disease.[94] Two of the authors of this paper (Grossman and Cormack) used supervised machine learning to assist medical researchers at St. Michael's Hospital in Toronto, working in conjunction with the Canadian Frailty Network, Health Canada, and the World Health Organization ("WHO") to perform rapid systematic reviews to identify scientific studies related to methods for preventing the transmission of Coronavirus in older adults living in long-term care, and to determine the effectiveness and safety of therapeutic options for COVID-19 and other Coronaviruses that cause serious respiratory infections, by searching massive medical publication and pre-print services that were constantly updating.[95] Using AI, they were able to hasten a task that normally can take

[92] *Validity* refers to the degree to which an AI tool measures what it purports to measure. *Reliability* refers to the consistency with which it does so. Valid algorithms are accurate predictors; reliable algorithms reach the similar conclusions in similar circumstances over time. One useful classification scheme further subdivides validity into "construct validity," *i.e.*, whether the measurements derived from the data measure what we think they measure, "internal validity," *i.e.*, whether the analysis correctly leads from the measurements to the conclusions reached, and "external validity," *i.e.*, whether and the extent to which findings from the measurements can be generalized to other situations. *See* Alexandra Olteanu et al., *Social Data: Biases, Methodological Pitfalls, and Ethical Boundaries*, FRONTIERS BIG DATA, July 11, 2019, at 1, 4–5.

[93] Indeed, one commentator has even connected the appearance of big data with the demise of the scientific method. "[F]aced with massive data, [the scientific approach]—hypothesize, model, test—is becoming obsolete. . . . Petabytes allow us to say: 'Correlation is enough.' We can stop looking for models. We can analyze the data without hypotheses about what it might show. We can throw the numbers into the biggest computing clusters the world has ever seen and let statistical algorithms find patterns where science cannot." Chris Anderson, *The End of Theory: The Data Deluge Makes the Scientific Method Obsolete*, WIRED (June 23, 2008, 12:00 PM), https://www.wired.com/2008/06/pb-theory [https://perma.cc/XC8G-T54X].

[94] *See* Bill Whitaker, *The Computer Algorithm that Was Among the First to Detect the Coronavirus Outbreak*, 60 MINUTES (April 27, 2020), https://www.cbsnews.com/news/coronavirus-outbreak-computer-algorithm-artificial-intelligence [https://perma.cc/8NBN-RMHD].

[95] "A systematic review attempts to identify, appraise and synthesize all the empirical evidence that meets pre-specified eligibility criteria to answer a specific research question. Researchers conducting

a year or more to less than two weeks. For a number of years, dermatologists have used AI to help predict skin cancers,[96] and radiologists have used AI to help determine whether patients have breast cancer, often more accurately than they can do on their own, unaided by such technology.[97]

AI has also been used to evaluate the performance of teachers,[98] to determine who gets job interviews,[99] and in credit forecasting for loans,[100]

systematic reviews use explicit, systematic methods that are selected with a view aimed at minimizing bias, to produce more reliable findings to inform decision making. . . . A Cochrane Review is a systematic review of research in health care and health policy that is published in the *Cochrane Database of Systematic Reviews*." *About*, COCHRANE LIBR., https://www.cochranelibrary.com/about/about-cochrane-reviews [https://perma.cc/6DX7-P97M] (last visited Jan. 22, 2021). A rapid (systematic) review is one that is typically completed in five weeks or less, although the time frame can vary. *See Systematic Reviews and Other Review Types*, TEMP. U. LIBR., https://guides.temple.edu/c.php?g=78618&p=4156608 [https://perma.cc/6364-75VJ]. For authors Grossman and Cormack's systematic reviews related to COVID-19, see Patricia Rios et al., *Preventing the Transmission of COVID-19 and Other Coronaviruses in Older Adults Aged 60 Years and Above Living in Long-Term Care: A Rapid Review*, 9 SYS. REV. 118 (2020); Patricia Rios et al., *Effectiveness and Safety of Pharmacological Treatments for COVID-19: A Rapid Scoping Review*, BR. MED. J. (forthcoming 2022).

[96] *See generally* Andre Esteva et al, *Dermatologist-Level Classification of Skin Cancers with Deep Neural Networks*, 542 NATURE 115 (2017); Kara Mayer Robinson, *How Artificial Intelligence Helps Diagnose Skin Cancer*, WEBMD,https://www.webmd.com/melanoma-skin-cancer/features/ai-skin-cancer#1 [https://perma.cc/K3GZ-CMHL].

[97] *See generally* Scott May McKinney et al., *International Evaluation of an AI System for Breast Cancer Screening*, 577 NATURE 89 (2020); Hannah Slater, *AI Assisted Radiologists See Improved Performance in Detection of Breast Cancer*, CANCER NETWORK (Feb. 29, 2020), https://www.cancernetwork.com/view/ai-assisted-radiologists-see-improved-performance-detection-breast-cancer [https://perma.cc/N7Y8-4M2C]; Fergus Walsh, *AI 'Outperforms' Doctors Diagnosing Breast Cancer*, BBC NEWS (Jan. 2, 2020), https://www.bbc.com/news/health-50857759 [https://perma.cc/W2YJ-GEPQ].

[98] *See generally Hous. Fed'n of Teachers, Loc. 2415 v. Hous. Indep. Sch. Dist.*, 251 F. Supp. 3d 1168 (S.D. Tex. 2017) (lawsuit challenging use of AI to evaluate teacher performance); CATHY O'NEIL, *Sweating Bullets: On the Job*, *in* WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (Crown Publishers 2016). For a discussion of the use of AI tools for the purposes of law firm recruitment see Victoria Hudgins, *Diversity, Metrics Demands Are Pushing Firms to Embrace AI Hiring Tools*, LEGALTECH NEWS (Jan. 13, 2021, 12:15 PM), https://www.law.com/legaltechnews/2021/01/13/diversity-metrics-demands-are-pushing-firms-to-embrace-ai-hiring-tools [https://perma.cc/3FYZ-TXJ5].

[99] Rebecca Heilweil, *Artificial Intelligence Will Help Determine If You Will Get Your Next* Job, VOX (Dec. 12, 2019, 8:00 AM EST), https://www.vox.com/recode/2019/12/12/20993665/artificial-intelligence-ai-job-screen [https://perma.cc/M9WL-T87J].

[100] Zoran Ereiz, *Predicting Default Loans Using Machine Learning (OptiML)*, 2019 27TH TELECOMMS. F. (TELFOR) 1 (2019); Daniel Faggella, *Artificial Intelligence Applications for Lending and Loan Management*, EMERJ: THE AI RESEARCH AND ADVISORY COMPANY (Apr. 3, 2020), https://emerj.com/ai-sector-overviews/artificial-intelligence-applications-lending-loan-management [https://perma.cc/R9RD-73QY].

mortgages,[101] and credit cards[102]—sometimes resulting in high-profile scandals involving the potential for bias in such systems.[103] AI has long been used in Fintech for high-speed securities trading,[104] where the advantage of a few milliseconds can result in huge financial gains. The number of new applications of AI that emerge each week is staggering.[105]

AI has also entered the legal realm in numerous ways,[106] some more risky and harmful than others. In addition to the use of data analytics and technology-assisted review in electronic discovery, ever since TAR was first approved by the courts in 2012,[107] machine-learning technologies have also been used for contract management and for due-diligence reviews in mergers and acquisitions,[108] for public disclosure analytics,[109] for natural-language

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[101] Lin Zhu et al., *A Study on Predicting Loan Default Based on the Random Forest Algorithm*, 162 PROCEDIA COMPUT. SCI. 503, 508–09 (2019), https://www.sciencedirect.com/science/article/pii/S1877050919320277 [https://perma.cc/KV84-VQT4]; Michael J. Cooper, A Deep Learning Prediction Model for Mortgage Default (May 2018) (Master's thesis, University of Bristol) (ResearchGate).

[102] Scott Zoldi, *How to Build Credit Risk Models Using Artificial Intelligence and Machine Learning*, FICO: BLOG (Apr. 6, 2017), https://www.fico.com/blogs/how-build-credit-risk-models-using-ai-and-machine-learning [https://perma.cc/H893-CJ94]*; Risk and Reward: The Role of AI in Acquiring Credit Card Prospects*, APPIER (Oct. 17, 2019), https://www.appier.com/blog/risk-and-reward-the-role-of-ai-in-acquiring-credit-card-prospects [https://perma.cc/72B5-95V2].

[103] *See, e.g.*, Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, Reuters (Oct. 10, 2018, 6:04 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G [https://perma.cc/A2ZE-64J4]; Neil Vigor, *Apple Card Investigated After Gender Discrimination Complaints*, N.Y. TIMES (Nov. 10, 2019), https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html [https://perma.cc/5JES-6ZUW].

[104] *See* JASMINA ARIFOVIC ET AL., HIGH FREQUENCY TRADING IN FINTECH AGE: AI WITH SPEED (SSRN 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771153 [https://perma.cc/L9JV-UNCM].

[105] For a compendium of AI applications across all domains, the reader can register for the weekly *Cognitive RoundUp* from *SwissCognitive – The Global AI Hub*, SWISSCOGNITIVE, https://swisscognitive.ch [https://perma.cc/H5KB-YCDX].

[106] For a compendium of AI applications in law and legal practice, the reader is referred to Daniel Faggella, *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, EMERJ: THE AI RESEARCH AND ADVISORY COMPANY (Mar. 14, 2020), https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications [https://perma.cc/GLS7-8X2R].

[107] *See* Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y 2012), adopted sub nom. Moore v. Publicis Groupe SA, No. 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012), (first federal case); Glob. Aerospace Inc. v. Landow Aviation, L.P., No. CL 61040 (Vir. Cir. Ct. Apr. 23, 2012) (first state case).

[108] Brittainy Boessel, *The Role of AI in Contract Management*, KIRA (June 15, 2020), https://kirasystems.com/learn/role-of-ai-in-contract-management [https://perma.cc/7F26-R9UG]; Ellie Nikolova, *AI's Role in Mergers and Acquisitions*, CORP. L.J. (Sept. 25, 2019), https://www.thecorporatelawjournal.com/technology/ais-role-in-mergers-and-acquisitions [https://perma.cc/B738-CUCP].

[109] For an example of an AI tool that analyzes SEC filings and associated exhibits, see LEXISNEXIS' *Intelligize*, https://www.intelligize.com/products/intelligize [https://perma.cc/3482-C77E].

legal research inquiries,[110] for legal brief analytics,[111] for drafting of legal memoranda and pleadings,[112] for litigation forecasting for the purposes of litigation funding,[113] for review of legal billing,[114] and even in bots employed to analyze claims and to complete forms to improve access to justice.[115]

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[110] Nicole Black, *Lawyers Have a Bevy of Advanced and AI-Enhanced Legal Research Tools at Their Fingertips*, ABA J. (Nov. 22, 2019), https://www.abajournal.com/web/article/lawyers-have-a-bevy-of-advanced-and-ai-enhanced-legal-research-tools-at-their-fingertips [https://perma.cc/9QA3-TSW3].

[111] For examples of AI tools that can analyze briefs to find and recommend the most on-point authorities or to uncover cases that opposing counsel has failed to cite, see *CARA A.I.*, https://casetext.com/cara-ai [https://perma.cc/84BY-YEB3] or *Brief Analyzer*, https://pro.bloomberglaw.com/brief-analyzer [https://perma.cc/LS9M-5HPP]. There is even an AI brief-checking tool designed specifically for judges: *Quick Check Judicial*, https://legal.thomsonreuters.com/en/c/quick-check-judicial-on-westlaw-edge?cid=9023855&sfdccampaignid=7014O000001iorNQAQ&chl=pr [https://perma.cc/FH8S-3MEJ].

[112] For an example of an AI tool that can provide responses to legal questions in a memo form, see Alexsei, https://www.alexsei.com [https://perma.cc/2QVU-E3D9]. For examples of AI tools that automate the preparation of the first draft of legal pleadings or briefs, respectively, see LegalMation®, https://www.legalmation.com [https://perma.cc/XMP6-JC5Z], and see *Compose*, https://compose.law [https://perma.cc/PM85-WWK2] .

[113] "Legalist, a legal startup backed by PayPal co-founder Peter Thiel, bills itself as 'the first AI-powered litigation finance firm.'" *AI-Powered Litigation Finance Firm Offer Bounty to Sexual Harassment Victims*, LEGAL TECH BLOG (Oct. 19, 2017), https://legal-tech-blog.de/ai-powered-litigation-finance-firm-offers-bounty-to-sexual-harassment-victims [https://perma.cc/T3DF-WH5M]; *see also* Bob Ambrogi, *Litigation Finance Startup Legalist Raises $100 Million to Fund Lawsuits*, LAWSITES (Sept. 19, 2019), https://www.lawsitesblog.com/2019/09/litigation-finance-startup-legalist-raises-100-million-to-fund-lawsuits.html [https://perma.cc/YB5X-DRB9] ("Legalist leads the new wave of technologists using artificial intelligence and machine learning to streamline and underwrite litigation investments.").

[114] For examples of AI tools used for automated review of legal bills, see Bilr, https://www.getbilr.com/legal-invoice-review [https://perma.cc/ZR5N-RMXL], and see *Brightflag*, https://brightflag.com [https://perma.cc/W332-WQCG] .

[115] Luke Dormehl, *Meet the British Whiz Kid Who Fights Justice with a Robo-Lawyer Sidekick*, DIGITALTRENDS (March 25, 2018), https://www.digitaltrends.com/cool-tech/robot-lawyer-free-acess-justice [https://perma.cc/BV2E-LPKS] (discussing Joshua Browder's DoNotPay chatbot that has helped to successfully appeal millions of dollars' worth of parking tickets); Luis Millán, *AI Initiative Seeks to Improve Access to Justice, Law in Quebec* (Jan. 13, 2020),https://lawinquebec.com/ai-initiative-seeks-to-improve-access-to-justice [https://perma.cc/Y7GZ-VEBP]. For a comprehensive discussion of the pros and cons of the use of AI to address "the justice gap," see Katherine L.W. Norton, *The Middle Ground: A Meaningful Balance Between the Benefits and Limitations of Artificial Intelligence to Assist with the Justice Gap*, 75 U. MIA. L. REV. 190 (2020).

Perhaps of greater interest (and concern) to the present audience is software used to analyze opposing counsel or judges,[116] and for online adjudication.[117]

More controversial uses lie in the area of law enforcement and the criminal justice system, including algorithms used for predictive policing, facial recognition, bail setting, and sentencing decisions. These contexts pose higher risk of harm than many of the aforementioned uses and are more likely to come to the attention of judicial officers.

Predictive Policing has been around for some time. In or about 2010 or 2011, UCLA scientists working with the Los Angeles Police Department ("LAPD") developed a software program called PredPol, designed to analyze crime data to spot patterns of criminal behavior, so that police could intervene in predicted high-crime areas to prevent crimes from happening.[118] The software is now used by more than 60 police departments around the country to identify neighborhoods where serious crimes are more likely to occur during particular periods of time.[119] The company that designed the software claims that its research has shown that it is "twice as accurate as human analysts" in predicting where crimes will take place, but these self-

[116] For examples of AI tools that may be used for legal analytics involving opposing counsel, judges, or courts, see *Lex Machina Legal Analytics Platform*, https://lexmachina.com/legal-analytics [https://perma.cc/A56Z-F49H]; Premonition, https://premonition.ai [https://perma.cc/2S4L-QGBN]; and *Context*, *Ravel*, https://home.ravellaw.com [https://perma.cc/L2EB-QEQW]. Note that France banned the use of judicial analytics in Article 33 of the Justice Reform Act of Mar. 23, 2019. A violation of the law can result in a criminal penalty of up to five years in prison. Jason Tashea, *France Bans Publishing of Judicial Analytics and Prompts Criminal Penalties*, ABA J. (June 7, 2019), https://www.abajournal.com/news/article/france-bans-and-creates-criminal-penalty-for-judicial-analytics [https://perma.cc/C2LH-C4PH].

[117] Carole Piovesan & Vivian Ntiri, *Adjudication by Algorithm: The Risks and Benefits of Artificial Intelligence in Judicial Decision-Making*, ADVOCS.' J. 42 (2018), https://marcomm.mccarthy.ca/pubs/Spring-2018-Journal_Piovesan-and-Ntiri-article.pdf (discussing use of AI technology and online dispute resolution for low-value claims). *See also* Eric Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, WIRED (Mar. 25, 2019), https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so [https://perma.cc/BJM5-3JU5] (last visited Jan. 22, 2021).

[118] Randy Rieland, *Artificial Intelligence Is Now Used to Predict Crime. But Is It Biased?*, SMITHSONIAN MAG. (Mar. 5, 2018), https://www.smithsonianmag.com/innovation/artificial-intelligence-is-now-used-predict-crime-is-it-biased-180968337 [https://perma.cc/RVK9-R44G]. There is considerable debate over whether the LAPD's predictive tool is effective. *Compare* Stuart Wolpert, *Predictive Policing Substantially Reduces Crime in Los Angeles During Months-Long Test*, UCLA NEWSROOM (Oct. 7, 2015), https://newsroom.ucla.edu/releases/predictive-policing-substantially-reduces-crime-in-los-angeles-during-months-long-test [https://perma.cc/2E93-WDGA] *with* Mark Puente, *LAPD Pioneered Predicting Crime with Data. Many Police Don't Think It Works*, L.A. TIMES (July 3, 2019),https://www.latimes.com/local/lanow/la-me-lapd-precision-policing-data-20190703-story.html [https://perma.cc/2PPC-LB2T]. With more and more critics—particularly with respect to its potentially discriminatory impact on minority populations—predictive policing "may be falling out of fashion." Eva Ruth Moravec, *Do Algorithms Have a Place in Policing?*, ATLANTIC (Sept. 5, 2019), https://www.theatlantic.com/politics/archive/2019/09/do-algorithms-have-place-policing/596851 [https://perma.cc/8VXK-H95J].

[119] Rieland, *supra* note 118.

reported results have not been independently verified.[120] The City of Chicago took crime projection a step further by building a "Strategic Subject List" of individuals "most likely to be involved in future shootings," either as perpetrators or victims.[121] The American Civil Liberties Union ("ACLU"), the Brennan Center for Justice, and other civil rights organizations have sounded the alarm about the risk of bias inherent in such prediction software because historical data from police practices is used to train the algorithm, leading to a feedback loop through which the software makes forward-looking decisions that both reflect and reinforce past beliefs about which neighborhoods (or which people) are "safe" or "dangerous."[122] Software that relies on arrest data carries an even higher degree of risk of bias than software based on, for example, convictions, because it is more reflective of police practices than actual crime.[123] After all, police only arrest people for crimes where they look for them.

Facial recognition by police has recently come under greater scrutiny. In June 2020, the *New York Times* reported on the first-known case where a faulty facial recognition match led to the arrest of a Michigan man for a crime he did not commit.[124] The man was handcuffed on his front lawn, in front of his wife and two young daughters, and subsequently booked and held overnight for allegedly shoplifting five watches worth $3,800 from an upscale Detroit boutique, based on a grainy still image retrieved from a surveillance video that was incorrectly matched to the man's driver's license photo by a facial recognition algorithm used to search a police database of 49 million photos.[125] Apparently, without much further investigation, the detectives simply included the large Black man's picture in a six-pack photo lineup that they showed to the store's loss-prevention coordinator—who had previously reviewed the store's surveillance video and sent a copy to the Detroit police—and she subsequently identified the man as the perpetrator.[126]

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[120] *Id.*

[121] *Id.* The controversial eight-year program was quietly retired in early 2020. Jeremy Gorner & Annie Sweeney, *For Years Chicago Police Rated the Risk of Tens of Thousands Being Caught Up in Violence. That Controversial Effort Has Quietly Been Ended.*, CHI. TRIB. (Jan. 24, 2020), https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-strategic-subject-list-ended-20200125-spn4kjmrxrh4tmktdjckhtox4i-story.html [https://perma.cc/U73T-3CZC].

[122] Rieland, *supra* note 118.

[123] *Id.*

[124] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/B6VA-2HS8].

[125] *Id.*

[126] *Id.* Apparently, this did not turn out to be the first such event. An earlier misidentification occurred in May 2019 when the Detroit Police wrongly charged a 25-year-old Black man of felony larceny for allegedly reaching into a teacher's vehicle, grabbing a cellphone, and throwing it, resulting in a cracked

Facial recognition systems have been used by police for more than two decades.[127] Recent studies conducted by researchers at the Massachusetts Institute of technology ("MIT") and Microsoft Research, as well as at NIST, have found that while the technology works relatively well on White men, the results are less accurate for other demographics, in part, because they are less well represented in the sources of the images used to train the algorithms.[128] These AI tools are reported to falsely identify African American and Asian faces between 10 and 100 times more often than Caucasian faces.[129] In the same month as the *New York Times* reported on the Michigan misidentification case, Amazon, Microsoft, and IBM announced that they planned to cease—or at least pause—their facial recognition offerings for law enforcement.[130] But these are not the big players in this industry,[131] so the use of these technologies by police departments continues

screen and broken case. Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit*, DETROIT FREE PRESS (July 10, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002 [https://perma.cc/87FH-K9FR]. Since the publication of these two articles, a third misidentification of a Black man using faulty facial recognition has occurred. *See* Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html. [https://perma.cc/7ZNP-85K6]. In this instance, a New Jersey man was accused of "shoplifting candy and trying to hit a police officer with a car . . . "The man turned out to have been 30 miles away at the time of the incident. He spent 10 days in jail and paid approximately $5,000 to defend himself. *Id.*

[127] Jennifer Valentino-DeVries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html [https://perma.cc/6QS7-7HH4].

[128] Kyle Wiggers, *NIST Benchmarks Show Facial Recognition Technology Still Struggles to Identify Black Faces*, VENTUREBEAT (Sept. 9, 2020), https://venturebeat.com/2020/09/09/nist-benchmarks-show-facial-recognition-technology-still-struggles-to-identify-black-faces [https://perma.cc/3ANZ-FQGB]; Larry Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial-Intelligence Systems*, MIT NEWS (Feb. 11, 2018), https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212 [https://perma.cc/N4T9-UKF4]; Steve Lohr, *Facial Recognition is Accurate if You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html [https://perma.cc/TD6Z-RPB2]. One of the authors of the MIT/MS Research study (Timnit Gebru) claimed that she was later fired by Google because she refused to retract a subsequent paper also on responsible AI and algorithmic accountability. *See* Nitasha Tiku, *Google Hired Timnit Gebru to Be an Outspoken Critic of Unethical AI. Then She Was Fired for It.*, WASH. POST (Dec. 23, 2020), https://www.washingtonpost.com/technology/2020/12/23/google-timnit-gebru-ai-ethics [https://perma.cc/GUA5-X7HM]; Alex Hanna & Meredith Whittaker, *Timnit Gebru's Exit From Google Exposes a Crisis in AI*, WIRED (Dec. 31, 2020), https://www.wired.com/story/timnit-gebru-exit-google-exposes-crisis-in-ai [https://perma.cc/ZH4R-D6LG].

[129] Natasha Singer & Cade Metz, *Many Facial-Recognition Systems Are Biased, Says U.S. Study*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html [https://perma.cc/48NZ-MKVT].

[130] Hill, *supra* note 124.

[131] The technology that police departments use is supplied by Vigilant Solutions, Cognitec, NEC, Rank One Computing, and Clearview AI, and NTech Labs. Hill, *supra* note 124; Tate Ryan-Mosley,

largely unabated.[132] Since the Michigan misidentification case was reported, at least two more arrests of Black men using faulty facial identification have been divulged.[133]

Perhaps of even more concern than predictive policing and the use of facial recognition by law enforcement is the following. In March, 2016, an article published in *Pro Publica* reported on risk-assessment software called the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") that was being used, with increasing frequency, across the United States to inform—and sometimes to make—decisions about a criminal defendant's or convict's risk of reoffending during various points in the criminal justice system, from pre-trial release, to criminal sentencing and probation.[134] These tools are vaguely reminiscent of "Minority Report," "1984," "Black Mirror," and other dystopian science fiction.[135] COMPAS is not the only proprietary risk and needs assessment ("RNA") tool available—there are over 100 general and specialty tools that have been developed by private entities, non-profit organizations, universities, and even states.[136] While most of the tools are computerized to some degree, not all of them rely on AI to make predictions. COMPAS does. At the time of the *Pro Publica* article, while dozens of criminal RNA tools were in use, few had been independently tested.[137] In a 2013 study, researchers Sarah Desmarais and Jay Singh examined 19 such tools used across the United States and found that "in most cases, validity had been examined in one or two studies,"

There Is a Crisis of Face Recognition and Policing in the US, MIT TECH. REV. (Aug. 14, 2020), https://www.technologyreview.com/2020/08/14/1006904/there-is-a-crisis-of-face-recognition-and-policing-in-the-us [https://perma.cc/D7CX-PDZP].

[132] Hill, *supra* note 124. We do not actually know how often U.S. police departments use facial recognition because in most jurisdictions they are not required to report it. The most recent numbers come from 2016 and are speculative, but they suggest that at that time, at least half of Americans' photos were contained in a facial recognition system and that one county in Florida ran 8,000 searches each month. Ryan-Mosley, *supra* note 131.

[133] *See supra* note 126; Ryan-Mosley *supra* note 131.

[134] Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/H3S4-G7PQ].

[135] *See* Rhys Dipshan et al., *The United States of Risk Assessment: The Machines Influencing Criminal Justice Decisions*, LEGALTECH NEWS (July 13, 2020), https://www.law.com/legaltechnews/2020/07/13/the-united-states-of-risk-assessment-the-machines-influencing-criminal-justice-decisions [https://perma.cc/Q5DV-WN2W].

[136] Specialized tools include those used for women or juvenile offenders, and those that assess a defendant's or convict's likelihood of committing domestic or sexual violence.

[137] Angwin et al., *supra* note 134. For a comprehensive critique of "the serious shortcomings of risk assessment tools in the U.S. criminal justice system," including "[c]oncerns about the validity, accuracy, and bias in the tools themselves," see PARTNERSHIP ON AI, *Report on Algorithmic Risk Assessment Tools in the U.S. Justice System*, 2 (2019), https://www.partnershiponai.org/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system [https://perma.cc/LQR7-3RH7].

and that "frequently, those investigations were completed by the same people who developed the instrument."[138] They concluded that the tools "were moderate at best in terms of predictive validity."[139] *Pro Publica's* own study was even more troubling. Their reporters collected the risk scores of more than 7,000 people arrested in Broward County, Florida, in 2013 and 2014, and followed them to see how many were charged with another crime over the following two years, the same benchmark used by COMPAS.[140] "The score proved remarkably unreliable in forecasting violent crime: Only 20% of the people predicted to commit violent crimes actually went on to do so."[141] When a full range of crimes was taken into account, "[o]f those deemed likely to reoffend, 61% were arrested for any subsequent crimes within two years."[142] What *Pro Publica* found next was even more problematic—significant racial disparities: Black offenders were twice as likely as White offenders to be incorrectly labeled as high risk (44.85% versus 23.45%), while White offenders were twice as likely as Black offenders to be incorrectly labeled as low risk (47.72% versus 27.99%).[143] COMPAS' developer admitted that it was difficult to construct a score that did not include items that could be correlated with race—such as poverty, joblessness, and social marginalization. "If those are omitted from your risk assessment, accuracy goes down."[144]

Defendants rarely have an opportunity to challenge the results of their risk and need assessments. While the overall score may be shared with their attorney, the algorithm that produced the score, and the underlying data on which it relied, are typically not disclosed; they are almost always withheld as proprietary trade secrets. This problem was raised in a Wisconsin criminal case involving defendant, Eric Loomis, who was a repeat offender labeled by COMPAS as high risk to the community.[145] Loomis was charged with

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[138] Angwin et al, *supra* note.134.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See id.; see also* Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PRO PUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm [https://perma.cc/DXW4-ME4E]. However, Pro Publica's analysis of the COMPAS data is not without its critics. *See, e.g.,* Anthony W. Flores et al., *False Positives, False Negatives, and False Analyses: A Rejoinder to "*Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks.*",* 80 FED. PROB. 1 (Sept. 2016), https://www.researchgate.net/publication/306032039_False_Positives_False_Negatives_and_False_Analyses_A_Rejoinder_to_Machine_Bias_There%27s_Software_Used_Across_the_Country_to_Predict_Future_Criminals_And_it%27s_Biased_Against_Blacks [https://perma.cc/D4DS-Z3ZV].

[144] Angwin et al., *supra* note 134.

[145] Wisconsin v. Loomis, 881 N.W.2d 749, 755 (2016).

driving a stolen vehicle away from the scene of a drive-by shooting and fleeing the police.[146] The judge in the case imposed a sentence of eleven years.[147] Loomis challenged the use of the COMPAS score at his sentencing as a violation of his due process rights because the proprietary nature of the tool prevented him from challenging the scientific validity of the assessment (*e.g.*, how COMPAS weighed various factors, how the algorithm calculated risk, the impact of the comparator data—which was based on a national not a local (*i.e.,* Wisconsin) sample, the fact that some studies of COMPAS' RNA scores had raised questions about whether they disproportionally classified minorities as having a higher risk of recidivism, and thus, the accuracy of the scores).[148]

The case went to the Wisconsin Supreme Court, which pointed out that the Presentence Investigation (i) warned that "the COMPAS risk assessment does not predict the specific likelihood that an individual will reoffend. Instead, it provides a prediction based on a comparison of information about the individual to a similar data group," and (ii) cautioned that "risk scores are not intended to determine the severity of a sentence or whether an offender is incarcerated."[149] Because the COMPAS risk score was accompanied by such admonitions, and was not the *sole* determinant of the Court's sentencing decision—it was ostensibly used only to corroborate the Court's findings—its use did not violate a Mr. Loomis' right to due process.[150]

These examples are only the tip of the iceberg with respect to how lawyers and judges can expect AI to arise in the cases they handle, and how AI increasingly may be applied in the justice system.

V. ISSUES RAISED BY THE USE OF AI IN BUSINESS AND LAW TODAY

While AI offers great promise for the advancement of social good in many domains—including access to justice—it also poses significant risks and challenges, some of which are likely apparent from the examples provided above. Unfortunately, the benefits and burdens of AI are often not equally distributed across society, and we risk losing the benefits if we cannot find solutions to the challenges raised by AI. Some of these challenges are discussed below.

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[146] *Id.* at 754.

[147] *See Id.* at 756 note 18.

[148] *Id.* at 756, 760–63.

[149] *Id.* at 754, 770.

[150] *See id.* at 755, 771–72.

A. Bias

Bias leading to sometimes intended—but more often unintended—discriminatory outcomes is a serious problem with AI. There are multiple places where bias can impact AI systems, from the inputs to the outputs of such systems, and even in the ways in which the outputs are interpreted and used by humans.[151]

Because machine-learning algorithms are trained using historical data, they can serve to perpetuate the very biases they are often intended to prevent. Bias in data can occur because the training data is not representative of a target population to which the AI system will later be applied. Two high-profile examples of this problem include Google Photo's mistaken identification of two Black people as gorillas,[152] and Amazon's failed experiment with a hiring algorithm that merely replicated the company's existing disproportionately male workforce.[153] We see this same problem with facial recognition software that has difficulty correctly identifying Black women's faces because they are not adequately reflected in the training set.[154] Data can also be differentially noisy for different groups, meaning that errors are not evenly distributed across the different groups, or data may simply be missing for certain groups as compared to others, for example, when the data is either unavailable or the collection process is incomplete because the techniques used to capture data fail to capture all data equally. This is particularly the case when the law prohibits collecting, labeling, or using the data of certain protected groups. This can cause other problems, for example, when a treatment actually works better for one gender or race than another, but the beneficial effect is masked by an overall (*i.e.*, combined) accuracy rate that is low, or because the protected data is either not collected or not considered by the algorithm.[155] Defendant Loomis

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[151] For a useful discussion of some of the different types of bias that can impact AI systems, see Selena Silva & Martin Kenney, *Viewpoint: Algorithms, Platforms, and Ethnic Bias*, 62 COMMC'N ACM 37 (2019), https://cacm.acm.org/magazines/2019/11/240361-algorithms-platforms-and-ethnic-bias/fulltext [https://perma.cc/JF4P-APNW].

[152] Maggie Zhang, *Google Photos Tags Two African-Americans As Gorillas Through Facial Recognition Software*, FORBES (July 1, 2015), https://www.forbes.com/sites/mzhang/2015/07/01/google-photos-tags-two-african-americans-as-gorillas-through-facial-recognition-software/?sh=23e9c0a3713d [https://perma.cc/G5ZW-NDDZ]; Pete Pachal, *Google Photos Identified Two Black People As 'Gorillas,'* MASHABLE (July 1, 2015), https://mashable.com/2015/07/01/google-photos-black-people-gorillas [https://perma.cc/5RGQ-K5NB].

[153] Dastin, *supra* note 103.

[154] *E.g.*, Lohr, *supra* note 128.

[155] *Cf.* Heather P. Whitley & Wesley Lindsey, *Sex-Based Differences in Drug Activity*, 80 AM. FAM. PHYSICIAN 1254 (2009), https://www.aafp.org/afp/2009/1201/p1254.html [https://perma.cc/TA2Z-3WC2]; Valentine J. Burroughset al., *Racial and Ethnic Differences in Response to Medicines: Towards Individualized Pharmaceutical Treatment*, 94 J. NAT'L MED. ASS'N 1 (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2594139 [https://perma.cc/L8XW-ZAE3]. A similar

asserted that the COMPAS tool discriminated on the basis of gender because the tool assessed male and female offenders separately due to the fact that research has shown that female offenders are different from male offenders.[156] Thus, it is not always clear when information about protected classes should and should not be used by AI.

Data can also be biased for the reason that while an AI system may not take a protected class label or feature such as race directly into account, the data includes proxies for that label or feature that the algorithm does consider. For example, the COMPAS tool asks for information about arrests for drug possession and use.[157] It is well known that Black people are arrested for drug possession and use many times more often than White people,[158] so this question is a ready proxy for race, as are many other features like zip code, education, employment, and incarceration. When arrest records for drug use are used as a predictor in RNA algorithms, they may be more reflective of police activity than recidivism risk and can therefore lead to

problem can occur when an algorithm fails to take racial differences into account when it should. In one prominent example, a health-care algorithm used health-care costs as a proxy for health-care needs, without taking into account the fact that unequal access to health care meant that less money was spent caring for Black patients than White patients. Thus, at the same score on the predictive measure, Black patients were considerably sicker than White patients, but were systematically offered less care. Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCI. 447, 453 (2019), https://science.sciencemag.org/content/366/6464/447/tab-pdf [https://perma.cc/NB9D-XN4Q]. Tom Simonite, *A Health Care Algorithm Offered Less Care to Black Patients*, WIRED (Oct. 24, 2019), https://www.wired.com/story/how-algorithm-favored-whites-over-blacks-health-care [https://perma.cc/ZPG7-ND4U].

[156] *See Loomis*, 881 N.W.2d at 765–66; *see also* Rhys Dipshan, *Constitutional Brawl Looms Over How Risk Assessment Tools Account for Gender*, LEGALTECH NEWS (July 20, 2020), https://www.law.com/legaltechnews/2020/07/20/constitutional-brawl-looms-over-how-risk-assessment-tools-account-for-gender [https://perma.cc/YN6J-3F3S].

[157] See *Risk Assessment*, Northpointe Suite v. 8.1.18.12 (Northpointe, Inc. 2011) ("19. How many prior possession/use offense arrests as an adult?") (copy on file with author Grossman).

[158] *See* Rhys Dipshan & Victoria Hudgens, *Risk Assessment Tools Aren't Immune From Systemic Bias. So Why Use Them?*, LEGALTECH NEWS (July 17, 2020), https://www.law.com/legaltechnews/2020/07/17/risk-assessment-tools-arent-immune-from-systemic-bias-so-why-use-them [https://perma.cc/QST5-LTQA]. Dr. Jennifer Skeem, Professor of Public Policy at the University of California, Berkeley "notes that, where possible, tools should avoid criteria that [are] impacted by the differential treatment African Americans receive in the criminal justice system. 'A really good example is arrest for drug offense. We know that policing patterns make it such that Blacks are much more likely to be arrested for drug offenses than whites, even though there isn't much difference at the behavioral level and in terms of rates of drug use, etc.'" *See also* Peter Walker, *Black People Twice as Likely to Be Charged with Drug Possession – Report*, THE GUARDIAN (Aug. 21, 2013), https://www.theguardian.com/world/2013/aug/21/ethnic-minorities-likely-charged-drug-possession [https://perma.cc/FHJ8-HYXZ]; PARTNERSHIP ON AI, *supra* note 137, at 16, n.15 ("Statistical validation of recidivism in particular suffers from a fundamental problem: the ground truth of whether an individual committed a crime is generally unavailable, and can only be estimated via imperfect proxies such as crime reports or arrests. . . . One problem with using such imperfect proxies is that different demographic groups are stopped, searched, arrested, charged, and are wrongfully convicted at very different rates in the current US criminal justice system." (citations omitted)).

biased outcomes. Another example would be an AI tool that uses health-care costs as a measure of health-care needs. It is well known that minority communities have less access to health care and pay less into the health-care system, thus their needs may be improperly reflected when the algorithm considers health-care costs as a measure of health-care needs. In these examples, what we observe, and measure does not line up with what we actually care about.

Finally, bias in data also can obviously occur because the data reflects the systematic race and gender discrimination that exists in society. This can be seen with tools that assess resumes for interviews,[159] or applications for Apple credit cards.[160]

While the line between the data and the model that is derived from it can be fuzzy, bias can also come into play with respect to the algorithm itself. Most machine-learning algorithms are premised on "bias" in the sense that their entire purpose is to discriminate between X and Y, because that is what helps the tool to make predictions. The choice of tool itself imposes assumptions on the data, and norms and values are built into the models the tools generate. AI developers make certain decisions about problem specification, what the system is trying to model or predict and how best to do so, including methods for data cleansing and processing, the features the system will consider, the weights the system will assign to those features, how data (particularly outliers) are to be treated, outcome variables, and so on, often without much consideration of the potential harms or unintended consequences that can flow from these hidden choices. For example, if an AI system is trying to predict the quality of employees, and it takes the number of promotions, raises, and highest-attained salary into account, the output will necessarily be biased because those features typically are not evenly distributed across race and gender. Another example might be an algorithm designed to determine where street repairs are needed based on reports of potholes reported by phone or on a website. But if the algorithm does not take into account the fact that not all people in all neighborhoods have access to cell phones or computers, and undocumented residents may be unwilling to contact a public agency, such an algorithm would only serve to increase disparities in road conditions in poor versus wealthy neighborhoods.

AI developers may not be the best qualified or the best equipped to make such algorithmic design choices in light of the fact that that they typically do not reflect the diversity of the populations to which the

[159] *See* Dastin, *supra* note 103.

[160] *See* Vigor, *supra* note 103.

algorithms will be applied,[161] and have little to no training in ethics or the law, and therefore may be insensitive to the unintended consequences of their decisions. Lawyers, ethicists, policy makers, and regulators are brought into the process, if at all, long after these decisions have been made and when they are no longer transparent or easily altered. This oversight results in silent failures that often go undetected until they result in public relations nightmares.

Most AI tools place a great emphasis on achieving predictive accuracy and efficiency, but do not always consider statistical or demographic parity,[162] the distribution of false positives and false negatives,[163] or other measures of fairness and bias. Even if society were able to come to consensus on a definition of "fairness" in AI,[164] fairness would still be incredibly hard

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[161] *See* Sarah Myers West et al., *Discriminating Systems: Gender, Race and Power*, in AI, AI NOW INSTITUTE (Apr. 2019), https://ainowinstitute.org/discriminatingsystems.pdf [https://perma.cc/8AXB-46RV]; *see also* Kari Paul, *'Disastrous' Lack of Diversity in AI Industry Perpetuates Bias, Study Finds*, THE GUARDIAN (Apr. 17, 2019), https://www.theguardian.com/technology/2019/apr/16/artificial-intelligence-lack-diversity-new-york-university-study [https://perma.cc/KB5C-MGKY].

[162] An unknown author once defined *statistical parity* as "the statistical equivalent of the legal doctrine of adverse impact. It measures the difference that the majority and protected classes get a particular outcome. When that difference is small, the classifier is said to have 'statistical parity,' *i.e.*, to conform to this notion of fairness." *Cf.* Gal Yona, *A Gentle Introduction to the Discussion on Algorithmic Fairness*, TOWARDS DATA SCI. (Oct. 5, 2017), https://towardsdatascience.com/a-gentle-introduction-to-the-discussion-on-algorithmic-fairness-740bbb469b6 [https://perma.cc/AWT2-HMSH] ("US legal theory uses the 'disparate impact theory' principle: a practice is considered *illegal discrimination* if it has a 'disproportionately adverse' effect on members of a protected group . . . The mathematical equivalence of the disparate impact principle at its most extreme version (allowing no adverse effect on members of the protected group) for binary classification tasks is the Statistical Parity condition: it essentially equalizes the outcomes across the protected and non-protected groups."). For more technical discussions of statistical or demographic parity, and fairness of algorithms, see Jeremy Kun, *One Definition of Algorithmic Fairness: Statistical Parity*, MATH ∩ PROGRAMMING (Oct. 19, 2015), https://jeremykun.com/2015/10/19/one-definition-of-algorithmic-fairness-statistical-parity [https://perma.cc/9Y9V-DVK6]; Simon Prince, *Tutorial #1: Bias and Fairness in AI*, BOREALIS AI (Aug. 19, 2019), https://www.borealisai.com/en/blog/tutorial1-bias-and-fairness-ai [https://perma.cc/P8PV-UFMR].

[163] *See, e.g.*, PARTNERSHIP ON AI, *supra* note 137, at n.6 ("[E]valuation of machine learning models is a complicated and subtle topic which is the subject of active research. In particular, note that inaccuracy can and should be divided into errors of 'Type I' (false positive) and 'Type II' (false negative) – one of which may be more acceptable than the other, depending on the context.").

[164] *See, e.g.*, Kenn So, *A Primer on Fairness*, TOWARDS DATA SCI., https://towardsdatascience.com/artificial-intelligence-fairness-and-tradeoffs-ce11ac284b63 [https://perma.cc/VGN8-NUM6] ("There is no one definition of what is fair. What is considered fair depends on the context."); Louise Mastakis, *What Does a Fair Algorithm Actually Look Like?*, WIRED, https://www.wired.com/story/what-does-a-fair-algorithm-look-like [https://perma.cc/G32Z-MGVT] ("The question of '[w]hat it means for an algorithm to be fair?' does not have a technical answer alone. . . . It matters what social processes are in place around that algorithm."); Jeremy Kun, *What Does It Mean for an Algorithm to Be Fair?*, MATH ∩ PROGRAMMING, https://jeremykun.com/2015/07/13/what-does-it-mean-for-an-algorithm-to-be-fair [https://perma.cc/E2CK-9X6U] ("[T]here is no accepted definition of what it *means* for an algorithm to be fair.") (emphasis in original); Alexandra Ebert, *We Want Fair Algorithms – But How to Define Fairness? (Fairness Series Part 3)*, MOSTLY • AI,

to operationalize and highly context-dependent.[165] Many commentators have noted that it may not be possible to achieve both good predictive accuracy and fairness at the same time,[166] and lawyers and judges may be forced to decide which of these competing values is more important under any given set of circumstances. While many high-level aspirational principles and guidelines have been promulgated for trustworthy or ethical AI, and while they are admirable, many simply cannot be implemented in any practical way.[167] And, it is questionable in the first place whether we want developers making "de-biasing" decisions in the dark. This leaves it up to lawyers and judges to make sure that the correct questions are being asked—for example, whether impact assessments have been performed, how the tool was assessed for bias and by whom, and whether the correct metrics were collected and reported.

Finally, bias arises as a result of the human interpretation of the output of AI systems. All humans have unconscious or implicit biases,[168] such as confirmation bias. *Confirmation bias* is the tendency for humans to search for, interpret, favor, and recall information that confirms their prior beliefs and values;[169] It has a tendency to distort evidence-based decision-making.

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https://mostly.ai/2020/05/06/we-want-fair-ai-algorithms-but-how-to-define-fairness [https://perma.cc/4FCD-VNMV] ("Fairness is a vastly complex concept and as people tend to have different values their interpretations of fairness differ as well.").

[165] *See* So, *supra* note 164.

[166] Indeed, the Practitioner's Guide to COMPAS Core itself cites to a 2018 study that concluded from "a thorough examination of risk assessment fairness in criminal justice settings" that "[e]xcept in trivial cases, it is impossible to maximize accuracy and fairness at the same time and impossible simultaneously to satisfy all kinds of fairness." *Practitioner's Guide to COMPAS Core*, NORTHPOINTE INC. D/B/A EQUIVANT 1, 19 (2019), https://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf [https://perma.cc/CMG4-R2QA] (quoting Richard Berk et al., *Fairness in Criminal Justice Risk Assessments: The State of the Art*, 50 SOC. METHODS & RES. 1, 1 (2018)); *see also* Katherine B. Forrest, *When AI Tools Are Designed for Accuracy Over Fairness*, N.Y. L.J., https://www.law.com/newyorklawjournal/2020/10/06/when-ai-tools-are-designed-for-accuracy-over-fairness [https://perma.cc/K4KU-VSCL].

[167] For a global inventory of AI Ethics Guidelines, see *AI Ethics Guidelines Global Inventory*, ALGORITHM WATCH, https://inventory.algorithmwatch.org [https://perma.cc/6XEG-W3DX].

[168] *See* Karen Steinhauser, *Everyone Is a Little Bit Biased*, ABA, https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased [https://perma.cc/P5WR-2KF7]; Keith Payne et al., *How to Think About 'Implicit Bias,'* SCI. AM., https://www.scientificamerican.com/article/how-to-think-about-implicit-bias [https://perma.cc/Y8DH-PQY8]; Perry Hinton, *Implicit Stereotypes and the Predictive Brain: Cognition and Culture in 'Biased' Person Perception*, 3 PALGRAVE COMM., Art. No. 17086 (2017); the interested reader can test their own implicit biases using the Harvard Implicit Association ("HIA") Test. *See* Project Implicit, HARVARD, https://implicit.harvard.edu/implicit [https://perma.cc/LZ7S-RNX7].

[169] *See Confirmation Bias*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Confirmation_bias&oldid=1001137946 [https://perma.cc/2MRU-Z77M]; Bettina J. Casad, *Confirmation Bias*, BRITANNICA, https://www.britannica.com/science/confirmation-bias [https://perma.cc/M5T8-BVZJ].

There are other biases that are more specific to algorithms and their outputs. Berkeley J. Dietvorst and his colleagues at the University of Pennsylvania wrote a seminal paper on *algorithm aversion* showing that, even though in many circumstances automated decision-making systems can more accurately predict the future than human forecasters,[170] when forecasters are given the choice of whether to use a human prediction or an algorithmic one, they tend to favor the former even when they have observed the algorithmic predictor repeatedly outperform the human forecaster.[171] Dietvorst et al. posit that this is because people more quickly lose confidence in algorithms than in humans when they make the same mistakes, holding the algorithms to a higher standard.[172] This phenomenon can be observed, for example, with autonomous vehicles. Even though evidence shows that these vehicles are likely to reduce car accidents by 94%, people continue to fear them because what they remember is Google's relatively limited number of accidents.[173]

On the other side of the coin is the problem of *automation bias*, the tendency for humans to favor results from automated decision-making systems and to ignore or discount contradictory evidence generated separately from such systems, even if it is correct, because they believe that the automated decision-making system is somehow more "trustworthy" or "objective."[174] A classic example of this is the case of three foreign tourists vacationing in Australia who followed the instructions of their GPS system and drove straight into Moreton Bay so far that they were forced to abandon their vehicle in the water.[175] We see both of these tendencies at work with the

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[170] *See* Dietvorst et al., *supra* note 19, at 123

[171] *See id.*

[172] *See id.*

[173] *See* Teena Maddox, *How Autonomous Vehicles Could Save Over 350k Lives in the US and Millions Worldwide*, ZDNET, https://www.zdnet.com/article/how-autonomous-vehicles-could-save-over-350k-lives-in-the-us-and-millions-worldwide [https://perma.cc/9JLA-EMBX] ("[Department of Transportation ("DOT")] researchers estimate that fully autonomous vehicles, also known as self-driving cars, could reduce fatalities by up to 94% by eliminating those accidents that are due to human error."). *But see* Matthew Hutson, *People Don't Trust Driverless Cars. Researchers Are Trying To Change That*, SCI., https://www.sciencemag.org/news/2017/12/people-don-t-trust-driverless-cars-researchers-are-trying-change [https://perma.cc/YQ6Y-ML3U] ("Unnerved by the idea of not being in control—and by news of semi-AVs that have crashed, in one case killing the owner—many consumers are apprehensive.").

[174] *See Automation Bias*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Automation_bias&oldid=1001875428 [https://perma.cc/UAE5-EYCK]; Mary L. Cummings, *Automation Bias in Intelligent Time Critical Decision-Making Support Systems*, PROC. AM. INST. OF AERONAUTICS & ASTRONAUTICS ("AIAA") 1ST INTELLIGENT SYS. TECH. CONF. (2014).

[175] *See* Hillary Hanson, *GPS Leads Japanese Tourists to Drive into Australian Bay*, HUFFPOST US, https://www.huffpost.com/entry/gps-tourists-australia_n_1363823 [https://perma.cc/D575-HG68]. *See also What Is Automation Bias and How Can You Prevent It*, PA CONSULTING, https://www.paconsulting.com/insights/what-is-automation-bias-how-to-prevent

use of RNA tools: States and judges both under- and over-rely on them.[176] They ignore RNAs in determining treatments for offenders—the very purpose for which they were designed—and rely on them for sentencing—a use for which their own developer expressed concerns.[177]

B. Lack of Robust Testing for Validity and Reliability

A second serious concern with algorithms and their outputs is the lack of proper evaluation of many AI systems commonly used today. Unlike drugs, which must undergo a rigorous testing and approval process under the auspices of the U.S. Food and Drug Administration ("FDA"), algorithms—even those that can have a significant impact on legal and human rights—do not need to undergo any evaluation at all prior to the time that their output is offered into evidence in a civil or criminal trial. And even when testing is performed, it is rarely independent, peer-reviewed, or sufficiently transparent to be properly assessed by those competent to do so. There are no standards for the conduct of AI product testing and many tools that are in use today would not pass muster if they were subjected to the scientific method.

Validity is the quality of being correct or true, in other words, whether and how *accurately* an AI system measures (*i.e.*, classifies or predicts) what it is intended to measure.[178] *Reliability* refers to the *consistency* of the output of an AI system; that is, whether the same (or a highly correlated) result is obtained under the same set of circumstances.[179] Both need to be measured and both need to exist for an AI system to be trustworthy. As mentioned with respect to COMPAS, focus on overall "accuracy,"[180] at the expense of

[https://perma.cc/S5Z7-3CLX] ("This sort of thing happens so often in Death Valley, California, that the local rangers have coined the term 'death by GPS.'").

[176] *See* Rhys Dipshan, *Judges May Be Using Risk Assessments Too Much—and Too Little*, LEGALTECH NEWS, https://www.law.com/legaltechnews/2020/07/16/judges-may-be-using-risk-assessments-too-much-and-too-little [https://perma.cc/CUT7-HMTF].

[177] *See id.*; *See also* Angwin et al, *supra* note 134 ("I didn't design this software to be used in sentencing. . . . But as time went on, I started realizing that so many decisions are made, you know, in the courts. So I gradually softened on whether this could be used in the courts or not.").

[178] *See* Roberta Heale & Alison Twycross, *Validity and Reliability in Quantitative Studies*, 18 EVID.-BASED NURS. 66 (July 15, 2015).

[179] *See id.*

[180] According to *Pro Publica's* analysis, COMPAS' predictive validity is at best moderate. The score has proved remarkably unreliable in forecasting violent crime: Only 20% of the people predicted to commit violent crimes in next two years went on to do so. When a full range of crimes were considered—including misdemeanors and driving with an expired license—of those deemed likely to re-offend, only 61% were arrested for a subsequent crime within the next two years. *See* Angwin et al., *supra* note 134. There are others, however, who have criticized *Pro Publica's* findings. *See, e.g.*, Flores et al., *supra* note 143

measures that illuminate false-positive and false-negative errors,[181] and other metrics, can mislead users about the quality of the classifications or predictions made by an AI system.[182] As of 2016, when the *Pro Publica* piece was written, even though COMPAS was being used in connection with sentencing, it had never been tested by the U.S. Sentencing Commission.[183] While the tool was developed using a nation-wide training sample, it was not always tested using a sample of local offenders before it was applied such that there was a reason to believe that the training set was reflective of the population on which the algorithm would be used.[184] Since the publication of

[181] "A false positive is an error in binary classification in which a test result incorrectly indicates the presence of a condition such as a disease when the disease is not present, while a false negative is the opposite error where the test result incorrectly fails to indicate the presence of a condition when it is present. These are the two kinds of errors in a binary test, in contrast to the two kinds of correct result (a true positive and a true negative)." *False Positives and False Negatives*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=False_positives_and_false_negatives&oldid=1001661831 [https://perma.cc/J2F3-AQT9]. In statistical hypothesis testing, these are typically referred to as "Type I" and "Type II" errors, respectively. *See id*.; *See also supra* note 162.

[182] *See* Jason Brownlee, *Classification Accuracy Is Not Enough: More Performance Measures You Can Use*, MACHINE LEARNING MASTERY (Mar. 21, 2014), https://machinelearningmastery.com/classification-accuracy-is-not-enough-more-performance-measures-you-can-use [https://perma.cc/GM8H-BER5]. This problem is sometimes referred to as the "accuracy paradox." *See Accuracy Paradox*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Accuracy_paradox&oldid=979551882 [https://perma.cc/Q7XA-XGJB] ("The accuracy paradox is the paradoxical finding that accuracy is not a good metric for predictive models when classifying in predictive analytics. This is because a simple model may have a high level of accuracy but be too crude to be useful. For example, if the incidence of category A is dominant, being found in 99% of cases, then predicting that *every* case is category A will have an accuracy of 99%. Precision [*i.e.*, the proportion of cases predicted to be in category A that are actually in category A] and recall [*i.e.*, the proportion of actual cases in category A that are correctly predicted to be in category A] are better measures in such cases. The underlying issue is that there is a class imbalance between the positive class and the negative class," which causes accuracy to be a misleading measure) (emphasis in original). For definitions of "precision" and "recall" in the context of information retrieval, see Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 25, 27 (2013) (Precision is "[t]he fraction of Documents identified as Relevant by a search or review effort, that are in fact Relevant;" Recall is "[t]he Fraction of Relevant Documents that are identified as Relevant by a search or review effort."). *See also Precision and Recall*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Precision_and_recall&oldid=1001750137 [https://perma.cc/R59H-DTYB]. With respect to COMPAS specifically, Dr. Jennifer Skeem, Professor of Public Policy at the University of California at Berkeley notes "If you try to equalize false positive rates [between Black and White people], you may find that your calibration suffers, you're going to misclassify people in terms of their likelihood of reoffending. But if you have really good calibration, you're going to have unbalanced error rates, and that's really the conundrum." *See* Rhys Dipshan & Victoria Hudgens, *Risk Assessment Tools Aren't Immune from Systematic Bias. So Why Use Them?*, LEGALTECH NEWS (July 17, 2021), https://www.law.com/legaltechnews/2020/07/17/risk-assessment-tools-arent-immune-from-systemic-bias-so-why-use-them [https://perma.cc/BKK4-64QT].

[183] *See* Angwin et al., *supra* note 134.

[184] *See* Wisconsin v. Loomis, 371 Wis. 2d 235 (2016), *cert. denied*, 137 S. Ct. 2290 (2017) ¶ 27 (citing to expert testimony opining that "The Court does not know how the COMPAS compares that individual's history with the population that it's comparing them with. The Court doesn't even know whether that population is a Wisconsin population, a New York population, a California population. . .

the *Pro Publica* article, there has been greater testing and evaluation of RNAs, but some still question whether there has been enough, and whether they should ever have been deployed without stringent prior validation.[185]

.”). *See also* Rhys Dipshan, *Same Score, Different Impact: States Can Decide Who Assessment Tech Deems ‘High Risk,’* LEGALTECH NEWS (July 15, 2020), https://www.law.com/legaltechnews/2020/07/15/same-score-different-impact-states-can-decide-whom-assessment-tech-deems-high-risk [https://perma.cc/3CBT-D9WY] (“Decisions about risk thresholds . . . have to be made for each criminal justice population. After all, risk scores and their related failure rates are specific to particular populations, not just within a jurisdiction, but within different parts of the criminal justice system as well. . . . Risk factors are changed to ensure a tool accounts for a locality’s specific characteristics.”); Rhys Dipshan et al., *States vs. Vendors: Are Some Risk Assessment Tools Better Than Others?*, LEGALTECH NEWS (July 14, 2020), https://www.law.com/legaltechnews/2020/07/14/states-vs-vendors-are-some-risk-assessment-tools-better-than-others [https://perma.cc/J43F-E4AM] (“some states and jurisdictions choose to build their own tool[s] . . . because of the notion that developing and validating an instrument for their specific population will be more accurate than validating one originally built for another population. . . . ‘You get better results if you develop your instrument and test it on your own population.’”); PARTNERSHIP ON AI, *supra* note 137 (“[V]alidating a tool in one context says little about whether that tool is valid in another context. . . . [A] risk assessment might predict future arrests quite well . . . in one jurisdiction, but not another.”; “Given that validity often depends on local context to ensure a tool’s utility, where possible, the data . . . should be collected on a jurisdiction-by-jurisdiction basis in order to capture significant differences in geography, transportation, and local procedure[s]. . . .”).

[185] *See* Alex Chohlas-Wood, *Understanding Risk Assessment Instruments in Criminal Justice*, BROOKINGS INST. (June 19, 2020), https://www.brookings.edu/research/understanding-risk-assessment-instruments-in-criminal-justice [https://perma.cc/XBE6-2QG7] (“Though many studies have simulated the impact of RAIs [risk assessment instruments], research on their real-world use is limited.”; “Finally—and perhaps most important—algorithms should be evaluated as they are implemented. It is possible that participants in any complicated system will react in unexpected ways to a new policy (e.g., by selectively using RAI predictions to penalize communities of color). Given this risk, policymakers should carefully monitor behavior and outcomes as each new algorithm is introduced and should continue routine monitoring once a program is established to understand longer-term effects. These studies will ultimately be key in assessing whether algorithmic innovations generate the impacts they aspire to achieve.”); PARTNERSHIP ON AI, *supra* note 137, at 3, 11, 15, 33 (“[The Partnership] has outlined ten largely unfulfilled requirements that jurisdictions should weigh heavily and address before further use of risk assessment tools in the criminal justice system. . . . Challenges in using these tools [include] . . . [c]oncerns about the validity, accuracy, and bias in the tools themselves. . . .”; “An overwhelming majority of the Partnership’s consulted experts agreed that current risk assessment tools are not ready for use in helping to make decisions to detain criminal defendants without the use of an individualized hearing.”; “In combination with concerns about accuracy and validity, [challenges with bias] present significant concern for the use of risk assessment tools in criminal justice domains.”; “One approach is for jurisdictions to cease using the tools in decisions to detain individuals until they can be shown to have overcome the numerous validity, bias, transparency, procedural, and governance problems that currently beset them.”); Alexander Babuta & Marion Oswald, *Data Analytics and Algorithmic Bias in Policing* 1, 7 (RUSI 2019) (“Independent, methodologically robust evaluation of trials is essential to demonstrate the accuracy and effectiveness of a particular tool or method. If such evaluation does not demonstrate the tool’s effectiveness and proportionality, continued use would raise significant legal concerns regarding whether use of the tool was justified to fulfil a particular policing function, requiring the police force to review its design and operational use.”). Babuta and Oswald’s report focuses on both predictive crime mapping, as well as risk assessment, both of which are referred to as forms of “predicting policing.” *Id.* at 4. *See also Dipshan*, *supra* note 184 (“[V]alidations don’t always happen as expected. Some jurisdictions that lack criminal justice outcome data, for instance, will implement a third-party tool without first testing it on their own population. . . . States will also differ in how often they revalidate

While the issue of evaluation is addressed in more detail in section VIII below, discussing the factors that ought to be considered by lawyers and judges when the results of an AI analysis is being offered into evidence in a civil or criminal trial, it is imperative that both groups understand the scientific method and statistical measurement so they can properly assess the validity, reliability, and error rates of AI systems. Often, they lack the training to do so.

C. Failure to Monitor for Function Creep

Closely related to the problem of inadequate testing and evaluation is the problem of *function creep*, which refers to the gradual widening of the use of a technology or system beyond the use for which it was originally intended, often, but not always, without validation and/or leading to an invasion of privacy.[186] COMPAS, again, provides a good example of this. As explained above, COMPAS was originally designed for assessing the

tools to confirm the instruments still work as intended, a necessity given demographic changes and new research findings. While some revalidations are required every few years by law in some states, in others, their timing can depend as much on available resources as need."); Stephanie LaCambra et al., *Recidivism Risk Assessments Won't Fix the Criminal Justice System*, ELECTRONIC FRONTIER FOUND., (Dec. 21, 2018), https://www.eff.org/deeplinks/2018/12/recidivism-risk-assessments-wont-fix-criminal-justice-system [https://perma.cc/Y2FC-KTNL] ("Risk assessment tools are often built using incomplete or inaccurate data because the representative dataset needed to correctly predict recidivism simply doesn't exist. There is no reason to believe that the crime data we do have is sufficiently accurate to make reliable predictions."; "Risk assessment tools must be *evaluated by independent scientific researchers*—not the DOJ itself or a private vendor. To the extent Congress intends the law to reduce disparate impacts on protected classes, independent research must verify that the system can accomplish that and not make the problem worse. Those evaluations should be made public.") (emphasis in original); Thomas Douglas et al., *Risk assessment Tools in Criminal Justice and Forensic Psychiatry: The Need for Better Data*, 42 EUR. PSYCHIATRY 134, 134 (May 2017) ("Violence risk assessment tools are increasingly used within criminal justice and forensic psychiatry, however there is little relevant, reliable and unbiased data regarding their predictive accuracy."). The Law Commission of Ontario ("LCO") recently raised the question of whether Canada should impose "a moratorium on algorithmic risk assessments or similar tools in the Canadian criminal justice system," noting that "Many advocates in the United States would answer . . . affirmatively. This belief is based on the many significant and legitimate criticisms of these systems as presently deployed." *See* LCO, *The Rise and Fall of AI and Algorithms in American Criminal Justice*: LESSONS FOR CANADA 1, 41 (2020). For a recent paper discussing three guiding principles—auditability, transparency, and consistency—that should govern the use of RNA tools to help ensure due process for defendants, see John Villasenor & Virginia Foggo, *Artificial Intelligence, Due Process, and Criminal Sentencing*, 2020 MICH. ST. L. REV. 295 (2020).

[186] *See Function Creep*, DICTIONARY.COM, https://www.dictionary.com/browse/function-creep [https://perma.cc/5W77-9W5S]. *See also Function Creep: The Frankenstein of Privacy*, VICTORIA MCINTOSH (Oct. 1, 2018), https://victoriamcintosh.com/function-creep-the-frankenstein-of-privacy [https://perma.cc/KE63-AYJE]. Oddly, while the term is used in hundreds of articles every year, the phenomenon is largely unresearched and there are few, if any, papers written on the phenomenon itself. Bert-Jaap Koops, *The Concept of Function Creep*, 13 LAW, INNOVATION, & TECH. 29, 30 (2021). "What distinguishes function-creep from . . . innovat[ion] . . . [is that it] denotes some qualitative change [in functionality] . . . that causes concern not only . . . because of the change itself, but also because the change is insufficiently acknowledged as transformative and in need of discussion." *Id.* at 53–55.

treatment needs of offenders, but its use morphed from that to pre-trial release and bail decisions, and from there to sentencing, despite its lack of validation for the additional purposes.[187]

Another concern relates to full-body security scanners used at airports and court houses. While the U.S. Transportation Security Administration ("TSA") claims that its equipment is configured so that images cannot be recorded, it nonetheless requires that all airport body scanners that it purchases have a hard drive and Internet connectivity so that they are able to store and transmit images for the purposes of "testing, training, and evaluation."[188] In 2010, the U.S. Marshals Service acknowledged that it surreptitiously recorded tens of thousands of images at a single Florida checkpoint and that the machine it used could even be operated remotely.[189] The purposes for which this data was collected remains unclear.

A recent example of function creep that implicates AI is Services Australia's use of the country's national facial biometrics database—developed for a different purpose—to confirm the identities of people who had their self-identifying documents ("IDs") destroyed as a result of catastrophic summer bushfires and were in need of disaster relief because of displacement.[190] While arguably a laudable application, and while the individuals involved were asked to provide their consent to the process, the Department of Home Affairs provided little detail about how the service was deployed and how it might be used in the future.[191] Apparently, in this case, a webcam setup was used to capture the facial images of those who lost their

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[187] "Most modern risk tools were originally designed to provide judges with insight into the types of treatment that an individual might need—from drug treatment to mental health counseling." Angwin et al., *supra* note 134. COMPAS's developer himself "testified that he didn't design his software to be used in sentencing. 'I wanted to stay away from the courts . . . [b]ut as time went on I started realizing that so many decisions are made, you know, in the courts. So, I gradually softened on whether this could be used in the courts or not'. . . . Still, . . . 'I don't like the idea myself of COMPAS being the sole evidence that a decision would be based upon.'" *Id*.; *See also* PARTNERSHIP ON AI, *supra* note 137, at 22 note 42 ("Notably, part of the holding in Loomis, mandated a disclosure in any Presentence Investigation Report that COMPAS risk assessment information 'was not developed for use at sentencing, but was intended for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole.'").

[188] Declan McCullagh, *Feds Found Storing Checkpoint Body Image Scan Images*, CBS NEWS (Aug. 4, 2010, 10:35 AM), https://www.cbsnews.com/news/feds-found-storing-checkpoint-body-scan-images [https://perma.cc/5HM7-UANJ].

[189] *See id.*

[190] *See* Justin Hendry, *Services Australia Put Face Matching to Work for Bushfire Relief Payments*, ITNEWS (June 5, 2020, 11:50 AM), https://www.itnews.com.au/news/services-australia-put-face-matching-to-work-for-bushfire-relief-payments-548978 [https://perma.cc/96T4-VFMP]; *see also* Marie Johnson, *Face Recognition, Function Creep and Democracy*, INNOVATIONAUS (June 9, 2020), https://www.innovationaus.com/face-recognition-function-creep-and-democracy [https://perma.cc/MMS8-UWFR].

[191] *See* Hendry, *supra* note 190.

IDs and sought disaster relief, and those photos were then matched to photos from passports, visas, and driver's licenses.[192] Even when the repurposing appears to be benign, lawyers and judges need to ensure that AI tools are being used for their intended purpose and that any expansion in their use is lawful and supported by empirical evidence.

As seen from the examples above, function creep can easily bleed into invasions of privacy, our next topic.

D. Failure to Ensure Data Privacy and Data Protection

It has been said that data is the new oil.[193] Supervised machine-learning algorithms, particularly those that employ deep learning, require massive amounts of labeled data to function. Where does this data come from? Sources include Internet searches and clicks, buying habits, and lifestyle and behavioral data gathered from public records, social network usage, mobile phones, video surveillance systems, sensors, and, more recently, the Internet of Things ("IoT"). Organizations analyze this information to classify individuals into different groups, often by using algorithms to identify correlations between different characteristics or behaviors taken from different data sets to create profiles about individuals. But, as most of us learned in grade school, "correlation does not imply causation."[194] That adage is often forgotten when it comes to AI applications.

"Big data" refers to the ways that organizations, including both private business and government, combine diverse datasets and then use statistics and other data-mining techniques to extract otherwise hidden information.

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[192] *Id.*

[193] *See, e.g.*, *The World's Most Valuable Resource Is No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data [https://perma.cc/2K64-CK7T]; *see also* Mitt Rosebrough, *Is Data Really 'The New Oil'?*, KENWAY CONSULTING (Apr. 27, 2020), https://www.kenwayconsulting.com/blog/data-is-the-new-oil [https://perma.cc/3DUR-QWKK]; *see also* Kiran Bhageshpur, *Data Is The New Oil - - And That's A Good Thing*, FORBES (Nov. 15, 2019, 8:15 AM), https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=3a287d6c7304 [https://perma.cc/HKK9-XMJ5]; Joris Toonders, *Data Is the New Oil of the Digital Economy*, WIRED (July 2014), https://www.wired.com/insights/2014/07/data-new-oil-digital-economy [https://perma.cc/AN44-ZKZB].

[194] *See, e.g.*, Seema Singh, *Why Correlation Does Not Imply Causation?*, TOWARDS DATA SCI. (Aug. 24, 2018), https://towardsdatascience.com/why-correlation-does-not-imply-causation-5b99790df07e [https://perma.cc/HZ8W-M9HQ]; Nathan Green, *Correlation Is Not Causation*, THE GUARDIAN (Jan. 6, 2012), https://www.theguardian.com/science/blog/2012/jan/06/correlation-causation [https://perma.cc/7MP5-H4ZZ]; *Correlation Does Not Imply Causation*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Correlation_does_not_imply_causation&oldid=1001822743 [https://perma.cc/5HH6-35PY]. At least one commentator believes that correlation is really all that matters in the age of big data. *See* Anderson, *supra* note 93 ("Petabytes allow us to say: 'Correlation is enough.'"; "Correlation supersedes causation, and science can advance even without coherent models, unified theories, or really any mechanistic explanation at all.").

These approaches raise serious privacy and fairness concerns. The profiles that result from these methods are then used to discover information about an individual's characteristics or preferences, to predict their future behavior, and/or to make decisions about them, often without appropriate disclosure. A good example of the danger of these systems is the Chinese Communist Party's (and similar private Chinese organizations') use of social credit scores for judging citizens' trustworthiness.[195] The data used by such rating systems can include anything from not paying a loan or a fine on time, to spending "frivolously," to misbehaving on a train by playing music too loud, to lighting up in a smoke-free zone, to walking a dog off-leash, to standing up a taxi, to driving through a red light, to spreading "fake news," to losing a defamation case against someone, to spending too much time playing video games.[196] One city, Rongcheng, gives all of its residents 1,000 points to start and deducts from these for "bad" behavior, such as traffic violations or stealing electricity, or adds points for "good behavior," such as donating to charity.[197] Even dating sites like Baihe allow potential partners to not only assess each other's looks, but also their social credit scores.[198] The consequences of low scores can be more serious than simply losing a date; they include the loss of educational and employment opportunities, as well as transportation restrictions (*e.g.*, the inability to purchase business class train tickets or to lodge at certain hotels).[199] Those with high scores get perks such as discounts on utility bills, the ability to book hotel rooms without deposits, and faster application processing to travel abroad.[200] There is little, if any, opportunity to challenge one's score.

Corporations in the United States are increasingly using AI to divide consumers along class lines. In fact, financial services institutions have used

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[195] *See* Amanda Lee, *What Is China's Social Credit System and Why Is It Controversial?*, SOUTH CHINA MORNING POST (Aug. 9, 2020, 12:00 PM), https://www.scmp.com/economy/china-economy/article/3096090/what-chinas-social-credit-system-and-why-it-controversial [https://perma.cc/4AF5-MLMW]; Nicole Kobie, *The Complicated Truth about China's Social Credit System*, WIRED (July 6, 2019, 12:00 PM), https://www.wired.co.uk/article/china-social-credit-system-explained [https://perma.cc/7NAX-Q9SF].

[196] Nadre Nittle, *Spend 'Frivolously' and Be Penalized under China's New Social Credit System*, VOX (Nov. 2, 2018, 6:50 PM), https://www.vox.com/the-goods/2018/11/2/18057450/china-social-credit-score-spend-frivolously-video-games [https://perma.cc/B9AW-P48C].

[197] *See* Kobie, *supra* note 195.

[198] *See id.*; *see also* Celia Hatton, *China 'Social Credit': Beijing Sets Up Huge System*, BBC NEWS (Oct. 26, 2015), https://www.bbc.com/news/world-asia-china-34592186 [https://perma.cc/R5UN-2LLE] ("China's biggest matchmaking service, Baihe, has teamed up with Sesame [Credit, the financial wing of Alibaba] to promote clients with good credit scores, giving them prominent spots on the company's website. 'A person's appearance is very important,' explains Baihe's vice-president Zhuan Yirong. 'But it's more important to be able to make a living. Your partner's fortune guarantees a comfortable life.'").

[199] *See* Kobie, *supra* note 195; Nittle, *supra* note 196.

[200] *See* Nittle, *supra* note 196.

algorithms for these purposes for decades. The idea that a person's financial (*i.e.*, debt and credit) history and other characteristics reflect trustworthiness and reliability has long influenced employment and other decisions and can increasingly be expected to do so as AI continues to proliferate.

The collection of consumer data is often accomplished without meaningful informed consent. In circumstances where consent has been given, the subsequent sale of data to others may be inconsistent with reasonable expectations about its use, especially when it is being repurposed in unexpected ways to draw conclusions about individuals, with potentially harmful effects. Fairness dictates transparency in how data will be collected and used, and by whom; how long it will be retained; and the potential negative impact of the intended use of the data on the individual. Concerns about these issues have severely impeded the acceptance of contact tracing applications developed for COVID-19.[201]

Along with the collection of vast amounts of data for AI algorithms come the increasing risks of privacy violations and data breach. There is a tension between more accurate predictions based on larger, more representative data sets, and encroachment on privacy. Many commentators have scoffed that privacy is a dead letter.[202] They may be right. An early example of the illusion of anonymity occurred in 2006 when AOL released a large amount of data to the public showing user search requests. It turned out that some users could be identified by name based on their search queries.[203] This was followed by a scandal in 2008, in which two computer

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[201] *See* Kayla Hui, *Privacy Concerns Continue to Prevent Contract Tracing App Use*, VERYWELLHEALTH (Nov. 28, 2020), https://www.verywellhealth.com/family-tension-privacy-contact-tracing-app-covid-19-5088798 [https://perma.cc/6ZB6-4WCS]; Alejandro De La Garza, *Contract Tracing Apps Were Big Tech's Best Idea for Fighting COVID-19. Why Haven't They Helped?*, TIME MAG. (Nov. 10, 2020, 7:00 AM), https://time.com/5905772/covid-19-contact-tracing-apps [https://perma.cc/2QP9-PY5T]; Sarah Kreps et al., *Contract-tracing Apps Face Serious Adoption Obstacles*, BROOKINGS INST. TECHSTREAM (May 20, 2020), https://www.brookings.edu/techstream/contact-tracing-apps-face-serious-adoption-obstacles [https://perma.cc/QQB4-VZ6H].

[202] Sun Microsystems' CEO is claimed to have said in an interview with reporters and industry analysts "You have zero privacy anyway. Get over it!" Polly Sprenger, *Sun on Privacy: 'Get over it,'* WIRED (Jan. 26, 1999, 12:00 AM), https://www.wired.com/1999/01/sun-on-privacy-get-over-it [https://perma.cc/K3SZ-PTKY]. *See also*, *e.g.*, Summer Lewis, *Is Privacy a Dead Letter?*, IP OSGOODE (Oct. 30, 2019), https://www.iposgoode.ca/2019/10/is-privacy-a-dead-letter [https://perma.cc/9TPC-BEGX]; Henry Mance, *Is Privacy Dead?*, FIN. TIMES (July 19, 2019), https://www.ft.com/content/c4288d72-a7d0-11e9-984c-fac8325aaa04 [https://perma.cc/F32L-QBN3]; Judith Rauhofer, *Privacy Is Dead, Get Over It! Information Privacy and the Dream of Risk-Free Society*, 17 INFO. & COMM. TECH. L. 185 (2008).

[203] *See AOL Search Data Leak*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=AOL_search_data_leak&oldid=970872440 [https://perma.cc/RR8X-MVPB]. *See also* Michael Barbaro & Tom Zeller Jr., *A Face Is Exposed for AOL*

scientists were able to re-identify Netflix users in a database of customer records that Netflix had made available to researchers in a competition intended to improve the company's recommender system,[204] and another in 2013, by a study in which a computer scientist at Harvard was able to re-identify patients by name in a supposedly anonymized data set made publicly available by Washington State.[205] In a 2015 study entitled *Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata*, researchers analyzed credit card transactions made by 1.1 million people in 10,000 stores over a three-month period.[206] The data contained basic information about the date of each transaction, the amount charged, and the name of the store.[207] Although the data had been anonymized by removing personal information such as names and account numbers, the uniqueness of people's behavior made it easy to single them out.[208] It turned out that by knowing just four pieces of information, the researchers were able to re-identify 90 % of the shoppers as unique individuals, and to uncover their records.[209] By combining their "unicity" with publicly available information, such as posts on social media, it was possible to re-identify many of the individuals by name.[210] Since then, a reporter at Gawker was able to re-identify celebrities by name in an anonymized database of taxi records made public by New York City's taxi and Limousine Commission.[211] These examples call into question the standard approaches many companies, hospitals, government agencies, and other organizations use to anonymize

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Searcher No. 4417749, N.Y. TIMES (Aug. 9, 2006), https://www.nytimes.com/2006/08/09/technology/09aol.html [https://perma.cc/X9TT-3LHT].

[204] Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Sparse Data Sets*, PROC. OF THE IEEE SYMP. ON SECURITY AND PRIV. PROC. 111–25 (2008).

[205] LATANYA SWEENEY, MATCHING KNOWN PATIENTS TO HEALTH RECORDS IN WASHINGTON STATE DATA (SSRN 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289850 [https://perma.cc/T4D6-HWVS].

[206] Natasha Singer, *With a Few Bits of Data, Researchers Identify 'Anonymous' People*, N. Y. TIMES: BITS (Jan. 29, 2015, 2:01 PM), https://bits.blogs.nytimes.com/2015/01/29/with-a-few-bits-of-data-researchers-identify-anonymous-people [https://perma.cc/3Q2Z-7EMJ]; Yves-Alexandre de Montjoye et al., *Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata*, 347 SCI. 536 (2015). *But see* David Sánchez et al., *Comment on* "*Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata,"* 351 SCI. 1274 (2016) (arguing that "anonymization can be performed by techniques well established in the literature").

[207] *See* Montjoye et al., *supra* note 206, at 537–38.

[208] *See id.* at 538–39.

[209] *See* Singer, *supra* note 206.

[210] *Id.* "Unicity" refers to "the quality or state of being unique of its kind." *Unicity*, MERRIAM WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/unicity [https://perma.cc/ZE2C-Z9P2].

[211] *See* J.K. Trotter, *Public NYC Taxicab Database Lets You See How Celebrities Tip*, GAWKER (Oct. 23, 2014, 12:00 PM), https://gawker.com/the-public-nyc-taxicab-database-that-accidentally-track-1646724546 [https://perma.cc/BHX2-DCY9].

sensitive information. This problem will only increase as AI gets better at crunching information from disparate data sources.

There is presently very little law in the United States about how aggregated data and profiling may be used. This is not the case in the European Union ("EU"), where in 2018, the General Data Protection Regulation ("GDPR") was enacted.[212] The GDPR provides certain protections for the "processing" of personal data of data subjects in the EU.[213] While an extended discussion of the GDPR is beyond the scope of this paper, we will briefly mention a few protections that relate to "big data" and the use of AI.

Article 7 of the GDPR address the provisions relating to consent, which must be voluntary, freely given, informed, and unambiguous,[214] more so than those terms are typically understood in the United States. Consent must be obtained for the specific purpose for which the data will be used, so there cannot be undisclosed repurposing of the data.[215] Relatedly, Article 5(1)(b), which addresses how personal data may be processed (*i.e.*, used), requires that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes."[216] This is referred to as the "purpose limitation."[217] Article 5(1)(c) further states that personal data must be "limited to what is necessary in relation to the purposes for which they are processed."[218] This is referred to as "data minimization."[219]

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[212] *The General Data Protection Regulation Applies in All Member States from 25 May 2018*, EUR-LEX (May 24, 2018), https://eur-lex.europa.eu/content/news/general-data-protection-regulation-GDPR-applies-from-25-May-2018.html [https://perma.cc/L479-VS62]. Canada has recently proposed similar legislation. *See* News Release, Innovation, Sci. and Econ. Dev. Canada, *New Proposed Law to Better Protect Canadians' Privacy and Increase Their Control Over Their Data and Personal Information*, CANADA.CA (Nov. 17, 2020), https://www.canada.ca/en/innovation-science-economic-development/news/2020/11/new-proposed-law-to-better-protect-canadians-privacy-and-increase-their-control-over-their-data-and-personal-information.html [https://perma.cc/RR8W-MDVD].

[213] *See* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, art. 2(1), 2016 O.J. (L 119) 1, 32 [hereinafter "GDPR"] ("This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system."). The GDPR defines "processing" as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." *Id.* at art. 4(2).

[214] See *id.* at art. 7; *see also id.* at 6 (Recital 32).

[215] *See id.* at art. 7(2); *see also id.* at 6 (Recital 32).

[216] *Id.* at art. 5(1)(b); *see also id. at* 7, 9–10 (Recitals 39 and 50).

[217] *See id.* at art. 5(1)(b).

[218] *See id.* at art. 5(1)(c); *see also id.* at 7 (Recital 39).

[219] *See id.* at art. 5(1)(c).

The GDPR also provides for the "Right to Erasure" (a/k/a the "Right to be Forgotten") and Article 7 requires that consent be revocable.[220] Article 17(1) provides the data subject with the right to demand the erasure of personal data about themselves without undue delay, and that the data controller must comply when the data subject withdraws their consent.[221] This may be virtually impossible to accomplish once that data has been ingested into a machine-learning algorithm.

More important for present purposes is Article 22, which prohibits automated decision-making in certain circumstances.[222] Article 22(1) provides that a data subject may not be subject to a decision made solely on the basis of automated processing, including profiling, if that decision produces legal or similar effects.[223] Automated decision-making is the process of making a decision solely by automated means, without any human involvement.[224] These decisions can be based on factual data (*i.e.*, data provided by the data subject or observed about them) as well as digitally created profiles (*i.e.*, derived or inferred data). Examples of automated decisions include an online decision to award credit or a loan, eligibility for social service benefits or the amount of same, recruiting decisions about whether to interview a candidate for a position based on an automated analysis of their résumé, or decisions about providing a medical treatment to patients based on predictions about the likelihood of success given the presence or absence of certain group characteristics. The GDPR restricts only certain, solely automated decisions: ones that either affect a person's legal status or rights, or those that have a significant effect on an individual's circumstances, reputation, behavior, or choices.[225] The latter is not terribly well defined. The GDPR includes other collateral rights such as the right to request a review if an individual is unhappy with a solely automated decision.[226] The decision maker must be able to show how and why it reached the decision it did, and the system should be able to provide an audit trail

[220] *Id.* at art. 7(3), art. 17(1); *see also id.* at 12–13 (Recitals 65 and 66).

[221] *See id.* at art. 17(1); *see also id.* at 12–13 (Recital 65).

[222] *See id.* at art. 22; *see also id.* at 14 (Recital 71).

[223] *See id.* at art. 22(1); *see also id.* at 14 (Recital 71).

[224] Note that there is some variability across jurisdictions concerning the definition of "automated" when it comes to decision-making systems. For example, the Canadian government's definition allows partial human involvement in what is defined as an "automated decision system." *See Directive on Automated Decision-Making: Appendix A - Definitions*, CANADA.CA, https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592#appA [https://perma.cc/RR7E-5DLP] (An automated decision system "[i]ncludes any technology that either assists or replaces the judgment of the human decision-makers."). Others, however, would refer to that as a "semi-automated system." The preferable term for an AI system that has no human involvement may therefore be an "autonomous decision-making system."

[225] GDPR at art. 22(1); *see also id.* at 14 (Recital 71).

[226] *Id.* at art. 22(3); *see also id.* at 14 (Recital 71).

showing the key decision points that formed the basis for the decision.[227] There must be a process in place for individuals to challenge or appeal the decision, taking into account the factors upon which the original decision was based, as well as any additional evidence the individual can assemble to support their claim.[228] Right now, it is primarily up to lawyers and judges in the United States to provide these kinds of protections to individuals that have been subjected to automated decision-making.[229]

In addition to violations of privacy in connection with personal data, AI itself can be alarmingly intrusive. Recently, one of the authors (Grossman) received the following message: "Hi Maura. I'm Neville, the co-founder of XXXXXXXX. I would like to discuss our remote proctoring features for online assessments & see if this can be useful to you. Our tech comes with face recognition, 2 face detection, mobile & book detection geo tagging and much more!" (company name redacted).[230]

Because most educational instruction has moved online during the COVID-19 pandemic, the use of AI-based surveillance techniques for the purposes of proctoring exams has seen an increase at educational institutions. Proctorio is another fully automated "comprehensive learning integrity tool" used to monitor for cheating during exams.[231] It requires the student to sit in a quiet place without anyone else present in the room, which can disproportionally affect students coming from disadvantaged economic

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[227] *See id.* at 14 (Recital 71).

[228] *See also id.* at art. 22(3).

[229] Two notable exceptions to this are the Fair Credit Reporting Act ("FCRA"), enacted in 1970, and the Equal Credit Opportunity Act ("ECOA"), enacted in 1974, both of which address automated decision-making in the context of machine-based credit underwriting models. The Federal Trade Commission ("FTC") Act [of 1914] authority to prohibit unfair and deceptive practices has also been used to address consumer injury arising from the use of AI and automated decision-making. *See* Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM'N (Apr. 8, 2020, 9:58 AM), https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms [https://perma.cc/K9Y8-5Z4V]. In a recent case involving a photo application that the FTC claimed deceived consumers about the use of facial recognition technology and the retention of photos and videos of users who had deactivated their accounts, as part of the proposed settlement with the company, Everalbum, Inc., the company was not only required to "obtain consumers' express consent before using facial recognition technology on their photos and videos," but also to "delete models and algorithms it developed by [impermissibly] using the photos and videos uploaded by its users." Press Release, *Fed. Trade Comm'n, California Company Settles FTC Allegations It Deceived Consumers about use of Facial Recognition in Photo Storage App*, FTC.GOV (Jan. 11, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/california-company-settles-ftc-allegations-it-deceived-consumers [https://perma.cc/UQ7Z-KTFV].

[230] Invitation from Neville Katila, Co-Founder & Director at Eduswitch Solutions Private Limited, to connect on LinkedIn (Sept. 5, 2020) (on file with author Grossman).

[231] *See* PROCTORIO, https://proctorio.com [https://perma.cc/P8E6-KN9T]. For an unvarnished student's take on Proctorio, *see* Cassie Finley (@Angry_Cassie), TWITTER (Sept. 2, 2020, 10:26 PM), https://twitter.com/Angry_Cassie/status/1301360994044850182 [https://perma.cc/D2QT-VV3A].

backgrounds that may only have access to Wi-Fi in public or shared spaces. When registering for the exam, the test-taker must provide a photo ID using the computer's webcam, which will be compared to the test-taker's face on the day of the exam using facial recognition software.[232] The intent behind this process, to make sure that someone else is not taking the exam in place of the test- taker, is not unreasonable. But not everyone looks the same as their photo ID, perhaps because of weight gain or loss, illness, or gender transition. Before the start of the exam, the webcam must slowly be moved around the room to record the test-taker's surroundings,[233] ostensibly to confirm that nearby areas are free of materials that could be used to cheat. But what if the camera records a roommate's illicit paraphernalia or illegal reading materials? Proctorio also records all sounds in the room, flags "suspicious behavior," like taking one's eyes off the screen, and scans for plagiarism.[234] We do not know what other analyses Proctorio performs, and students do not have a choice to refuse such surveillance tools. We can expect to see an expansion in their use into employment and other settings.[235]

E. Lack of Transparency and Explainabilty

One of the most widely proposed solutions to the "black-box"[236] problem of AI is to require transparency and explainability, both in terms of how the AI system works, as well as how it reached its decision (*i.e.*, approved or denied for a loan), classification (*i.e.*, eligible for a prime loan versus a sub-prime loan), or prediction/conclusion (*i.e.*, the user will like the following movies, or the user should make the following grammatical corrections).[237] Cynthia Rudin argues that models for high-stakes decisions

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[232] *See ID Verification*, PROCTORIO, https://proctorio.com/platform/id-verification [https://perma.cc/24DD-BLJW].

[233] *See, e.g.*, *Online Proctoring*, PROCTORIO, https://proctorio.com/products/online-proctoring [https://perma.cc/5JSC-42VC]; *Desk Scan Setting and Exam Environment under Frequently Asked Questions*, PROCTORIO, https://proctorio.com/frequently-asked-questions [https://perma.cc/W8LT-GJ2W].

[234] *See Behavior under Frequently Asked Questions*, PROCTORIO, https://proctorio.com/frequently-asked-questions [https://perma.cc/YB3F-DUBR]; *Plagiarism*, PROCTORIO, https://proctorio.com/platform/plagiarism [https://perma.cc/H7VM-2PKZ].

[235] Recently, a colleague of author Grossman suggested that these kinds of monitoring tools might be useful to judges and adverse parties to assist them in assessing the credibility of witnesses during online depositions, hearings, and trials necessitated by the COVID-19 pandemic. The colleague had not considered the privacy implications.

[236] A "black box" is "anything that has mysterious or unknown internal functions or mechanisms." *Black Box*, MERRIAM WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/black%20box [https://perma.cc/R5CB-E9XD].

[237] *See, e.g.*, Ron Schmelzer, *Towards a More Transparent AI*, FORBES: COGNITIVE WORLD (May 23, 2020, 1:28 PM), https://www.forbes.com/sites/cognitiveworld/2020/05/23/towards-a-more-transparent-ai [https://perma.cc/K8TQ-2G2B]; Greg Satell & Josh Sutton, *We Need AI That Is*

must provide explanations that reveal their inner workings and that algorithms that are inherently black-box should be avoided for such decisions.[238] This remains an area of controversy.

The technical challenge of explaining AI decisions is known as the "interpretability problem,"[239] and an entire domain of research exclusively devoted to this problem has emerged, known as "Explainable AI" ("XAI").[240] Those who advocate for XAI believe that AI can only be trustworthy if it can be explained to humans, although they acknowledge that the level or type of explanation may vary for different applications or users. NIST has outlined four principles of XAI which include (i) explanation—that AI systems deliver accompanying evidence or the reason(s) for all outputs; (ii) meaningful—that AI systems provide explanations that are understandable to individual users; (iii) explanation accuracy—that the explanations correctly reflect the AI system's process for generating the outputs; and (iv) knowledge limits—that the AI system only operates under the conditions for which it was designed or when the system reaches sufficient confidence in its output.[241]

One transparency project, the Defense Advanced Research Project Agency ("DARPA") XAI program, aims to produce "glass-box" models that are explainable to a "human-in-the-loop" without sacrificing AI performance. [242] The term "glass box" has also been used to describe and monitor the inputs and outputs of an AI system with the purpose of verifying

Explainable, Auditable, and Transparent, HARV. BUS. REV. (Oct. 28, 2019), https://hbr.org/2019/10/we-need-ai-that-is-explainable-auditable-and-transparent [https://perma.cc/K4PG-NWQS]; Finale Doshi-Velez & Mason Kortz, *Accountability of AI Under the Law: The Role of Explanation* 11–12 (Berkman Klein Ctr. Working Grp., 2017), https://dash.harvard.edu/bitstream/handle/1/34372584/2017-11_aiexplainability-1.pdf [https://perma.cc/3LN8-M4X9]. For a slightly different take on the issue, see Kartik Hosanagar & Vivian Jair, *We Need Transparency in Algorithms, But Too Much Can Backfire*, HARV. BUS. REV. (July 25, 2018), https://hbr.org/2018/07/we-need-transparency-in-algorithms-but-too-much-can-backfire [https://perma.cc/422H-8ZXB].

[238] *See* Cynthia Rudin, *Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead*, 1 NATURE MACH. INTEL. 206 (May 13, 2019).

[239] *See Explainable Artificial Intelligence*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Explainable_artificial_intelligence&oldid=1002122023 [https://perma.cc/KX52-M2D6].

[240] *See id.*

[241] *See* P. Jonathon Phillips et al., *Four Principles of Explainable Artificial Intelligence* 1–2 (NIST Working Paper No. 8312-draft 2020), https://www.nist.gov/system/files/documents/2020/08/17/NIST%20Explainable%20AI%20Draft%20NISTIR8312%20%281%29.pdf [https://perma.cc/K7M6-9DUM].

[242] WIKIPEDIA, *supra* note 239. *See also* Matt Turek, *Explainable Artificial Intelligence (XAI)*, DARPA, https://www.darpa.mil/program/explainable-artificial-intelligence [https://perma.cc/4QN9-EE8L]; David Gunning & David. W. Aha, *DARPA's Explainable Artificial Intelligence (XAI) Program*, 40 AI MAG. 44 (2019).

the system's adherence to certain social, ethical, and legal values, therefore producing value-based explanations.[243]

The problem with the requirement of transparency is that many modern AI techniques are not explainable because they are naturally opaque. While Decision Trees alone are explainable, when combined into Random Forests (*i.e.*, ensembles of decision trees) they lose a certain degree of interpretability. Unlike code, which can be examined for bugs, it is often not apparent how a machine-learning model has been developed or works, especially when it employs deep learning or neural networks. It may be inexplicable why an algorithm mistakes a 3D-printed turtle for a rifle, or a baseball for an espresso,[244] nor is there typically a way to "bug-fix" a way to the correct model. Developers can only improve the training data, choose different features or parameters to emphasize, and re-assess the output, but otherwise, it may not be obvious why the model is performing poorly. Another challenge is that AI models are not static; they constantly adapt and update over time. While there has been some development of models that are more interpretable, there is typically a tradeoff between accuracy and explainability, so explainable algorithms have not yet achieved widespread adoption, especially when they require a decrease in predictive performance.

It is worth bearing in mind that there is great variability in the situations in which the law requires explanations from humans, such as strict liability, no-fault divorce, national security-related decisions, and jury determinations—where little to no explanation is required—versus direct discrimination, where intent must be proven, or administrative decision-making where, at minimum, the decision must be shown to be non-arbitrary.[245] Even judicial decisions can vary in their need for transparency; decisions on discovery motions are granted considerable deference, while a decision by a judge delivering a criminal sentence must provide a thorough explanation.

Generating explanations is not without cost or effect, and the utility of explanations must be balanced against the time and cost of generating them, including the benefits that are lost by imposing that requirement.[246] By way of example, a doctor who was required to explain every diagnosis and

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[243] WIKIPEDIA, *supra* note 239. For a more technical discussion *see* Arun Rai, *Explainable AI: from Black Box to Glass Box*, 48 J. ACAD. MARKETING SCI. 137 (2020).

[244] *See* James Vincent, *Google's AI Thinks This Turtle Looks Like a Gun, Which Is a Problem*, VERGE, https://www.theverge.com/2017/11/2/16597276/google-ai-image-attacks-adversarial-turtle-rifle-3d-printed [https://perma.cc/YXS9-MBYA]. *See also* Matthew Hutson, *A Turtle or a Rifle? Hackers Fool AIs into Seeing the Wrong Thing*, SCI., https://www.sciencemag.org/news/2018/07/turtle-or-rifle-hackers-easily-fool-ais-seeing-wrong-thing [https://perma.cc/3UU7-NA65].

[245] *See* Doshi-Velez & Kortz, *supra* note 237, at 5–6.

[246] *Id.* at 3.

treatment plan would likely make fewer mistakes, but would also see far fewer patients because they were busy making patient notes.[247] Moreover, it is well known that humans are notoriously inaccurate when providing post-hoc rationales for their decisions.[248] The need to provide explanations can also impact the decision-maker's choices in the same way that "observed particles behave differently."[249] Finally, it has also been shown that access to an explanation can actually decrease users' trust in some decisions.[250]

Some commentators have argued that there is no real difference between inexplicable AI systems and medications where the neurobiological mechanism through which the drugs operate is not well understood. They argue that this is why we have the Food and Drug Administration ("FDA") to ensure that appropriate testing is undertaken to ensure that drugs are safe before they are released to the public, and that the same should apply for high-impact AI systems.[251] The bottom line for lawyers and judges is that when an AI system is not transparent or explainable, then ensuring its validity and reliability increase in importance.

The *Loomis* case discussed above in section V highlights a related and critical issue that arises with respect to current AI systems and is increasingly likely to arise in court. Even when the data sources and training data are known, and the features, their weights, and parameter choices can be described, when it comes to litigation, AI providers generally assert that information concerning the data and the algorithms are proprietary trade secrets and refuse to disclose them, thereby impeding the ability to challenge their scientific validity and reliability, and to address the many other questions they raise. This is precisely what happened in the *Loomis* case, where Mr. Loomis challenged the Circuit Court's use of COMPAS at sentencing because it violated his due process rights when it interfered with his right "to be sentenced based upon accurate information, in part because the proprietary nature of COMPAS prevent[ed] him from assessing its

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[247] *Id.*

[248] *Id.* (citing Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCH. REV. 231 (1977)).

[249] *Id.* at 3 (citing William F. Messier Jr. et al., *The Effect of Accountability on Judgment: Development of Hypotheses for Auditing; Discussions; Reply*, 11 AUDITING 123 (1992)). In physics, this phenomenon is known as the "observer effect," which is "the disturbance of an observed system by the act of observation." *Observer Effects (Physics)*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Observer_effect_(physics)&oldid=1000916691 [https://perma.cc/BEW2-N7G8].

[250] *See* Hosanagar & Jair, *supra* note 237.

[251] *See* Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83 (2017). The FDA even recently published its own paper, see FDA, ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING (AI/ML)-BASED SOFTWARE AS A MEDICAL DEVICE (SAMD) ACTION PLAN (2021).

accuracy."[252] Northpointe, Inc., the developer of COMPAS, considers it to be "a proprietary instrument and a trade secret," and it accordingly declined to disclose how the risk scores were determined or how the factors were weighted.[253] Mr. Loomis argued that because COMPAS's developer would not disclose this information, he was denied information that the Circuit Court considered at his sentencing and therefore the ability to refute it.[254] Mr. Loomis further contended that unless he could review how the factors were weighed and how the risk score was determined, the accuracy of the COMPAS assessment could not be verified.[255] From a technical perspective, these were all valid arguments. Yet, the Wisconsin Supreme Court gave them short shrift, responding that while it agreed that Mr. Loomis could not review and challenge how the COMPAS algorithm calculates risk, he could review and challenge the resulting risk scores themselves.[256] The Court concurred with Mr. Loomis that "the risk scores do not explain how the COMPAS program uses information to calculate the risk scores. However, Northpointe's 2015 Practitioner's Guide . . . explains that the risk scores are based largely on static information (criminal history), with limited use of some dynamic variables (i.e. criminal associates, substance abuse)."[257] Thus, the Court asserted, "to the extent that Loomis's risk assessment is based upon his answers to questions and publicly available data about his criminal history, Loomis had the opportunity to verify that the questions and answers listed on the COMPAS report were accurate."[258] Loomis also "had an opportunity to challenge his risk scores by arguing that other factors or information demonstrate their inaccuracy."[259] Despite citing to studies that have raised questions about the accuracy of COMPAS and its tendency to disproportionally classify minority offenders as higher risk because of factors that may be out of their control, [260] the Court held that the tool could nonetheless be used with appropriate warnings, including that:

(1) the proprietary nature of COMPAS had been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) [COMPAS] compares defendants to a national sample, but no cross-validation study for a Wisconsin population

[252] *See* Wisconsin v. Loomis, 371 Wis. 2d 235 (2016), *cert. denied*, 137 S. Ct. 2290 (2017) ¶¶ 34, 46.

[253] *Id.* ¶ 51.

[254] *See id.*

[255] *See id.* ¶ 52.

[256] *See id.* ¶ 53.

[257] *Id.* ¶ 54.

[258] *Id.* ¶ 55.

[259] *Id.* ¶ 56.

[260] *See id.* ¶¶ 59–64.

has yet been completed; (3)some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.[261]

The many risks of AI raise questions as to the advisability of protecting the rights of RNA providers over the rights of criminal defendants.[262] Warnings, alone, do not make up for denying a party's ability to challenge the accuracy of an AI tool. The Court never addresses why a protective order would be insufficient protection for Northpointe, and this question can be expected to be an area that will be highly litigated as we move forward.

F. Lack of Accountability

Another place where we can expect to see significant challenges for lawyers and judges is in the area of accountability of AI, and the legal and regulatory frameworks that surround it. At present, there are relatively few laws or regulations governing AI and automated decision making.[263] The

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[261] *Id.* ¶ 66.

[262] Indeed, the AI Now Institute (an interdisciplinary research institute affiliated with New York University that is dedicated to understanding the social implications of AI technologies), see AINOW, www.ainowinstitute.org [https://perma.cc/G8LZ-MSPJ], has recommended that "AI companies should waive trade secrecy and other legal claims that stand in the way of accountability in the public sector. Vendors and developers who create AI and automated decision systems for use in government should agree to waive any trade secrecy or other legal claim that inhibits full auditing and understanding of their software. Corporate secrecy laws are a barrier to due process: they contribute to the 'black-box effect' rendering systems opaque and unaccountable, making it hard to assess bias, contest decisions, or remedy errors. Anyone procuring these technologies for use in the public sector should demand that vendors waive these claims before entering into any agreements." MEREDITH WHITTAKER ET AL., AI NOW INST., AI NOW REPORT 2018, 5 (2018), https://ainowinstitute.org/AI_Now_2018_Report.pdf [https://perma.cc/L5U6-8KM].

[263] *See* Mark MacCarthy, *AI Needs More Regulation, Not Less*, BROOKINGS INST. (Mar. 9, 2020), https://www.brookings.edu/research/ai-needs-more-regulation-not-less [https://perma.cc/S747-WHA4]; Devin Coldewey, *AI Desperately Needs Regulation and Public Accountability, Experts Say*, TECHCRUNCH (Dec. 7, 2018) (discussing the AI NOW REPORT 2018, *supra* note 262), https://techcrunch.com/2018/12/07/ai-desperately-needs-regulation-and-public-accountability-experts-say [https://perma.cc/A747-UPPM]. For other views on the regulation of AI, *see generally* Richard Diffenthal et al., *Artificial Intelligence – Time to Get Regulating?*, GLOBAL MEDIA TECH. & COMM. Q. (2018); Oren Etzioni, *How to Regulate Artificial Intelligence*, N.Y. TIMES (Sept. 1, 2017), https://www.nytimes.com/2017/09/01/opinion/artificial-intelligence-regulations-rules.html [https://perma.cc/NWC4-TGD5]; Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J. L. & TECH. 353 (2016). For a discussion of some of the arguments against the regulation of AI, see Andres Fogg, *Artificial Intelligence Regulation: Let's Not Regulate Mathematics!*, IMPORT.IO (Oct. 13, 2016), https://www.import.io/post/artificial-intelligence-regulation-lets-not-regulate-mathematics [https://perma.cc/ARZ4-ZNAX]. And finally, for useful resources surveying global AI governance and regulation issues, curated by the Multidisciplinary Institute on Artificial Intelligence ("MIAI") at Grenoble Alpes, see *AI Governance and Regulation*, AI-REGULATION, https://ai-regulation.com/ai-governance [https://perma.cc/AL6V-LZEE]. On April 21,

existing frameworks seem ill-prepared to address the unique capabilities and characteristics of AI. For example, in August 2019, Stephen L. Thaler of the Artificial Inventor Project[264] tried to patent two inventions—a food container and a flashing warning light—with the U.K.'s Intellectual Property Office ("UKIPO") and the European Patent Office ("EPO").[265] The inventor on the patent was listed as "DABUS."[266] Both regulators held that while the inventions themselves were patent-worthy, the applications were rejected because the "inventor" was not a natural person (*i.e.*, a human).[267] The UKIPO's decision was upheld by the U.K. High Court in October 2020, and was further appealed to the U.K. Court of Appeal, which, in September 2021, also denied the patent.[268] The result was no different in the United States, where in April 2020, the U.S. Patent and Trademark Office ("USPTO") likewise ruled that AI systems cannot be credited as an inventor in a patent, stating that: "[U]nder current law, only natural persons may be named as an inventor in a patent application."[269] The USPTO's decision was appealed to

2021, the European Commission released a long-awaited, comprehensive draft regulation on AI. *See Europe Fit for the Digital Age: Commission Proposes New Rules and Actions for Excellence and Trust in Artificial Intelligence*, European Commission Press Release (Apr. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1682.

[264] The Artificial Intelligence Project is a "site dedicated to a project seeking intellectual property rights for the autonomous output of artificial intelligence." *The Artificial Inventor Project*, ARTIFICIAL INVENTOR, https://artificialinventor.com [https://perma.cc/WJE3-DENF].

[265] A copy of the two patent applications, EP3564144 (food container) and EP3563896 (neural flame), can be found here: *Patents and Patent Applications*, ARTIFICIAL INVENTOR, https://artificialinventor.com/patent-applications [https://perma.cc/YK97-3UCJ]. *See also* Amy Sandys, *UK High Court Rejects Idea of Inventor by AI system Dabus*, JUVE PATENT (Oct. 9, 2020), https://www.juve-patent.com/news-and-stories/cases/uk-high-court-rejects-idea-of-invention-by-ai-system-dabus [https://perma.cc/BQ2J-44NU].

[266] Sandys, *supra* note 265. A technical description of DABUS, which stands for "device for the autonomous bootstrapping of unified sentience," *id.*, can be found here: *DABUS Described*, IMAGINATION ENGINES, https://imagination-engines.com/dabus.html [https://perma.cc/6D94-R5K3].

[267] Sandys, *supra* note 265. An appeal of the EPO denial is scheduled to be heard by the EPO Board of Appeal on Dec. 21, 2021. *See* Seiko Hidaka, *Court of Appeal – AI Generated Inventions Denied UK Patent in DABUS Case*, GOWLING WLG (Sept. 23, 2021), https://gowlingwlg.com/en/insights-resources/articles/2021/ai-invention-denied-patent-in-dabus-case [https://perma.cc/G25F-5ZDY].

[268] *See* Cynthia O'Donoghue & Angelika Bialowas, *UK Court of Appeal Rules AI is Not an Inventor*, REEDSMITH TECH. LAW DISPATCH (Sept. 26, 2021), https://www.technologylawdispatch.com/2021/09/in-the-courts/uk-court-of-appeal-rules-ai-is-not-an-inventor [https://perma.cc/UC8E-FMHX].

[269] *Petition Decision: Inventorship Limited to Natural Persons*, USPTO BULLETIN (Apr. 27, 2020), https://content.govdelivery.com/accounts/USPTO/bulletins/287fdc9 [https://perma.cc/37QD-RQG2]; *see also* Jon Porter, *US Patent Office Rules That Artificial Intelligence Cannot Be a Legal Inventor*, VERGE, https://www.theverge.com/2020/4/29/21241251/artificial-intelligence-inventor-united-states-patent-trademark-office-intellectual-property [https://perma.cc/X5UV-Q35K]. For a discussion of the reasons why the U.S. should grant AI inventor status, see Ernest Fok, *Challenging the International Trend: The Case for Artificial Intelligence Inventorship in the United States*, 19 SANTA CLARA J. INT'L LAW 51 (2021).

the U.S District Court for the Eastern District of Virginia. On September 9, 2021, the Court affirmed the decision of the USPTO.[270] However, two months before that, in July of 2021, South Africa was the first country to award DABUS a patent for its AI-generated invention.[271] Australia followed shortly thereafter.[272]

A December 2018 report published by the AI Now Institute makes the point that AI-based tools have been deployed with little regard to their potential negative effects or even sufficient documentation of their positive ones.[273] They lament that untested algorithms are employed in places where they can deeply affect thousands, if not millions of people, with no systems in place to monitor or stop them, other than limited ethical precepts often propounded by the very same companies that created the systems.[274] One particularly egregious example that AI Now cites surfaced in June 2018, immediately after the U.S. Department of Homeland Security implemented a family separation policy that forcibly removed immigrant children from their families, when it was revealed that U.S. Immigration and Customs Enforcement ("ICE") had altered its own risk-assessment algorithm so that it produced only one result: it recommended "detain" for 100% of the immigrants in custody.[275] Another concerning example described a voice recognition system in the U.K. designed to detect immigration fraud, which cancelled thousands of visas resulting in the deportation of people in error.[276] Documents leaked in July 2018, revealed that IBM Watson was rendering

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[270] Gourdin Sirles & Baldassare Vinti, *Update on Artificial Intelligence: Court Rules That AI Cannot Qualify As "Inventor,"* THE NAT'L L. REV. (Sept. 9, 2021), https://www.natlawreview.com/article/update-artificial-intelligence-court-rules-ai-cannot-qualify-inventor [https://perma.cc/D4NZ-F2VJ].

[271] *See* Sam Udovich, *Recent Developments in Artificial Intelligence and IP Law: South Africa Grants First Patent for AI-Created Invention*, THE NAT'L L. REV. (Aug. 3, 2021), https://www.natlawreview.com/article/recent-developments-artificial-intelligence-and-ip-law-south-africa-grants-world-s [https://perma.cc/ZE2J-4PS2].

[272] *See* John Collins, Natalie Shoolman & Rose Jenkins, *Robots Are Taking Over the Patent World – AI Systems or Devices Can Be "Inventors" Under the Australian Patents Act*, KLUWER PATENT BLOG (Sept. 8, 2021), http://patentblog.kluweriplaw.com/2021/09/08/robots-are-taking-over-the-patent-world-ai-systems-or-devices-can-be-inventors-under-the-australian-patents-act [https://perma.cc/ZK3Y-RYTM].

[273] *See generally* WHITTAKER ET AL., *supra* note 262.

[274] *See generally id.*

[275] *See id.* at 10 (citing Nikhil Sonnad, *US Border Agents Hacked Their 'Risk Assessment' System to Recommend Detention 100% of the Time*, QUARTZ (June 26, 2018), https://qz.com/1314749/us-border-agents-hacked-their-risk-assessment-system-to-recommend-immigrant-detention-every-time [https://perma.cc/28U4-VU8N]).

[276] *See id.* (citing Nikhil Sonnad, *A Flawed Algorithm Led the UK to Deport Thousands of Students*, QUARTZ (May 3, 2018), https://qz.com/1268231/a-toeic-test-led-the-uk-to-deport-thousands-of-students [https://perma.cc/4U5S-8DXA]).

"unsafe and incorrect" cancer treatment recommendations.[277] An investigation conducted in September 2018, unearthed the fact that IBM was also working in concert with the New York City Police Department ("NYPD") to build an "ethnicity-detection" algorithm to search faces based on race, using police camera footage of thousands of people on the streets of New York taken without their knowledge or consent.[278] This is likely just the tip of the iceberg.

On this basis, the AI Now Institute argues, compellingly, that the "frameworks presently governing AI are not capable of ensuring accountability," and that "[a]s the pervasiveness, complexity, and scale of these systems grow, the lack of meaningful accountability and oversight—including basic safeguards of responsibility, liability, and due process—is an increasingly urgent concern."[279] The responsibility for oversight will undoubtedly fall to the legal justice system until there is direct intervention by regulatory agencies.

Finally, AI Now highlights the large gap between those who develop and profit from AI, and those most likely to suffer the consequences of its ill effects.[280] They emphasize several reasons for this discrepancy, including insufficient government oversight, insufficient governance structures within tech companies, a highly concentrated AI sector subject to constant pressure to innovate and commercialize, power asymmetries between the tech companies and the people they serve, and a vast cultural divide between those responsible for technical research and development and the diverse populations on which AI systems are deployed.[281] In an earlier report from September 2018, the AI Now Institute, in collaboration with the Center on Race, Inequality, and the Law and the Electronic Frontier Foundation ("EFF"), discussed the growing number of legal challenges to the use of autonomous systems by government agencies in decisions that affect individual rights, such as Medicaid and disability rights, public teacher

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[277] *See id.* (citing Casey Ross & Ike Swetlitz, *IBM's Watson Supercomputer Recommended 'Unsafe and Incorrect' Cancer Treatments, Internal Documents Show*, STAT (July 25, 2018), https://www.statnews.com/wp-content/uploads/2018/09/IBMs-Watson-recommended-unsafe-and-incorrect-cancer-treatments-STAT.pdf [https://perma.cc/H2PN-LG8L]).

[278] See *id.* (citing George Joseph & Kenneth Lipp, *IBM Used NYPD Surveillance Footage to Develop Technology That Lets Police Search By Skin Color*, INTERCEPT (Sept. 6, 2018, 6:00 AM), https://theintercept.com/2018/09/06/nypd-surveillance-camera-skin-tone-search [https://perma.cc/2ZR5-DGWW]).

[279] *Id.* at 7.

[280] *See id.*

[281] *See id.*

employment evaluations, juvenile criminal risk assessment, and criminal DNA analysis.[282]

As the development, commercialization, and use of AI proliferates, so too will questions about how the risks of AI will be apportioned. These questions will be complicated by the vast sea of machine-learning applications in which humans are more or less in- or on-the-loop, and where the systems themselves continuously learn and can act in increasingly unpredictable ways. The present state of the law governing liability for AI systems does not specify who should be held accountable for errors and accidents caused by AI, and under what circumstances. There are many possibilities: the data collector/analyst, the inventor, the designer/developer, the manufacturer, the retailer, the user, the AI itself, some combination of the above, or none at all. The choice of who to hold accountable, and when, is not without consequences for those who can afford to enter the field and for the future of innovation itself.

Some commentators have argued that AI should not be humanized and, from an ethical (and therefore legal) vantage point, should not be treated differently from any other technology, equipment, or tool "we use to extend our own abilities and to accelerate progress on our own goals."[283] It also has been noted by others that concepts from tort and products liability law (*e.g.*, design or manufacturing defect, failure to warn, negligent operation, and strict liability) have been applied and will continue to develop creatively in

[282] *See* AI NOW INST., LITIGATING ALGORITHMS: CHALLENGING GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS (2018).

[283] *See* JOANNA J. BRYSON, CLOSE ENGAGEMENTS WITH ARTIFICIAL COMPANIONS: KEY SOCIAL, PSYCHOLOGICAL, ETHICAL AND DESIGN ISSUES 63 (Yorick Wilks ed., 2010). *But see* Ryan Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, 86 GEO. WASH. L. REV. 1, 4–5 (2018) ("This Article employs a functional approach to distinguish an autonomous computer, robot, or machine from an ordinary product. Society's relationship with technology has changed. Computers are no longer just inert tools directed by individuals."). *See also* Iria Giuffrida, *Liability for AI Decision-Making: Some Legal and Ethical Considerations*, 88 FORDHAM L. REV. 439, 440 (2019) (addressing "whether AI merits a new approach to deal with the liability challenges it raises when humans remain 'in' or 'on' the loop."); Karni A. Chagal-Feferkorn, *Am I An Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, 30 STAN. L. & POL'Y REV. 61, 82–86 (2019) ("Thinking algorithms, despite their nature as information-based and although they may frequently cause damage regardless of a defect, may thus nevertheless be governed by products liability."); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207 (1996) (arguing that the legal system is dynamic and capable of coping with new challenges by so-called new technologies).

this context.[284] But others believe that may not be the case,[285] because machine-learning applications are dynamic; they use data that is constantly updated and combined in new ways. AI systems are by their nature not intended to be static; they are systems that learn and adapt often in unpredictable ways. Therefore, they pose issues that are more complex than tools that are stable. Moreover, when the technology is "black box," it may be inherently impossible to determine how and why the system reached the conclusion it did or to reverse engineer the decision-making process. Classic tort law assigns liability based on fault. For example, a product is defectively designed when a reasonable alternative was possible and could have avoided foreseeable harm. These questions about alternative design or foreseeability simply may not be answerable when it comes to AI.

Consider, for example, the following hypothetical:

> Company is responsible for operating a dam and generating hydroelectric power. Company decides to modernize in order to be more efficient. It replaces its human-operated control system with a fully autonomous AI system. To enable the AI to function, Company installs a large number of sensors throughout the dam and the area in which the dam is. They collect temperature, moisture, stress, and other readings and send them via the internet to the AI. The "AI" actually consists of a number of components. The primary component is located in Company's primary corporate office some five hundred miles away. It constantly monitors the sensor data and varies water flow on a continuous basis. It implements its decisions via instructions to its implementation module in the dam control room on site. Meanwhile the AI modifies its programming based upon its ongoing experience of the interaction

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[284] *See, e.g.*, *Artificial Intelligence Litigation: Can the Law Keep Pace with the Rise of the Machines?*, QUINN EMANUEL URQUHART & SULLIVAN, LLP (Dec. 2016), https://www.quinnemanuel.com/the-firm/publications/article-december-2016-artificial-intelligence-litigation-can-the-law-keep-pace-with-the-rise-of-the-machines [https://perma.cc/3LYN-CC3K]. The treatment of AI systems under criminal law poses unique issues because of the *mens rea* requirement for imposing criminal liability. For a discussion of these issues, see Francesca Lagioia & Giovanni Sartor, *AI Systems Under Criminal Law: A Legal Analysis and a Regulatory Perspective*, 33 PHIL. & TECH. 433 (2020). For an interesting take on how the law might address artificially intelligent robots that misbehave, see Mark A. Lemley & Bryan Casey, *Remedies for Robots*, 86 U. CHI. L. REV. 1311 (2019).

[285] *See, e.g.*, Matthew U. Scherer, *supra* note 263, at 388–92. There is extensive debate in both the literature and the popular press over whether AI should be regulated and what form that regulation (if any) should take. *See* sources cited *supra* note 263. *See also, e.g.*, *Regulation of Artificial Intelligence*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Regulation_of_artificial_intelligence&oldid=1000320251 [https://perma.cc/ZM5S-TCVN]; R. David Edelman, *Here's How to Regulate Artificial Intelligence Properly*, WASH. POST (Jan. 13, 2020), https://www.washingtonpost.com/outlook/2020/01/13/heres-how-regulate-artificial-intelligence-properly [https://perma.cc/5857-NNR9]; Paul Chadwick, *To Regulate AI We Need Laws, Not Just a Code of Ethics*, GUARDIAN (Oct. 28, 2018), https://www.theguardian.com/commentisfree/2018/oct/28/regulate-ai-new-laws-code-of-ethics-technology-power [https://perma.cc/J8G3-FCW2].

> of all the monitored sensor factors in order to produce the most electricity at the cheapest operating cost while maintaining community safety. The AI is also connected, via the internet, to other dam systems so that it can learn from how those systems are operating.
>
> One night, the AI fully opens the emergency floodgates and floods one thousand homes downstream. Company investigates and cannot determine causation. Possibilities include: defective AI design; defective AI training; defective sensor design and/or manufacture; unforeseen consequences from multiple data inputs in real world circumstances; erroneous AI operation based upon sensor or remote data; and external interference, that could have been accidental or intentional, by either one or more private actors or on behalf of a foreign organization or nation. Notably, the sensors are from multiple companies and may have never been used together prior, certainly not in the instant configuration.[286]

It is entirely possible that causation and fault may be indeterminate under these circumstances.[287] Given multiple potential tortfeasors, courts are usually able to apportion damages in a reasonable manner, but that assumes that both the tortfeasors and causation can be identified.[288] While an analysis of proper legal and regulatory regimes for AI and/or whether we need an entirely new regime such as legal personhood for AI[289] is beyond the scope of this paper, it is clear that questions about accountability for AI failures will remain in the hands of the courts for the foreseeable future.

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[286] Giuffrida, *supra* note 283, at 446–47 (attributed to Professor Frederic I. Lederer, Chancellor Professor of Law, William & Mary Law School, *see Fredric I. Lederer*, WM. & MARY L. SCH., https://law2.wm.edu/faculty/bios/fulltime/filede.php [https://perma.cc/C8UT-DGYN]).

[287] *See id.* While, in some respects, the hypothetical presented might sound like a classic engineering malpractice claim, or something that would be prohibited by a regulator, it raises the issue of how to harness advancements in technology without, at the same time, hamstringing innovation through the litigation process. There is always a risk-reward tradeoff with advances in technology; early adopters assume greater risk than late adopters. A further discussion of this issue, however, is beyond the scope of this paper.

[288] *Id.*

[289] *See* MIREILLE HILDEBRANT, *Legal Personhood for AI?*, *in* LAW FOR COMPUTER SCIENTISTS 237 (2019). *See also* John-Stewart Gordon, *Artificial Moral and Legal Personhood*, 36 AI & SOC. (2020); Tyler L. Jaynes, *Legal Personhood for Artificial Intelligence: Citizenship as the Exception to the Rule*, 35 AI & SOC. 343 (2020). For a discussion of the perspective of the European Parliament on this issue, see Markus Häuser, *Do Robots Have Rights? The European Parliament Addresses Artificial Intelligence and Robotics*, CMS LAW-NOW (June 4, 2017), https://www.cms-lawnow.com/ealerts/2017/04/do-robots-have-rights-the-european-parliament-addresses-artificial-intelligence-and-robotics [https://perma.cc/HH6E-X4E3].

G. Lack of Resilience

Resilience refers to the degree to which AI systems can detect and resist both intentional and unintentional efforts to cause machine-learning models to fail, or to otherwise adapt to risk.[290] While researchers have developed measures to protect AI systems from such failures,[291] sophisticated hackers quickly learn ways to circumvent these defensive measures, and so it goes in a vicious cycle.

One of the biggest challenges that has emerged along with the introduction of digital evidence is the ease with which it can be altered through means such as spoofing.[292] Recently, a family law attorney in California reported on fake evidence used in several of his divorce cases.[293] In one particular matter, where a husband had been granted temporary custody of the children, the wife submitted text messages as evidence of domestic abuse perpetrated by the husband.[294] The wife was granted a Domestic Violence Restraining Order ("DVRO") and the three children were removed from the custody of husband, with no visitation permitted, pending resolution of the charges related to the threats contained in the text messages he had allegedly sent her.[295] The only problem was that the husband had not sent the text messages.[296] All the wife did was change the name associated with someone else's phone number in her cell phone to her husband's name

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[290] *See* Nathan Michael, *Shield AI Fundamentals: On Resilient Intelligence*, SHIELD AI (June 25, 2019), https://www.shield.ai/content/2019/6/25/shield-ai-fundamentals-on-resilient-intelligence [https://perma.cc/Y5CD-KWEM].

[291] *See, e.g.*, Shilin Qui et al., *Review of Artificial Intelligence Adversarial Attack and Defense Technologies*, 9 APPLIED SCI. 909 (2019); Ali Chehab et al., *Machine Learning for Network Resilience: The Start of a Journey*, PROC. 2018 5TH INT'L CONF. ON SOFTWARE DEFINED SYS. ("SDS"). 59 (2018); Yevgeniy Vorobeychik, *Adversarial AI*, PROC. 25TH INT'L JOINT CONF. ON ARTIFICIAL INTELL. ("IJCAI-16") 4094 (2016).

[292] "Spoofing is the act of disguising a communication from an unknown source as being from a known, trusted source. Spoofing can apply to emails, phone calls, and websites, or can be more technical, such as a computer spoofing an IP address. . . . Spoofing can be used to gain access to a target's personal information, spread malware through infected links or attachments, bypass network access controls, or redistribute traffic to conduct a denial-of-service attack. Spoofing is often the way a bad actor gains access in order to execute a large cyber attack. . . ." *What Is Spoofing? Spoofing Defined, Explained, and Explored*, FORCEPOINT, https://www.forcepoint.com/cyber-edu/spoofing [https://perma.cc/7KJP-EC6X].

[293] M. Jude Egan, *Deep Fakes in Divorce Court: Manipulated Electronic Evidence and What to Do About It*, LEGALTECH NEWS (Aug. 20, 2020), https://www.law.com/therecorder/2020/08/20/deep-fakes-in-divorce-court-manipulated-electronic-evidence-and-what-to-do-about-it [https://perma.cc/TWC6-8V9D]. Fake evidence is becoming a major challenge for judges and lawyers. *See* Matt Reynolds, *Courts and Lawyers Struggle with Growing Prevalence of Deepfakes*, ABA J., https://www.abajournal.com/web/article/courts-and-lawyers-struggle-with-growing-prevalence-of-deepfakes [https://perma.cc/N9M6-GXE3].

[294] *See* Egan, *supra* note 293.

[295] *Id.*

[296] *Id.*

and then sent herself the threatening texts.[297] When she printed out the texts to attach to the application, the husband's name appeared at the top of the messages and made it appear as if he had sent the messages.[298] Since judges in California often read DVRO requests on written pleadings, without notice to the other party, the restrained party may not have an opportunity to challenge the Temporary Restraining Order ("TRO") until a hearing is held.[299] In this case, the hearing was continued for almost four months due to the intervening Christmas Holiday and other events.[300] At the hearing, the husband was able to offer his monthly phone statement showing that he had never sent his wife a single text message on the date at issue, or any other day that month.[301] The judge dismissed the DVRO, but did not award the husband full custody of the children.[302] Fake evidence can be so sophisticated and convincing that it can take a forensic examiner to determine whether the evidence is real or not, but such expert assistance can be quite expensive in the average case. Photographs, audiotapes, and video images are also easily manipulated. While humans have a strong tendency to believe their own eyes and ears, and digital evidence has traditionally been given considerable credence, things are not always what they seem to be. This problem can cause judges to be reticent to grant domestic violence TROs when they are needed, and to be suspicious of other evidence that is actually authentic. This problem will only be exacerbated by AI.

"Adversarial AI" refers to the use of the very power of AI to pose malicious threats.[303] Such techniques attempt to fool machine-learning models by supplying deceptive input(s), most often to cause some kind of malfunction. Adversarial AI can be used to attack just about any kind of system built on AI technology, from causing an automated email message to disclose sensitive data such as credit card numbers, to tricking a computer

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[297] *See id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *See Adversarial Machine Learning*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Adversarial_machine_learning&oldid=1001999631 [https://perma.cc/6HKC-5SET]; Ben Dickson, *What Is Adversarial Machine Learning?*, TECHTALKS (July 15, 2020), https://bdtechtalks.com/2020/07/15/machine-learning-adversarial-examples [https://perma.cc/D9HF-88M8]. For a more technical discussion of adversarial machine learning, see, for example, Kevin Eykholt et al., *Robust Physical-World Attacks on Deep Learning Visual Classification*, PROC. 2018 IEEE/CVR CONF. ON COMPUTER VISION & PATTERN RECOGNITION 1625 (2018). For a taxonomy of different types of attacks on machine-learning technologies, and a variety of defenses against those attacks, see Marco Barrero et al., *Can Machine Learning Be Secure?*, Proc. 2006 ACM SYMP. ON INFO., COMPUTER, AND COMM. SECURITY ("ASIACCS '06") 16 (2006).

vision system in an automated vehicle by placing stickers on road signs, causing the vehicle to mistake a stop sign for a merge or speed limit sign.[304] By way of example, McAfee attacked Tesla's former Mobileye system, fooling it into driving 50 mph over the speed limit, by adding a two-inch strip of black tape to a speed limit sign.[305] Adversarial patterns on glasses or clothing can deceive facial recognition systems.[306] The possibilities are endless.

The mechanisms through which such attacks operate can differ, as can their specificity; a targeted attack attempts to allow a specific intrusion or disruption (*e.g.*, an attempt to gain access to personal information), whereas an indiscriminate attack creates general mayhem.

Evasion attacks are the most prevalent form of adversarial attack.[307] Spammers and hackers attempt to evade detection by obfuscating the content of spam or malware.[308] Samples of data are modified to evade detection so as to be classified as legitimate.[309] Another example of an evasion might be a spoofing attack against a biometric verification system, in which fake biometric traits may be exploited to impersonate a legitimate user.[310] Poisoning, on the other hand, is the adversarial contamination of training

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[304] *See* Madeleine Clare Elish, *When Humans Attack: Re-thinking Safety, Security, and AI*, POINTS: DATA & SOC. (May 14, 2019), https://points.datasociety.net/when-humans-attack-re-thinking-safety-security-and-ai-b7a15506a115 [https://perma.cc/V7SQ-X834]; MILES BRUNDAGE ET AL., THE MALICIOUS USE OF ARTIFICIAL INTELLIGENCE: FORECASTING, PREVENTION, AND MITIGATION (2018).

[305] Brian Barrett, *Security News This Week: A Tiny Piece of Tape Tricked Teslas Into Speeding Up 50 MPH*, WIRED, https://www.wired.com/story/tesla-speed-up-adversarial-example-mgm-breach-ransomware [https://perma.cc/5EUV-6RZL].

[306] *See, e.g.*, Aaron Holmes, *These Clothes Use Outlandish Designs to Trick Facial Recognition Software into Thinking You're Not Human*, BUS. INSIDER, https://www.businessinsider.com/clothes-accessories-that-outsmart-facial-recognition-tech-2019-10 [https://perma.cc/2RU7-JA5H]; John Seabrook, *Dressing for the Surveillance Age*, NEW YORKER (Mar. 9, 2020), https://www.newyorker.com/magazine/2020/03/16/dressing-for-the-surveillance-age [https://perma.cc/HVM8-7DW5]; Simen Thys et al., *Fooling Automated Surveillance Cameras: Adversarial Patches to Attack Personal Detection*, arXiv:1904.08653v1 [cs.CV] (Apr. 18, 2019), https://arxiv.org/pdf/1904.08653.pdf.

[307] WIKIPEDIA, *supra note* 303.

[308] *See id.*

[309] *See* Ilja Moisejevs, *Evasion Attacks on Machine Learning (or "Adversarial Examples")*, TOWARDS DATA SCI. (July 14, 2019), https://towardsdatascience.com/evasion-attacks-on-machine-learning-or-adversarial-examples-12f2283e06a1 [https://perma.cc/XR6Z-2CFQ]. For a more technical discussion of evasion, see, for example, Blaine Nelson et al., *Query Strategies for Evading Convex-Inducing Classifiers*, 13 J. MACH. LEARN. 1293 (2012).

[310] *See* Danny Thakkar, *Spoofing Fingerprint Scanner and Spoof Detection: How Do They Work?*, BAYOMETRIC, https://www.bayometric.com/spoofing-fingerprint-scanner-and-spoof-detection [https://perma.cc/CPH3-CEWF]; For a more technical discussion of spoofing, see, for example, Ricardo N. Rodrigues et al., *Robustness of Multimodal Biometric Fusion Methods against Spoof Attacks*, 20 J. Visual Lang. and Computing 169 (2009).

data.[311] An attacker may poison such data by injecting malicious samples that disrupt subsequent retraining.

Other than spam, perhaps the most well-known adversarial attacks are deepfakes, synthetic media in which a person in an existing image or video is replaced with someone else's likeness.[312] While faking content is not new, deepfakes leverage powerful machine-learning techniques to manipulate or generate visual and audio content with a high potential to deceive. AI-powered deepfakes are already being used in everyday attacks such as fraud. In one widely publicized U.K. case, a victim received a phone call from what he thought was his boss instructing him to wire money to the bank account of a supplier in Hungary.[313] The call and email that followed accurately replicated the mannerisms, accent, and diction of his employer.[314] The "Synthesizing Obama" program in 2017 modified video footage of former President Barack Obama to depict him mouthing the words contained in a separate audio track.[315] While this was an academic exercise, other such

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[311] *See* Ilja Moisejevs, *Poisoning Attacks in Machine Learning*, TOWARDS DATA SCI., (July 14, 2019), https://towardsdatascience.com/poisoning-attacks-on-machine-learning-1ff247c254db [https://perma.cc/839Z-MESS]; For a more technical discussion of poisoning, see, for example, Gan Sun et al., *Data Poisoning Attacks on Federated Machine Learning*, Vol. 14, No. 8, J. of Latex Class Files, 1 (2015).

[312] *Deepfake*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Deepfake&oldid=1002384861 [https://perma.cc/B6LS-MTCS]; *see also* Ian Sample, *What Are Deepfakes and How Can You Spot Them?*, GUARDIAN, https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them [https://perma.cc/L6LU-DLHV]; Aseem Kishore, *What Is a Deepfake and How Are They Made?*, ONLINE TECH TIPS, (May 23, 2019), https://www.online-tech-tips.com/computer-tips/what-is-a-deepfake-and-how-are-they-made [https://perma.cc/E2P2-642D].

[313] *See* Catherine Stupp, *Fraudsters Used AI to Mimic CEO's Voice in Unusual Cybercrime Case*, WSJ, (Aug. 30, 2019, 12:52 PM), https://www.wsj.com/articles/fraudsters-use-ai-to-mimic-ceos-voice-in-unusual-cybercrime-case-11567157402 [https://perma.cc/9RF5-G72R].

[314] Rahul Kashyap, *Are You Ready for the Age of Adversarial AI? Attackers Can Leverage Artificial Intelligence Too*, FORBES, https://www.forbes.com/sites/forbestechcouncil/2020/01/09/are-you-ready-for-the-age-of-adversarial-ai-attackers-can-leverage-artificial-intelligence-too/?sh=22337f3a4703 [https://perma.cc/ZM8P-YLR7].

[315] Daniel Akst, *The Researchers Who Synthesized Video of Barack Obama*, WSJ, https://www.wsj.com/articles/the-researchers-who-synthesized-video-of-barack-obama-1500655962 [https://perma.cc/L4MD-AZ6G]; For a copy of the research discussed in the WSJ article, see Supasorn Suwajanakorn et al., *Synthesizing Obama: Learning Lip Synch from Video*, 36 ACM TRANSAC. ON GRAPHICS ("SIGGRAPH 2017") (2017); For a video describing how the synthesized video was prepared, see Supasorn Suwajanakorn et al., *Synthesizing Obama: Learning Lip Sync from Audio;* SIGGRAPH (2017), GRAIL, https://grail.cs.washington.edu/projects/AudioToObama [https://perma.cc/HXZ3-T2J9]; For a more recent example of a deepfake video of Queen Elizabeth giving her annual Christmas speech, see Bruce Haring, *Queen Elizabeth 'Deepfake' Message Jabs Prince Harry and Meghan, Prince Andrew*, DEADLINE, https://deadline.com/2020/12/queen-elizabeth-deepfake-message-jabs-harry-meghan-prince-andrew-1234661642 [https://perma.cc/MAG6-EG26]; Of course, the two Canadian authors of this paper take issue with the Queen's jab at Canadians ("There are few things more hurtful than someone telling you they prefer the company of Canadians."). *Id.*

adversarial efforts are not. In January 2018, a proprietary desktop application called FakeApp was launched by an anonymous Reddit user. [316] It allowed users to easily create and share videos with their faces swapped with their friends.[317] Since then, FakeApp has been superseded by open-source alternatives such as faceswap.[318] Other deepfake efforts that are less amusing involve the alteration or manipulation of video related to well-known public officials. These are now being used to sow distrust in public and government institutions. Current events underscore the danger of these types of AI.

It is becoming increasingly difficult to distinguish material generated by AI from that generated by humans. In August 2020, a college student was able to use Generative Pre-trained Transformer 3 ("GPT-3"), one of the most powerful language-generating AI models to date, to create, in a matter of hours, a fake blog on productivity and self-help.[319] Many people hit

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[316] *See* Dan Marino, *FakeApp: Groundbreaking or Dangerous?*, ARTEFACT, (Feb. 13, 2018), https://www.artefactmagazine.com/2018/02/13/fakeapp-groundbreaking-or-dangerous [https://perma.cc/K7R4-96HX]. To download FakeApp version 2.2.0, see *FakeApp*, MALAVIDA, https://www.malavida.com/en/soft/fakeapp/#gref [https://perma.cc/TSG7-XKDU]. For a discussion of another application (Zao) that allows users to add themselves into their favorite movies, see Ryan Gilbey, *A 'Deepfake' App Will Make Us Film Stars – But Will We Regret Our Narcissism?*, GUARDIAN, https://www.theguardian.com/technology/2019/sep/04/a-deep-fake-app-will-make-us-film-stars-but-will-we-regret-our-narcissism [https://perma.cc/95QU-4Z8H].

[317] Marino, *supra* note 316.

[318] Faceswap bills itself as "the leading free and Open Source multi-platform Deepfake Software." *Welcome*, FACESWAP, https://faceswap.dev [https://perma.cc/YK2J-AQWW]. Faceswap can be downloaded here: *Download*, FACESWAP, https://faceswap.dev/download [https://perma.cc/YTF4-F2JT].

[319] *See* Karen Hao, *A College Kid's Fake AI-generated Blog Fooled Tens of Thousands. This Is How He Made It.*, MIT TECH. REV. (Aug. 14, 2020), https://www.technologyreview.com/2020/08/14/1006780/ai-gpt-3-fake-blog-reached-top-of-hacker-news [https://perma.cc/8R5E-D7A7]. In July of 2020, one month earlier, another college student using GPT-3 had launched an AI startup that could write emails "automatically from a few fragmentary notes . . . by learning the way 'a user thinks and responds'. . . ." Ken Schachter, *Long Island Artificial Intelligence Startup Can Write Your Emails*, NEWSDAY, (Sept. 21, 2020, 6:08 PM), https://www.newsday.com/business/technology/othersideai-artificial-intelligence-software-melville-matt-shumer-1.49644292 [https://perma.cc/45RH-S3CD]. In November 2020, the New York Times asked GPT-3 to write one of its *Modern Love* columns by giving it a short prompt: "The following is a New York Times's Modern Love Column about a woman named Frances, her husband Dean, and the unlikely story of how they first met." In response, GPT-3 wrote the following:

> After my fiancé died, my mother told me to "get out there again." She wanted me to go to a singles bar. I told her I'd rather go to the dentist.
>
> "Just once," she said. "Just to see what it's like."
>
> One day, early last year, I found myself driving to a singles bar in winter snow. I sat in my car for 15 minutes, then drove away. The next day, I went back and sat in my car for another 15 minutes. I did this for a couple of weeks, until I finally mustered up the nerve to walk in.

"subscribe." We can expect the appearance of more and more (truly) fake news.

Even more horrifying, perhaps, is the recent retraction by one of the world's most highly cited medical journals—*The Lancet*—of an article on Hydroxychloroquine ("HCQ") that caused the World Health Organization and several Latin American nations to halt their trials of the medication for the treatment of COVID.[320] The authors of the study withdrew the article

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> The place was mobbed. It was like one of those bad dreams where you show up for a test without having studied. I tried to size up the situation. I was a short, thin middle-aged woman in a sea of young, good-looking men. I didn't see anyone I wanted to meet. I decided to leave.
>
> As I walked toward the door, a man walking toward me accidentally bumped into me. "I'm sorry," he said. We shook hands, and I introduced myself. He asked where I was from, and I told him. . . . He was from a small town nearby. We talked for a while, and I asked him to have a drink with me.
>
> "I don't drink," he said.
>
> I was so shocked, I dropped my purse and my keys and had to pick them up. I don't drink, either, but I would have had a drink with this man, this stranger. "That's OK," I said.
>
> "I don't know," he said, and he seemed a little uncomfortable.
>
> "It's not a test," I said. "I don't care if you drink."
>
> "Well, in that case, I'll have a glass of water."

Cade Metz, *When A.I. Falls in Love*, N.Y. TIMES, (Nov. 24, 2020), https://www.nytimes.com/2020/11/24/science/artificial-intelligence-gpt3-writing-love.html [https://perma.cc/SH3W-SRRA]. For a discussion of what GPT-3 is, what it can do, and how it works, see Bernard Marr, *What Is GPT-3 And Why Is It Revolutionizing Artificial Intelligence?*, FORBES, (Oct. 5, 2020, 12:21 AM), https://www.forbes.com/sites/bernardmarr/2020/10/05/what-is-gpt-3-and-why-is-it-revolutionizing-artificial-intelligence/?sh=6a12d762481a [https://perma.cc/JJ4W-ZZ2W]. For a more technical discussion of GPT-3, see Tom B. Brown et al., *Language Models Are Few-Shot Learners*, arXiv2005.14165v4 [cs.CL] (July 22, 2020), https://arxiv.org/pdf/2005.14165.pdf [https://perma.cc/U592-GU8W]. For a less optimistic view of GPT-3, see Rob Toews, *GPT-3 Is Amazing—And Overhyped*, FORBES, (July 19, 2020, 6:56 PM), https://www.forbes.com/sites/robtoews/2020/07/19/gpt-3-is-amazingand-overhyped/?sh=4a59d1fb1b1c [https://perma.cc/UEE2-JZKL]; Tom Taulli, *Turing Test At 70: Still Relevant For AI (Artificial Intelligence)?*, FORBES, (Nov. 27, 2020, 12:59 PM), https://www.forbes.com/sites/tomtaulli/2020/11/27/turing-test-at-70-still-relevant-for-ai-artificial-intelligence/?sh=660c340e250f [https://perma.cc/C6UJ-KQBD] (noting that if you ask a GPT-3 system how many eyes the sun has, it responds that there is one, and if you ask it who was the president of the U.S. in 1600, it responds "Queen Elizabeth I").

[320] *See* Sarah Boseley & Melissa Davey, *Covid-19: Lancet Retracts Paper that Halted Hydroxychloroquine Trials*, GUARDIAN (June 4, 2020, 3:43 PM), https://www.theguardian.com/world/2020/jun/04/covid-19-lancet-retracts-paper-that-halted-hydroxychloroquine-trials [https://perma.cc/TXH5-LWD8].

because they determined that they could no longer vouch for the data obtained from a healthcare analytics company named Surgisphere.[321] After the paper was published, concerns were raised about the veracity of the data and the analysis of same conducted by the corporation. Surgisphere claimed to have collected data from 15,000 coronavirus patients who received HCQ alone, or in combination with antibiotics, from 1,200 hospitals around the world.[322] Subsequent investigations by The Guardian Australia, among others, revealed that the data was fake, when reporters contacted five Australian hospitals reported to have provided data and they denied it.[323] Moreover, the number of deaths reported in Australia due to coronavirus also did not match the numbers from the purported Australian database.[324]

There have been a number of federal and state efforts to enact regulatory responses to the problems posed by deepfakes,[325] but most have not yet been successful. On October 3, 2019, however, California Governor Newsom signed into law Assembly Bill Nos. 602 and 730, which respectively, provide individuals targeted by sexually explicit deepfake content made without their consent a cause of action against the content's creator, and prohibit the distribution of malicious deepfake audio or visual media targeting a candidate running for public office within 60 days of their election[326] Until better technology and more legislation emerge, the challenge of detecting deepfakes and addressing the mischief they may cause will fall in the hands of the U.S. courts. The remainder of this article will address the ways that lawyers and judges can test the veracity of the data used to fuel AI

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[321] Mandeep R. Mehra et al., *Retraction—Hydroxychloroquine or Chloroquine with or Without a Macrolide for Treatment of COVID-19: A Multinational Registry Analysis*, LANCET, (June 5, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31324-6/fulltext [https://perma.cc/9P8A-25XC].

[322] *See* Melissa Davey, *Questions Raised over Hydroxychloroquine Study Which Caused WHO to Halt Trials for Covid-19*, THE GUARDIAN, (July 1, 2020, 12:21 PM), https://www.theguardian.com/science/2020/may/28/questions-raised-over-hydroxychloroquine-study-which-caused-who-to-halt-trials-for-covid-19 [https://perma.cc/7QGU-889A]; *Medical Journal The Lancet Retracts its HCQ Article Based on Fake Data from a Dubious Company, Authors Say they Cannot Vouch for Data's Authenticity*, OPINDIA, (June 5, 2020), https://www.opindia.com/2020/06/lancet-retracts-article-study-hydroxychloroquine-trials-fake-data-surgisphere-who-clinical-trials-chicago-company [https://perma.cc/338G-KRRC].

[323] *See* OPINDIA, *supra* note 322.

[324] *See id.*

[325] *See* Matthew F. Ferraro, *Deepfake Legislation: A Nationwide Survey—State and Federal Lawmakers Consider Legislation to Regulate Manipulated Media*, WILMERHALE CLIENT ALERT (Sept. 25, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190925-deepfake-legislation-a-nationwide-survey [https://perma.cc/5DCY-M6P9].

[326] *See* K.C. Halm et al., *Two New California Laws Tackle Deepfake Videos in Politics and Porn*, DAVIS WRIGHT TREMAINE LLP: ARTIFICIAL INTELLIGENCE LAW ADVISOR (Oct. 11, 2019), https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2019/10/california-deepfakes-law [https://perma.cc/U95R-G66Q].

tools, the bona fides of the tools themselves, and the output of such tools when they are presented in court as evidence.

VI. ESTABLISHING VALIDITY AND RELIABILITY

A. Testimony, Expert Testimony, or Technology?

Because AI employs technology to emulate or exceed human cognitive ability, the question arises as to whether evidence gleaned from AI should be judged by the standard of direct witness testimony, expert witness testimony, or measurement using established technology.

Consider, for example, a smart digital assistant that "listens" to everything that goes on in a home, an automobile, or within "earshot" of a mobile phone. Arguably, the digital assistant is a direct witness to what it hears. At the same time, the digital assistant may employ sophisticated technology like voice recognition to draw conclusions regarding the identity of the speaker, their tone of voice, and the words that are spoken. It may also act as a verbatim recording device, capturing sound, time, global position, speed, and motion, and perhaps video. Some or all of this information may be stored in the device or transmitted to the cloud where it may be retrieved even if the device is lost or destroyed.[327]

When author Cormack's credit card was declined in Australia, he was sent the following voicemail transcript:

(800) 466-7295 4 Jul 2014, 9:15 am

> Yeah. This is an urgent call for Gordon. Cormac, yum the T. V. Canada Trust Loss Prevention center. This is not a telemarketing call. We would like to verify some recent activity on your T E D U. S. Dollar visa card, ending in. 8 Yeah, 0 Your yeah 1. Whether protection and security of your T V credit card account is very important that we speak to you. Please call us toll free at 1(800) 466-7295. You may call us back 24 hours a day, seven days a week. Yeah, the number again is 1(800) 466-7295. Thank you for choosing P D, Canada Trust goodbye.

This message was incorrectly marked spam and never delivered to Cormack's email and was discovered only when Cormack telephoned a bank representative, who told him that a voice message had been left for him. The effort to find this message resulted in the serendipitous discovery of two other important messages that had also been blocked by the spam filter:

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[327] *See, e.g.*, Anthony Cuthbertson, *Amazon Ordered to Give Alexa Evidence in Double Murder Case*, INDEPENDENT (Nov. 14, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/news/amazon-echo-alexa-evidence-murder-case-a8633551.html [https://perma.cc/U9TR-M4RA].

+1 XXX-XXX-XXXX 10 Jun 2014, 11:11 am

> Yeah, Hi. My name is calling. I'm calling with the Canada Revenue Agency, This message is for Gordon have a question regarding some self-employed earnings from U 2013 tax returns. Please call me back. Toll free number is 1(XXX) XXX-XXXX (XXX) XXX-XXXX. Thank you. Bye. (Phone numbers redacted).

+1 XXX-XXX-XXXX 18 Jun 2014, 10:00 am

> Hi, My name is Clint calling with the Canada Revenue Agency doing a follow up on the message I left on June 10th. Certain court and to the questions and some self employed or drinks from the 2013 tax. Please give a call back. Toll free number is 1(XXX) XXX-XXXX (XXX) XXX XXX. Thank you. (Phone numbers redacted.)

While these communications played no role in any legal controversy, it is easy to imagine a situation in which similar communications could have. Are the transcripts genuine? Are they accurate? Were they in fact blocked by a spam filter? Did the bank, the revenue agent, the spam filter, and the intended recipient exercise reasonable diligence to ensure that the communications were successful? Should the recipient, having read the transcript, be deemed to have been notified of its content? Should he have assumed that they were real rather than a scam or phishing attack?[328]

Establishing the provenance of the transcript involves several factors: (i) whether a call was really placed from the specified phone number to the recipient at the specified time; (ii) what voice recognition system was used to produce the transcript; (iii) what version and configuration was used, and how was it trained; and (iv) whether the proffered text is an accurate reproduction of the transcript?

Accuracy does not mean perfection. Clearly there are errors in each of the examples. The name of the bank is T.D. [Canada Trust] not T.V. or T.E.D. or P.D. The revenue agent's name was neither "calling" nor "Clint." "Self employed or drinks" presumably should be "self-employed earnings."

[328] A phishing attack is a "fraudulent attempt to obtain sensitive information or data, such as usernames, passwords and credit card details or other sensitive details, by impersonating oneself as a trustworthy entity in a digital communication. Typically carried out by email spoofing, instant messaging, and text messaging, phishing often directs users to enter personal information at a fake website which matches the look and feel of the legitimate site. Phishing is an example of social engineering techniques used to deceive users. Users are lured by communications purporting to be from trusted parties such as social networking websites, auction sites, banks, mails/messages from friends or colleagues/executives, online payment systems or IT administrators." *Phishing*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Phishing&oldid=1002208250 [https://perma.cc/6X4X-386E].

There are several spelling mistakes. Notwithstanding these errors, it might be argued that the transcripts convey accurately enough the substance of the voicemail messages, and also the spoken telephone numbers, which were correctly transcribed.

Determining whether a transcript is *accurate enough* is fraught with challenges: Precisely defining and quantifying what is meant by "accuracy," estimating the accuracy of a particular transcript, determining what threshold of accuracy is sufficient, and determining the reliability with which a transcription tool meets this threshold.

As a term of art, the accuracy of a transcript typically refers to the fraction or percentage of words that are correctly transcribed. To evaluate accuracy, according to this definition, it is necessary to define, in turn, what is meant by a word, and what is meant for that word to be correctly translated. Is "T.D." one word or two, and is its correct spelling "T.D." or "TD"? How is the spurious E in "T E D" to be counted? Is the telephone number 1(800) 466-7295 a word? It was probably spoken as ten words: "one eight hundred four six six seven two nine five." Are homonyms or sound-alike words correct or incorrect?

Any quantitative assessment of accuracy depends on such arbitrary but necessary choices. For a reasonable set of choices, we might determine that the first voicemail message contained 120 words, of which 100 were correctly transcribed, or 83% accuracy. Error—the complement of accuracy—is 17%, or one in six. It can be argued that this transcript could be considered accurate enough for many purposes.

But this is not to say that the transcription tool always achieves 83% accuracy, or that all transcripts achieving 83% accuracy are sufficiently accurate to assume the recipient has knowledge. In the first transcript, TD was consistently misspelled, but arguably, the words "Canada Trust" provided essential context. Imagine if the caller had referred to the bank as simply TD—would the recipient be able to determine that the call was not just another phishing attempt? Would the accuracy be considered acceptable?

The error rate in this transcript was 17%, or one-in-six words. Imagine a different transcription in which one in six of the digits of the telephone number were transcribed incorrectly. Would such accuracy be considered acceptable?

Admittedly, these are contrived examples, and generally, we find that measured accuracy and acceptable accuracy are well correlated. Researchers and developers take advantage of this correlation to evaluate and improve their AI systems, under the assumption that improving measured accuracy tends to improve the reliability with which an AI system achieves its

intended purpose: here, a transcript sufficient to convey the substance of the message.

B. Benchmarks and Goodhart's Law

In 1975, Charles Goodhart, acting as a member of the Bank of England's Policy Committee, observed that "any observed statistical regularity will tend to collapse once pressure is placed upon it for control purposes."[329] In other words, when a statistical measure of effectiveness, accuracy, or reliability is used as a target or acceptance criterion, it ceases to be a valid measure. The reason for this effect is that, although the measure may be apt if the measurement is conducted independent of what is being measured, it is no longer independent and therefore, no longer apt, if the thing being measured is influenced by the measurement.[330] In more common terms, the purpose of a college examination is defeated if the examinees are aware of the questions beforehand.

Benchmarks and statistical measures are very useful tools for monitoring and improving the effectiveness of AI technologies. But if these benchmarks are public or used repeatedly, technologies will evolve—whether intentionally or not—to optimize their performance with respect to the benchmark and the chosen measure of success, not the general problem for which the benchmark is intended to be a representative example, or the underlying property that the measure was designed to estimate.

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[329] David Manheim & Scott Garrabrant, *Categorizing Variants of Goodhart's Law*, https://arxiv.org/pdf/1803.04585.pdf [https://perma.cc/2LCS-996D]. *See also Goodhart's law*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Goodhart%27s_law&oldid=999730673 [https://perma.cc/J3NS-Y89X].

[330] A famous example of Goodhart's law is the "Cobra effect." *See* Cedric Chin, *The Four Flavors of Goodhart's Law*, HOLISTICS BLOG, https://www.holistics.io/blog/four-types-goodharts-law [https://perma.cc/ZF5X-AK73]. So, the story goes, the British Colonial Government in India was becoming concerned about the increasing number of venomous cobras in Delhi, so it began offering a bounty for each dead cobra that was delivered. *Id.* Initially, this was a successful strategy; locals brought in large numbers of the slaughtered snakes. *Id.* But over time, enterprising individuals started to breed cobras in order to kill them for the supplemental income. *Id.* When the government abandoned the bounty, the cobra breeders released their cobras into the wild and Delhi experienced a surge in its snake population. *Id.* Similarly, in 1902, the French Colonial government in Hanoi created a bounty program to reduce the rat population. *Cobra effect*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Cobra_effect&oldid=1002053645 [https://perma.cc/NP3X-MPN7]. To collect the bounty, locals needed to provide the severed tail of a rat. *Id.* Shortly thereafter, Vietnamese officials began to notice an increasing number of rats running around the city without tails. *Id.* It turned out that the rat catchers would capture the rats, sever their tails, and release them back into the sewers so they would procreate, produce more rats, and therefore generate more revenue. *Id.* So, too, when a court indicates that claims and defenses must be based on "evidence," this can lead to pressures and incentives to massage and manipulate such "evidence," either by optimizing for a metric that defeats the metric's goal or that reduces its predictive effect. *See* Chin, *supra* note 330. This has also been referred to as "Adversarial Goodhart." *Id.*

This issue was brought to the fore recently with respect to vehicle emissions testing. Given a standard evaluation protocol and a measure of success, the systems learn (or are taught) to behave differently when they are being tested, and to optimize not actual emissions, but whatever the test instruments register.[331]

In an ideal world, the accuracy and reliability of AI tools should be established by *independent* testing. Even so, it is necessary to consider carefully whether the results from such testing actually transfer to the problem at hand. In practice, progress in AI has occurred so quickly that often such independent testing has not yet occurred. Some AI tools have been rigorously tested by their developers; others, not so much. Some vendors disclose the nature of the testing they have conducted, but rarely do they disclose detailed protocols and results. Should they be required to do so, as are the purveyors of drugs, medical devices, and safety-critical equipment? Until such time as requirements like these are implemented, unvetted AI technologies will continue to be deployed, and it will be necessary to estimate their effectiveness and reliability on an ad-hoc basis. It would be unwise to consider such ad-hoc determinations as judicial notice, absent rigorous independent testing.

As an example, consider the voice transcription results shown above. There is reason to believe that the major corporation providing the transcription service has tested its software and has a reputational (if not economic) incentive for it to work well. And, perhaps, it works well enough for its intended purpose in this particular example. That transcript might even be offered in evidence to demonstrate that Cormack had notice, provided its provenance could be established. But the authors would not suggest that all transcription software, or indeed all transcriptions provided by this particular company, are necessarily accurate or should automatically be admitted as evidence.

As particular AI tools mature, the standards for their acceptance as evidence should tighten, as should the criteria to be used in assessing the weight of the evidence provided by them.

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[331] *See, e.g.*, Benjamin Hulac, *Volkswagen Uses Software to Fool EPA Pollution Tests*, SCI. AM. (Sept. 21, 2015), https://www.scientificamerican.com/article/volkswagen-uses-software-to-fool-epa-pollution-tests [https://perma.cc/HN5J-463L]; *Volkswagen emissions scandal*, WIKIPEDIA https://en.wikipedia.org/w/index.php?title=Volkswagen_emissions_scandal&oldid=1000735588 [https://perma.cc/BD5K-62TY].

VII. EVIDENTIARY PRINCIPLES THAT SHOULD BE CONSIDERED IN EVALUATING THE ADMISSIBILITY OF AI EVIDENCE IN CIVIL AND CRIMINAL TRIALS

A. Adequacy of the Federal Rules of Evidence in Addressing the Admissibility of AI Evidence

As the above discussion illustrates, understanding what AI is, and how it functions in the many different applications in which it is used, is a complex and challenging undertaking. This complexity is no less present when lawyers and judges are faced with the task of determining how to evaluate the admissibility of AI evidence when it is offered to support and defend claims in civil and criminal cases. To date, there have been few, if any, court decisions squarely addressing this topic, and the cases that have referenced AI evidence often have done so in a cursory or tangential manner.[332] Th challenge is compounded by the fact that the Federal Rules of Evidence[333] are amended infrequently, and the process of amendment is slow, because it is governed by the procedural requirements of the Rules Enabling Act.[334] In contrast, technology, and especially AI technology, changes at near-breakneck speed, and often is incorporated into routine use by individuals, organizations, corporations, and governments long before it is the subject of evidentiary scrutiny in a particular case. For this reason, it is

[332] *See, e.g.*, Wisconsin v. Loomis, *supra* note 145. The *Loomis* Court discussed AI technology in the context of due process challenges to its use during a sentencing, where the rules of evidence are inapplicable. *See, e.g.*, FED. R. EVID. 1101(d)(3). It therefore provides no real help in evaluating the standards to be used when AI evidence is being offered during trials where evidence rules do apply.

[333] Every state in the United States has adopted its own rules of evidence, some of which are identical or nearly identical to the Federal Rules of Evidence, and some of which differ in significant respects. Nevertheless, the evidentiary concepts that govern admissibility of AI evidence are fundamental and are found in all compilations of the rules of evidence. Further, the Federal Rules of Evidence are frequently cited as persuasive authority even in states that have evidence codes that differ from the Federal Rules. For that reason, the authors will refer to the Federal Rules of Evidence in this paper because of their national scope and their influence on state codifications of the rules of evidence.

[334] *See* 28 U.S.C. §§ 2072–2077. Section 2073 of the Rules Enabling Act (the "Enabling Act") authorizes the Judicial Conference of the United States Courts to appoint a standing committee on rules of practice, procedure, and evidence, and individual committees for the rules of civil, criminal, appellate, and bankruptcy procedure, and the rules of evidence. The meetings of the standing committee, as well as those of the individual committees, are open to the public, minutes are kept of their proceedings, and there must be sufficient advance public notice of committee meetings. When one of the individual committees recommends a new rule (or amendment) it must prepare a proposed rule (or amendment) and explanatory note. The standing committee reviews and approves proposed new rule (or amendment), and it then is transmitted to the U.S. Supreme Court for review and approval. Section 2074 of the Enabling Act requires the Supreme Court to transmit the proposed new rule (or amendment) to Congress not later than May 1 of the year in which a proposed new rule (or amendment) is to become effective. The proposed new rule (or amendment) then takes effect on December 1 of that year, unless revised or rejected by Congress. *See id.*

not an unfair question to ask whether the Federal Rules of Evidence provide an adequate analytical framework to evaluate whether AI evidence ought to be admitted in court cases.[335]

But the Federal Rules of Evidence are nothing if not resilient, and they are designed to be used in a manner that is not static or inflexible. Rule 102 provides: "These rules should be construed so as to administer every proceeding fairly, eliminating unjustifiable expense and delay, and *promote the development of evidence law*, to the end of ascertaining the truth and securing a just determination." (emphasis added).[336] As this paper argues, the existing Federal Rules of Evidence are adequate for the task of evaluating AI evidence, provided they are applied flexibly.

We will start with the rules that define what relevant evidence is, then discuss the rules that govern how to authenticate evidence, and, finally, focus on the rules that govern how to admit scientific, technical, and specialized evidence. In the process, we will focus primarily on the evidentiary issues associated with relevance and authenticity, the two areas that create most of the evidentiary challenges for admitting AI evidence. Other evidence doctrines, such as the hearsay rule,[337] and the original writing rule,[338] can be encountered, but these rules present less of a concern than authenticity. Why? Because the focus of the hearsay rule is intentionally assertive statements made by human declarants,[339] and AI applications, by their very nature, involve machine-generated output.[340] While the evidence may, and

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[335] *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 542–43 (D. Md. 2007) (courts have rejected arguments calling for abandoning the existing rules of evidence and adopting more demanding rules to govern admissibility of electronic evidence). *See also* Michael M. Martin, Stephen A. Salzburg, and Daniel J. Capra, 5 *Federal Rules of Evidence Manual* § 901.02[9], at 901–19 (12th ed. 2019) (noting that the "basic authentication principles . . . [of the Fed. R. Evid.] have been found to be sufficiently adaptable to all forms of electronic evidence.").

[336] FED. R. EVID. 102.

[337] *See* FED. R. EVID. 801–07.

[338] *See* FED. R. EVID. 1001–08.

[339] *See* FED. R. EVID. 801(a)–(c).

[340] "Because human design, input, and operation are integral to a machine's credibility, some courts and scholars have reasoned that a human is the true 'declarant' of any machine conveyance. But while a designer or operator might be partially epistemically or morally responsible for a machine's statements, the human is not the sole source of the claim. . . . The machine is influenced by others but is still a source whose credibility is at issue." Andrea Roth, *Machine Testimony*, 127 Yale L.J. 1972, 1978–79 (2017). While it may be a useful analogy to compare the factually assertive output of an AI algorithm as a "statement," akin to one made by a human declarant, for purposes of stressing the importance of not accepting algorithmic output without critical analysis, this analogy has its limits. First, algorithms, unlike human beings, cannot intentionally "lie," they have no "demeanor" that a jury can evaluate for clues of deception or candor, and they cannot be subjected to an "oath" to impress upon them the duty to be truthful. Therefore, anthropomorphically characterizing the results of AI programs as having potential "credibility" problems adds little to what lawyers and judges must consider in deciding whether AI evidence may be considered by a jury. At its root, the hearsay rule is intended to promote the reliability

often does, take the form of an express or implied factual assertion (*e.g.*, "this is the photo of the person depicted in the surveillance video"; "this is the sector of the city that is likely to have the greatest potential for criminal activity on a particular date and time"; "this job applicant is most qualified for the vacancy being filled"), and may be offered for its substantive truth, the source is not a *human* declarant, therefore it is not properly regarded as hearsay.[341] Rather, the key issue is *authenticity*—how accurately does the AI system that generated the evidence produce the result that its proponent claims it does. Similarly, the original writing rule imposes a requirement that proof of the content of writings, recordings, and photographs must be made by introducing an original or duplicate original,[342] but those terms are defined interchangeably, and broadly, so they are seldom difficult to comply with, unless a witness is called who merely describes what he or she observed as the output of the AI system, instead of introducing a copy. This seldom occurs for the simple reason that having a human describe the contents of the output of an AI system that produces a written, recorded, or photographic result robs it of most of the weight that the evidence would have if the jury were shown the output itself (once properly authenticated).

B. Relevance

Federal Rule of Evidence 401 defines relevance. It states: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than

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of testimonial evidence, and the many hearsay exceptions all share a common denominator of being sufficiently reliable and accurate to allow the jury to consider them without the need to have the human declarant appear before them to assess credibility. If validity and reliability are the common goals, then, at least for AI, it is much more usefully analyzed under the lens of the authenticity rules, and the rules governing admissibility of evidence regarding experts, than by strained analogies to the hearsay rule.

[341] *See, e.g.*, U.S. v. Wallace, 753 F.3d 671, 675 (7th Cir. 2014) (rejecting confrontation-clause challenge to the admissibility of a video recording showing an exchange of drugs between two people because there was no human declarant to be cross examined and there was no showing that the conduct involved was intended by the participants to be an assertion, therefore there was no hearsay "statement," as contemplated by Fed. R. Evid. 801(a), and no "declarant," as contemplated by Fed. R. Evid. 801(b)); U.S. v. Lizarraga-Tirado, 789 F. 3d 1107, 1109-10 (9th Cir. 2015) (rejecting hearsay challenge to a satellite image and accompanying GPS coordinates. The Court found that the satellite image, exclusive of any labels and markers, was not hearsay because it contained no "assertion," as Fed. R. Evid. 801(a) requires. Similarly, because the geolocation coordinates of a particular point on the image was identified by a "tack," it was not hearsay since it was automatically generated by the Google Earth program. The Court held that "[a] tack placed by the Google Earth program and automatically labeled with the GPS coordinates isn't hearsay," because it contains no "statements" made by a "human" declarant.). These same analyses apply with equal force to the content and output of AI systems. *See also* 31 Charles A. Wright and Victor J. Gold, *Federal Practice and Procedure: Evidence* §7103, at 4 (Supp. 2018) ("While machine produced evidence like a readout from a global positioning system raises an issue under Rule 901, it does not also raise a hearsay issue because such evidence does not contain the statement of a person.").

[342] *See* FED R. EVID. 1001(e) (defining duplicates and duplicate originals), 1002 (setting forth the substantive rule), and 1004–1007 (setting forth exceptions to the rule).

it would be without the evidence; and (b) the fact is of consequence in determining the action." This is a relatively low bar to admitting evidence, because even evidence that has slight tendency to prove or disprove facts that are important to resolve a civil or criminal case meet this standard.[343] Examined in isolation, it could be argued that AI evidence that has not adequately been examined to determine its validity and reliability still has some tendency to prove a disputed issue. Rule 401 does not require perfection, only a tendency to prove or disprove.

But Rule 401 must not be read in isolation; it must be considered in conjunction with its evidentiary neighbors, Rules 402 and 403. Rule 402 states: "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules [of evidence]; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."[344] In essence, Rule 402 creates a presumption that relevant evidence is admissible, even if it is only minimally probative, unless other rules of evidence or sources of law require its exclusion. But, while the first part of Rule 402 is flexible, the second part is immutable: Irrelevant evidence is never admissible.

Rounding out Rules 401 and 402 is Rule 403, which is designed to level the evidentiary playing field. It provides: "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."[345] As it relates to the admissibility of AI evidence, Rule 403 has three important features. First, it establishes a "balancing test" for determining whether relevant evidence may be considered by the judge or jury. This scale "tilts" towards admissibility of relevant evidence.[346] It is inadmissible only if its probative value (*i.e.*, its ability to prove or disprove important facts presented in a case) is substantially outweighed by the adverse consequences listed in the rule. It is not enough that relevant evidence will be prejudicial to the party against which it is introduced—after all, all evidence offered by a plaintiff against a defendant is intended to be

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[343] *See, e.g.*, MICHAEL M. MARTIN ET AL., 1 FEDERAL RULES OF EVIDENCE MANUAL § 402.02[1] 401, 406–7 (12th ed. 2019) ("To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence. The question of whether relevance is thus different from whether evidence is *sufficient* to prove a point. . . . It should be emphasized that 'any tendency' is enough. The fact that the evidence is of weak probative value does not make it irrelevant.") (emphasis in original)).

[344] FED. R. EVID. 402.

[345] FED. R. EVID. 403.

[346] *See, e.g.*, United States v. Terzado-Madruga, 897 F. 2d 1099, 1117 (11th Cir. 1990) (The balancing test of Fed. R. Evid. 403 "should be struck in favor of admissibility.").

prejudicial in the sense that it is offered to show that the defendant is liable. It is excludable only if its prejudice is *unfair* to that party.[347] Similarly, Rule 403 will tolerate a degree of confusion on the part of the judge or jury that must evaluate the evidence, even if it tends to mislead them, provided that these adverse consequences do not substantially outweigh the tendency of the evidence to prove important facts in the case. But even though the balancing in Rule 403 favors admissibility, the fact that the rule clearly establishes that judges must consider unfairness, be aware that confusion may result, and be careful to discern whether the jury may be misled, is extremely important, especially when applied to the admissibility of AI evidence. After all, the court cannot evaluate technical evidence for prejudice, confusion, or assess whether it misleads without understanding how it works. And judges cannot assess whether a jury will be misled or confused by AI evidence unless they have an appreciation for whether the AI application meets acceptable standards of validity and reliability, which may differ depending on what the evidence is being offered to prove, and the adverse consequences flowing from allowing a jury composed of lay persons to consider that evidence in reaching its verdict.

Second, Rule 403 makes it clear that it is the trial judge who is charged with the responsibility of reviewing the evidence in the first instance to determine whether the jury may hear it. This obligation flows from another rule of evidence, Rule 104(a), which states: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."[348] This is all well and good, but implicit in this delegation of responsibility is the notion that the judge must have the tools to make this preliminary determination. The hallmark feature of the American justice system is that it is an adversary process. This means that it is the responsibility of the parties, not the judge, to develop and present the factual evidence that will be offered to the jury for its consideration. When it comes to technical evidence like AI, the judge often is in a battle of wits unarmed, as the court is not involved in the investigation of the facts

[347] *See* United States v. Guzman-Montanez, 756 F.3d 1, 7 (1st Cir. 2014) ("[T]he law shields a defendant against unfair prejudice not against all prejudice. '[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.'"); Martin, *supra* note 343, § 403.02[3], at 403,410–11 ("Evidence is not 'prejudicial' merely because it is harmful to the adversary. After all, if it didn't harm the adversary, it wouldn't be relevant in the first place. Rather, the rule refers to the negative consequences of 'unfair' prejudice. Unfair prejudice is that which could lead the jury to make an emotional or irrational decision, or to use the evidence in a manner not permitted by the rules of evidence.").

[348] FED. R. EVID. 104(a). The party introducing the evidence bears the burden of proving that the offered evidence meets the requirements of Rule 104(a) by a preponderance of the evidence. *See* Martin, *supra* note 343 § 104.02[9], at 104–12.

underlying a case, or the marshalling of evidence to prove or disprove it. What this means is that it is the obligation of lawyers who intend to offer (or challenge) AI evidence to do the hard work necessary to show the judge how the AI system works (*i.e.*, produced its output), why the evidence will enlighten not confuse, and promote a just outcome, not one that is unfair. To do this, they must understand the AI system and its output themselves, and that can be a challenge for lawyers who more often than not are generalists, not specialists in the many scientific and technical disciplines that underlie AI systems and their related evidence.

For their part, the trial judge must raise with the parties well in advance of the trial the question of whether they intend to offer AI or similarly technical evidence at trial, and as part of the pretrial scheduling process, impose deadlines for disclosing an intention to introduce such evidence, and for challenging its admissibility sufficiently far in advance of trial to allow the judge to have a hearing (which may require the testimony of witnesses). Determinations about whether AI evidence meets adequate thresholds of validity and reliability sufficient for it to be considered by the jury do not lend themselves to last minute, on-the-fly assessments, and should not be attempted or allowed in the middle of a trial itself.

Finally, it should be obvious that a judge cannot make the determinations required by Rules 401 through 403 unless the party offering the AI evidence is prepared to disclose underlying information concerning, for example, the training data and the development and operation of the AI system sufficient to allow the opposing party (and the judge) to evaluate it, and the party against whom the AI evidence will be offered to decide whether and how to challenge it. If a party intends to rely on facts that are the product of AI applications in a civil or criminal trial, they should not be permitted to withhold from the party against whom that evidence will be offered the information necessary to determine the validity (*i.e.*, the degree of accuracy with which the AI tool measures what it purports to measure), and the reliability (*i.e.*, the consistency with which the AI algorithm correctly measures what it purports to measure), of the AI evidence. If they are prohibited from doing so by the claims of proprietary information or trade secrets raised by the company that developed the AI application, the trial judge should give the proponent of the AI evidence a choice: disclose the underlying evidence (under the provisions of an appropriate protective order), or otherwise demonstrate its validity and reliability. If the proponent is unwilling or unable to do so, they should be precluded from introducing the evidence at trial.[349]

[349] In addition to evidentiary concerns associated with admitting AI evidence against a party that has been denied sufficient information with which to assess its validity and reliability, this can also raise

The long and the short of it is not hard to grasp. Invalid or unreliable AI systems produce results that have insufficient tendency to prove or disprove disputed facts in a trial. Neither the trial judge nor the party against whom AI evidence is offered should be required to accept at face value the unproven claims of the proponent of the evidence that it is valid and reliable. This takes us to the next important area where the Federal Rules of Evidence provide guidance: the process of authentication.

C. Authentication of AI Evidence

Federal Rule of Evidence 901(a) sets forth in plain terms what is meant by the requirement that AI evidence must be authenticated in order to be considered by the jury. It states: "To satisfy the requirement of authenticating . . . an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[350] Rule 901(b) then lists ten non-exclusive ways in which a party can

procedural due process issues if the proponent of the evidence is a government entity. In *Houston Fed. of Teachers, Local 2415 v. Houston Ind. Schl. Dist.*, *supra* note 98, the Court denied the school district's motion for summary judgment on the plaintiffs' procedural due process claims largely because the plaintiff school teachers had been "denied access to the computer algorithms and data necessary to verify the accuracy of their [teacher evaluation] scores." *Id.* at 1177. The school district used an AI-based evaluation system developed by a third-party vendor to evaluate teacher performance in order to determine whether to renew the employment of public school teachers. *Id*. The vendor claimed that the algorithms and related software were trade secrets and refused to allow the plaintiffs the ability to test their validity. *Id.* The Court concluded that the inability of the teachers to ensure the correct calculation of their evaluation scores exposed them to the risk of "mistaken deprivation" of their jobs and refused to grant summary judgment to the school district on the teachers' procedural due process claims. *Id.* at 1180. Similarly, in a more recent opinion, the Superior Court of New Jersey, Appellate Division, rejected claims of trade-secret protection as a bar to producing source code to permit the defendant in a criminal case to evaluate the validity and reliability of the State's DNA analysis software used to prove that the defendant's DNA was present, reversing the decision of the trial judge that blocked the disclosure of the source code. The Court held that "[w]ithout . . . [access to the source code] defendant is relegated to blindly accepting the company's assertions as to its reliability. *And, importantly, the judge would be unable to reach an informed reliability determination . . . as part of his gatekeeping function.* Hiding the source code is not the answer. The solution is producing it under a protective order." State v. Pickett, 466 N.J. Super. 270, 246 A.3d 279 (App. Div. 2021) (emphasis added)). Compare these two cases with the decision in *Wisconsin* v. *Loomis*, *supra* note 145, where the Wisconsin Supreme Court rejected due process challenges to the use of the AI-powered COMPAS system for evaluating defendant recidivism risk for purposes of sentencing defendants. *Id.* at 271 ¶86. In *Loomis*, the Court was unpersuaded that the defendant had been denied access to information necessary to evaluate the validity of the COMPAS software, on similar claims of proprietary trade secrets. *Id*. at 257–64 ¶¶46–65. In light of the discussion in this article, it is our view that the *Loomis* Court unwisely dismissed the defendant's legitimate challenges to the validity and reliability of the COMPAS system, while the *Houston Fed. of Teachers* and *Pickett* Courts correctly recognized the inherent unfairness associated with allowing claims of trade secrets to preclude litigants from testing the validity and reliability of critical AI evidence that is being offered against them. In *Pickett*, the Court cogently explained why the trial judge, as well as the party against whom the electronic evidence will be offered, needs this information to rule on its accuracy.

[350] FED. R. EVID. 901(a).

accomplish this task.[351] The examples that most readily lend themselves to authenticating AI evidence are: Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); and Rule 901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).

When authenticating AI evidence using Rule 901(b)(1), the testimony of the witness called to accomplish this task must comply with other rules of evidence. For example, Rule 602 requires that the authenticating witness have personal knowledge of how the AI technology functions.[352] It states: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."[353]

There are some important features of Rule 602 that tend to be overlooked by some lawyers and judges. There is an understandable tendency to call the fewest number of witnesses as possible to authenticate evidence. When a single person possesses all the knowledge needed to do so, then that is all that is required. But if this paper has shown anything, it is that AI applications seldom are the product of a single person possessing personal knowledge of all the facts that are needed to demonstrate that the technology and its output are what its proponent claims them to be. Data scientists may be required to describe the data used to train the AI system. Developers may be required to explain the features and weights that were chosen for the machine-learning algorithm. Technicians knowledgeable about how to operate the AI system may be needed to explain what they did when they used the tool, and the results that they obtained. These technicians, however, may be entirely at sea when asked to explain how the data was

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[351] *See* FED. R. EVID. 901(b)(1)–(10).

[352] *See* 31 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure: Evidence* §7103 24–25 (1st ed. 2000), which states that "[f]or purposes of analyzing the scope of Rule 901, the most important additional relationship is the one between that provision and Rule 602. . . . Both Rules 602 and 901 identify elemental qualities that make evidence worthy of consideration. Since the provisions perform similar functions, it is important to know when evidence is subject to the personal knowledge requirement of Rule 602 and when it is subject to the authentication or identification requirement of Rule 901. Rule 602 applies only to testimonial evidence. . . . Rule 901 does not apply to testimonial evidence; it applies to all other evidence. The distinction can be misleading, however, because it might be taken to suggest that Rules 602 and 901 never apply to the same evidence. In fact, these provisions are simultaneously applied where testimony is the means by which some respect of non-testimonial evidence is relayed to the jury."; *See, also id*. at 25, n.33 ("Further, perhaps the most common way to establish authenticity or identity is with testimony that satisfies the personal knowledge requirement of Rule 602. *See Rule 901(b)(1).*" (emphasis added)).

[353] FED. R. EVID. 602.

collected or cleansed, how the algorithm that underlies the AI system was programmed, or how the system was tested to show that it produces valid and reliable results. An example illustrates this nicely.

As mentioned above, a Canadian company named BlueDot developed an algorithm that allowed it to examine data from a large number of publicly available sources—as varied and diverse as medical bulletins, livestock reports, and airline flight information—enabling it to accurately predict, as early as December, 2019, where the COVID-19 virus would spread.[354] Development of the algorithm required a team that included, among other disciplines, engineers, ecologists, geographers, and veterinarians.[355] Once developed, the algorithm had to be trained for over a year to learn how to detect 150 pathogens.[356] If evidence derived from use of the BlueDot algorithm was being offered into evidence at trial, the party seeking to introduce it would be required to show how it could accurately and reliably accomplish what its developers claimed it could. Given the number of specialties involved in the tool's development, and the length and complexity of the process by which it was "trained" to analyze data from so many disparate sources, it is difficult to imagine how a single person would be able to testify from personal knowledge in order to do so.

Of course, Rule 602 would not require authentication by a single person possessing personal knowledge of all of the information needed to authenticate the BlueDot's AI technology, if the person chosen for this task qualified as an expert witness under Rules 702 and 703.[357] Rule 702 provides that: "A witness who is qualified as an expert by knowledge, skill, experience training or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[358]

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354 *See* Bill Whitaker, *supra* note 94.

355 *See id.*

356 *See id.*

357 *See* Charles A. Wright & Victor J. Gold, *supra* note 352 §7103, at 26, stating that "[t]he connections between Rule 901 and the rules governing opinion evidence are also of consequence. Rules 701 and 702 impose general limits on the admissibility of lay and expert opinion testimony. . . . Rule 901(b) seems to assume that opinion evidence may be admitted under Rules 701 and 702 in certain limited contexts. . . ." One such context is Rule 901(b)(3), which provides that authentication may be accomplished by "[a] comparison with an authenticated specimen by an expert witness or the trier of fact." Similarly, Rule 901(b)(5) states that authentication of the identity of a person's voice may be accomplished by "[a]n opinion identifying a person's voice."

358 FED. R. EVID. 702.

Importantly, Rule 703 states that: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."[359] If the requirements of Rules 702 and 703 were met, then, a party that wanted to authenticate an AI system that was developed by a team of individuals with scientific, technical, or specialized knowledge beyond the personal knowledge of any one person could do so with a single qualified expert. But that is a big "if," because, as will be seen, the requirements of Rules 702 and 703 are quite demanding when applied as intended by the Federal Rules of Evidence.

The key takeaway point is that lawyers must keep in mind, and judges must be vigilant to require, that the person or persons called to authenticate AI evidence either have personal knowledge of the authenticating facts or qualify as an expert that is permitted to incorporate into their testimony information from sources beyond their own personal knowledge, provided it is sufficiently reliable.[360]

The second authenticating rule most suited to AI evidence is Rule 901(b)(9). It permits authentication by "[e]vidence describing a process or system and showing that it produces an accurate result."[361] Of course, to do so, the party that wishes to introduce the AI evidence would face the exact challenges just described in the discussion of Rule 901(b)(1)—calling a single person or persons themselves possessing personal knowledge of all the authenticating facts or qualifying as an expert under Rules 702 and 703.[362]

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[359] FED. R. EVID. 703.

[360] *See, e.g.*, Fed. R. Evid. 703. *See also* United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004), for a discussion of the importance of a trial judge to diligently fulfill their "gatekeeping" function under Fed. R. Evid. 104(a) to ensure the "reliability and relevancy of expert testimony" because an expert's opinion "can be both powerful and quite misleading because of the difficulty in evaluating it." The Court in *Frazier* noted that "[i]ndeed, no other kind of witness is free to opine about a complicated matter without any firsthand knowledge of the facts in the case and based upon otherwise inadmissible hearsay if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" (internal citations omitted)); *Cooper* v. *Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001)("While Rule 702 was intended to liberalize the introduction of relevant expert evidence, courts 'must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading.'") (internal citation omitted)).

[361] FED. R. EVID. 901(b)(9).

[362] There are two additional rules of evidence that may be used to authenticate AI evidence that are closely related to Rules 901(b)(1) and 901(b)(9). They are Fed. R. Evid. 902(13), which allows authentication of "[a] record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person"; and Fed. R. Evid. 902(14), which allows authentication of "[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person." Rules 902(13) and (14) would allow the proponent of AI evidence to authenticate it by substituting the certificate of a qualified witness

An important feature of authentication needs careful consideration in connection with admitting AI evidence. Normally, a party has fulfilled its obligation to authenticate non-testimonial evidence by producing facts that are sufficient for a reasonable factfinder to conclude that the evidence more likely than not is what the proponent claims it is.[363] In other words, by a mere preponderance. This is a relatively low threshold—51%, or slightly better than a coin toss.[364] However, as we have shown in this paper, not all AI evidence is created equal. Some AI systems have been tested and shown to be valid and reliable. Others have not, when, for example, efforts to determine their validity and reliability have been blocked by claims of proprietary information or trade secret. Furthermore, some of the tasks for which AI technology has been put to use can have serious adverse consequences if it does not perform as promised—such as arresting and criminally charging a person based on flawed facial recognition technology or sentencing a defendant to a long term of imprisonment based on an AI system that has been trained using biased or incomplete data that inaccurately or differentially predicts the likelihood that the defendant will reoffend.

The greater the risk of unacceptable adverse consequences, the greater the need to show that the AI technology is unlikely to produce those consequences. Judges, tasked with making the initial determination of admissibility of AI evidence under Rule 104(a), should be skeptical of admitting AI evidence that has been shown to be accurate by no more than an evidentiary coin toss. They should insist that the proponent of the evidence establish the validity and reliability of the AI to a degree that is commensurate with the risk of the adverse consequences likely to occur if the technology does not perform as claimed. And if the proponent of the evidence fails to do so, then the trial judge should evaluate under Rule 403

for their live testimony. But it must be stressed that the qualifications of the certifying witness and the details of the certification that the evidence produces an accurate and reliable result must be the same as would be required by the in-court testimony of a similarly qualified witness. Rules 902(13) and (14) are not invitations for boilerplate or conclusory assertions of validity and reliability and should not be allowed to circumvent the need to demonstrate, not simply proclaim, the accuracy and reliability of the system or process. *See, e.g.*, Wright & Gold, supra note 352 §7147, at 43, stating that "[n]ewly adopted Rule 902(13)] allows the authenticity foundation that satisfies Rule 901(b)(9) [process or system producing accurate results] to be established by a certification rather than the testimony of a live witness. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under Rule 902(13)." The same applies for the certification in Rule 902(14), certified data copied from an electronic device, storage medium, or file.

[363] *See, e.g.*, Lorraine v. Markel Am. Ins. Co., *supra* note 335 at 542; United States v. Safavian, 435 F.Supp.2d. 36, 38 (D.D.C. 2006); United States v. Holmquist, 36 F.3d 154, 168 (1st Cir. 1994) ("the standard for authentication, and hence for admissibility, is one of reasonable likelihood.").

[364] *See, e.g.*, Martin, *supra* note 343 § 901.02[1], at 901–07 ("[The requirement to authenticate or identify evidence imposed by Rule 901(a)] is a mild standard—favorable to admitting the evidence.").

whether the probative value of AI authenticated by a mere preponderance is substantially outweighed by the danger of unfair prejudice to the adverse party or would confuse or mislead the jury to an unacceptable degree,[365] taking into consideration the nature of the adverse consequences that could occur if the AI technology is insufficiently accurate or reliable.

What is the best, fairest way to do so? We believe it is to employ Rule 102, which requires the rules of evidence to be "construed so as to administer every proceeding fairly . . . and promote the development of evidence law"[366] to "borrow" from Rule 702 and the cases that have interpreted it, when determining the standard for admitting scientific, technical, or other specialized information that is beyond the understanding of lay jurors and generalist judges. These factors are commonly referred to as the *Daubert* factors and are discussed next.

D. Usefulness of the Daubert Factors in Determining Whether to Admit AI Evidence

As previously noted, Federal Rule of Evidence 702 requires that introduction of evidence dealing with scientific, technical, or specialized knowledge that is beyond the understanding of lay jurors be based on a sufficient facts or data and reliable methodology that has been applied reliably to the facts of the particular case.[367] These factors were added to the evidence rules in 2000 to bolster the rule in light of the U.S. Supreme Court's decisions in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167 (1999).[368] Therefore, while Rule 702 was not intended to codify the *Daubert* decision, the factors discussed in that decision relating to determining the reliability of scientific or technical evidence are quite informative when determining whether Rule 702's reliability[369] requirement has been met. As described in the Advisory Committee Note to the amendment of Rule 702 that went into effect in 2000, the "*Daubert* Factors" are: "(1) whether the expert's technique or theory can be or has been tested . . . ; (2) whether the technique

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[365] *See* FED. R. EVID. 403.

[366] FED. R. EVID. 102.

[367] *See* FED. R. EVID. 702 (b)-(d). *See also generally* In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994), which helpfully discusses the importance of the reliability factor in the *Daubert* analysis, and the obligation of the trial judge to "take into account" all of the factors listed in *Daubert* that are relevant to determining the reliability of the scientific or technical evidence that is being offered into evidence.

[368] *See* Advisory Committee Note, FED. R. EVID. 702 (2000).

[369] In legal parlance the "reliability" of scientific or technical evidence usually refers to its trustworthiness, as opposed to the narrower technical definition of "reliability" used in this paper. The legal concept of reliability encompasses both validity (*i.e.*, accuracy) and reliability (*i.e.*, consistency across similar circumstances).

or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific [or technical] community."[370]

The usefulness of borrowing these factors in assessing whether AI evidence should be admitted is readily apparent. To authenticate AI technology, its proponent must show that it produces accurate, that is to say valid, results. And it must perform reliably, meaning that it consistently produces accurate results when applied in similar circumstances. When the accuracy and reliability of technical evidence has been verified through independent testing and evaluation of the AI system that produced it, the methodology used to develop the evidence has been published and subject to review by others in the same field of science or technology, when the error rate associated with the AI system use is not unacceptably high, when the standard testing methods and protocols have been followed, and when the methodology used is generally accepted within the field of similar scientists or technologists, then it has been authenticated. It does what its proponents say it does. And introducing it produces none of the adverse consequences that Rule 403 is designed to guard against.

In contrast, when the validity and reliability of the system or process that produces AI evidence has not properly been tested, when its underlying methodology has been treated as a trade secret by its developer preventing it from being verified by others, when applying the method produces unacceptably high error rates, when corners were cut and standard procedures were not followed when it was developed or employed, or when the methodology is not accepted as reliable by others in the same field, then it is hard to maintain with a straight face that it does what its proponent claims it does, which ought to render it inauthentic and inadmissible. The bottom line is that if a lawyer intends to rely on AI evidence to prove their case, they would be foolish not to consider these five factors and marshal the facts to show compliance with as many of them as they can. And if the reader is a judge that takes seriously their obligation to employ the rules of evidence during a trial "to the end of ascertaining the truth and securing a just determination,"[371] they will insist that the party offering evidence produced by an AI system to prove its case adequately has shown that it does what its proponent claims it does, to a degree of certainty commensurate with the risk of an unacceptably bad outcome if it turns out that the technology was unreliable. Failing that, the AI evidence should be excluded for insufficiency

[370] *See* Advisory Committee Note, *supra* note 368.

[371] FED. R. EVID. 102.

of authentication (Rule 901(a)), failure to show the use of reliable methodology that was replied applied to the facts of the case (Rule 702), and/or excessive danger of unfair prejudice, or of confusing or misleading the jury (Rule 403).

E. Practice Pointers for Lawyers and Judges

If both lawyers and judges accept that there are multiple types and uses of AI, and that there are many potential issues with it—for example, risk of bias, lack of robust testing and validation, function creep, potential lack of transparency and explainability, and possible lack of resilience—which can all affect the validity and reliability of AI evidence, and they recognize the need to authenticate it properly before it is admitted into evidence (and the need to follow the rules that govern how to do so), then the question arises: How should lawyers faced with introducing or challenging AI evidence, and judges who must rule on its admissibility, go about doing so? Below, we offer some practical suggestions with the hope that they will make this task less daunting in practice.

1. What problem was the AI created to solve?

As we have shown, the essence of AI technology comes down to the data and the algorithm or algorithms that were developed to govern it. Algorithms are a set of rules or procedures for solving a problem or accomplishing an end. So, the starting place for determining the admissibility of AI technology is to define the problem that the AI was designed to solve. Knowing this is essential to assessing the validity of the system (*i.e.*, its accuracy in performing these functions); its reliability (*i.e.*, the consistency with which it produces the same or substantially similar results when applied under substantially similar circumstances); and whether it is being used for purposes for which it was not designed (*i.e.*, there has been substantial function creep). The proponent of the evidence needs to know its design objective in order to advance the evidence necessary to secure its admissibility. Opposing parties need to know this information to be able to intelligently assess whether its admissibility may be challenged. And judges need to know this to be able to rule on the admissibility of the evidence derived from the AI system. Relevance is not an abstract concept. Evidence is relevant only to the extent that it has the ability to prove or disprove facts that are consequential to the resolution of a case. The problem that the AI was developed to resolve—and the output it produces—must "fit" with what is at issue in the litigation. Without knowing what the AI was designed and programmed to do, none of these fundamental questions can be answered.

2. How was the AI developed, and by whom?

One of the issues that affects the validity and reliability of AI evidence is whether its design was influenced by intended or unintended bias. Was the data used to train the AI representative, or skewed? Is it representative of the proper target population? If not trained with overtly discriminatory data, were discriminative proxies used in the training process? What assumptions, norms, rules, or values were used to develop the system? Were the people who did the programming themselves sufficiently qualified or experienced to ensure that there was not inadvertent bias that could impact the validity and reliability of the output of the system? Have the programmers given due consideration to the population that will be affected by the performance of the system? It does not require Napoleonic insight to realize that these questions cannot be answered without knowledge about the details of the data that was used as input for purposes of training, how the AI system was developed, including the design choices that were made, how the system was operated, and how the output was interpreted. When the party offering the output of an AI system into evidence thwarts efforts to obtain this information by asserting that it is proprietary or a trade secret, this should be a red flag for both the adverse party and the court. And judges should be particularly careful not to allow a party planning to introduce AI evidence to hide behind claims of proprietary information or trade secrets without careful consideration of the consequence to the party against whom the AI evidence will be offered. Will allowing trade-secret claims to shield disclosure of how the AI evidence was developed, trained, and functions prevent the party against whom it will be introduced from having a fair opportunity to learn how the AI works so they can prepare a defense? If so, how are they to frame evidentiary challenges to its use? Adverse parties who are refused access to the information they need to assess AI's validity and reliability on the basis of claims of trade secrets should challenge these designations and seek a ruling from the court that either grants them access to the information that they reasonably need (subject to proper protective measures,) or prohibits the introduction of the AI evidence at trial. And judges must ask themselves how they can fulfill their gatekeeping role in ruling on the admissibility of the AI evidence if presented with little more than a "black-box" AI program and a conclusory claim that it consistently functions as it was designed to.

3. Was the validity and reliability of the AI sufficiently tested?

We have repeatedly stressed the importance of the concepts of validity and reliability in assessing whether AI evidence should be admitted as evidence. The proponent of AI evidence should be required to demonstrate that the AI system that produced the evidence being offered has been tested (preferably independently) to confirm that it is both valid for the purpose for

which it is being offered, and reliable. If it was not tested, why not? And why should the court even consider allowing the introduction of the output of an untested AI system? Who designed and carried out the testing? Was it the same people who developed the system in the first place? If so, was the methodology used to test the system standard or otherwise reasonable, adhering to procedures accepted as appropriate by the relevant scientific or technological community familiar with the subject matter at the heart of the AI system? Under what conditions did the testing occur, and how do they compare to the circumstances under which the system is now being used? Was the system tested both for validity and reliability? Has the validity and reliability been confirmed by others who are independent of the developers? Are the results of the testing still available so that they may be reviewed by the adverse party and the court? The answers to these questions should inform the court's decision as to whether the evidence should be admitted at all. Allowing the introduction of AI evidence that has not been shown to be valid and reliable for the purpose for which it is being introduced substantially increases the risk that its probative value (if any) is substantially outweighed by the danger of unfairly confusing or misleading the factfinder. This is particularly so if the AI evidence is the primary evidence being offered to prove an essential element of the proponent's case.

4. Is the manner in which the AI operates "explainable" so that it can be understood by counsel, the court, and the jury?

As we discussed earlier, an important factor in evaluating the admissibility of AI evidence is whether the functioning of the system that produced it can be explained to lay persons unfamiliar with the technology and methodology involved, so they can understand how the system operates, how it achieves its results, and thus, evaluate the amount of weight they are willing to give to it. Recall our earlier discussion of "XAI" ("Explainable AI") and the principles advanced by the National Institute of Standards and Technology.[372] In NIST's draft publication titled *Four Principles of Explainable Artificial Intelligence*, the authors explained why it is important for the developers of AI programs to be able to explain to others—even if only in general terms—how they work. Notably, they stated:

With recent advances in artificial intelligence (AI), AI systems have become components of high-stakes decision processes. The nature of these decisions has spurred a drive to create algorithms, methods, and techniques to accompany outputs for AI systems with explanations. This drive is motivated in part by laws and regulations which state that decisions including those from automated systems, provide information

372 *See* discussion *supra* at page 61; Phillips et. al., *supra* note 241.

about the logic behind those decisions and the desire to create trustworthy AI.[373]

Based on these calls for explainable systems, it can be assumed that the inability or failure to articulate an answer can affect the level of trust users will afford that system. Suspicions that the system is biased or unfair can raise concerns about harm to oneself and to society. This may slow societal acceptance and adoption of AI technology, as members of the general public oftentimes place the burden of meeting societal goals on manufacturers and programmers themselves. Therefore, in terms of societal acceptance and trust, developers of AI systems may need to consider that multiple attributes of an AI system can influence public perception of the system. Explainable AI is one of several properties that can increase trust in AI systems. "Other properties include resiliency, reliability, elimination of bias, and accountability."[374]

The four principles of explainable AI are defined as follows:

> Explanation: Systems deliver accompanying evidence or reason(s) for all outputs;
>
> Meaningful: Systems provide explanations that are understandable to individual users;
>
> Explanation Accuracy: the explanation correctly reflects the system's process for generating the output; and
>
> Knowledge Limits: The system only operates under conditions for which it was designed or when the system reaches a sufficient confidence in its output.[375]

Although written from the perspective of scientists interested in the development of valid and reliable AI methods, the discussion emphasizes the same themes that underlie the purpose of the rules of evidence: that when technical information is offered during a trial, the proponent of that evidence must demonstrate that it is sufficiently trustworthy for the jury to credit it in making its decision. If the proponent of the evidence cannot even explain how the AI system operates in a way that can be understood by the trier of fact (including assuring them that it only is being used under the conditions

[373] Phillips et al., *supra* note 241 at 1.

[374] *Id.*

[375] *Id.* at 2. (emphasis in original).

for which it was designed and that there is sufficient confidence in its accuracy), then the evidence produced from it should not be admitted by the court.

5. What is the risk of harm if AI evidence of uncertain trustworthiness is admitted?

As we have explained, the Federal Rules of Evidence do not require that all risk of error be eliminated before scientific and technical evidence may be admitted. After all, evidence is relevant if it has any tendency, however slight, to prove or disprove facts that are important to deciding a case.[376] And authenticity is established if the proponent demonstrates that the evidence more likely than not is what it purports to be.[377] The argument could be made that even AI evidence shown to be valid and reliable for a particular purpose, but which is being offered to prove something for which its validity and reliability have not been established, has some tendency to prove what it is being offered to prove.

The expert witness rules[378]—which we argue should inform the decision of whether AI evidence is admissible—are probably the most helpful rules for evaluating the admissibility of AI evidence because they supply demanding standards: (i) whether there is a sufficient factual basis to support the evidence; (ii) whether the methods and principles used to generate the evidence were reliable; and (iii) whether they were reliably applied to the facts of the particular case.[379] And the *Daubert* Factors further focus the inquiry on the following: (i) whether the methodology was tested; (ii) whether there is a known error rate; (iii) whether the methods used are generally accepted as reliable within the relevant scientific or technical community that is familiar with the methodology; (iv) whether the methodology has been subject to peer review by others knowledgeable in the field; and (v) if standard procedures or protocols are applicable to the methodology, whether they were complied with.[380] But even this enhanced level of analysis does not require perfection. The ultimate question that must be decided in each case is whether the evidence is sufficiently valid and reliable for the purpose for which it is being offered. The answer to this question will depend on what is at stake if the fact finder credits AI evidence that is invalid and unreliable. Two factual scenarios will help to illustrate the import of this question.

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[376] *See* FED. R. EVID. 401.

[377] *See* United States v. Holmquist, 36 F. 3d 154, 168 (1st Cir. 1994).

[378] *See* FED. R. EVID. 702–03.

[379] *See* FED. R. EVID. 702.

[380] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593–94 (1993).

Imagine a civil case for breach of contract that seeks money damages. There have been terabytes of electronic documents generated by the parties that are potentially relevant to the resolution of the dispute. Reviewing them all manually, by humans, would be too time consuming and costly. A party requested to produce "all documents relevant to the dispute" by its adversary uses an AI system known in the eDiscovery community as "technology-assisted review" or "TAR"[381] to search the records and to identify those that are responsive to the request for production, and those that are not. The party produces the records deemed responsive by the TAR system, subject to a review for privilege. The requesting party is not satisfied with the production, the parties are unable to reach agreement, and they take the dispute to the court. The producing party touts the accuracy of its TAR system; the requesting party reels off reasons why it thinks the search methodology was unreliable and the production is incomplete. The judge must decide. Undoubtedly, the court will consider the "proportionality factors" set forth in Fed. R. Civ. P. 26(b)(1),[382] including what is at stake in the litigation, how important the information is to resolving the issues in dispute, how much the TAR process already cost the producing party, what it would cost to require further TAR (or other search and review efforts), how much more complete and accurate the production might be if more TAR (or other search and review methods) were performed, what the parties resources are, and whether what was produced—even if it does not include all of the available responsive documents—is sufficient to allow the requesting party a fair opportunity to prove its case.[383] Depending on how the judge weighs these factors they may rule that the production is "good enough," even if imperfect, or they may require further TAR (or other search and review methods), and decide who must pay for it. But unless the initial production is so clearly deficient as to hamstring the requesting party's ability to prove its case, the risk of ruling that no further production is required is not catastrophic to the requesting party. Expressed differently, the production, though imperfect, is sufficient, and the possibility that some undiscovered but responsive documents might not have been produced is not

[381] *See* Grossman & Cormack, *supra* note 56.

[382] *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the party's case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs it is likely benefit.").

[383] FED. R. CIV. P. 26(g) requires that the search inquiry must be reasonable, not perfect; an attorney's signature on a discovery response certifies that it was based on a "reasonable inquiry." *See also* FED. R. CIV. P. 26(b)(1) defines the scope of discovery and provides that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. . . ."

the end of the world for the requesting party—the circumstances of the case will allow a degree of risk that the TAR system did not locate every possible responsive document.

Now, contrast this situation with one where a judge is tasked with sentencing a criminal defendant who has been convicted of possession with the intent to distribute a controlled substance. The defendant has a history of mental health problems, substance abuse, and two prior drug convictions: one for simple possession and the other for distribution. In fashioning a sentence, the judge will consider a number of factors to arrive at a sentence that is sufficient, but not excessive: the nature and circumstances of the offense; the safety of the public; the need to deter the defendant and others from committing similar crimes in the future; the history and characteristics of the particular defendant; whether the sentence should include drug testing and mental health treatment to lessen the risk that the defendant will recidivate; and perhaps other relevant factors.[384]

At sentencing, the prosecution argues that a prolonged jail sentence is needed to protect the public and to deter the defendant from committing future drug offenses. The prosecutor relies on an evaluation of the defendant performed by the court's probation department, which used an AI system similar to the COMPAS system we have discussed at length in this paper. That evaluation compared the defendant's characteristics to a national database of criminal convictions and determined that the defendant is 70% likely to recidivate within two years of his release from prison, unless the sentence includes both mental health treatment and substance abuse treatment. Focusing on the 70% recidivism prediction, the prosecutor argues that the judge should incarcerate the defendant for an extended period of time. The defense attorney argues that the AI system was not designed to be used to recommend the length of the sentence of incarceration, but rather to determine what services should be included in the sentence to mitigate the risk of recidivism once the defendant has been released from custody. The defense attorney also points out that the data used to make the recidivism prediction was gathered from a national database, not one that was representative of convictions in the state where the case has been brought. Nor has the AI been independently validated, and the defense attorney was not allowed access to the information needed to test the validity and reliability of the AI system, and so on.

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[384] *See, e.g.*, 18 U.S.C. § 3553(a). The sentencing factors include: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense; to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant; to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See id.*

The judge must decide whether to rely on the AI recidivism prediction when deciding how long a sentence of incarceration they should impose. If the AI system has not been shown to be valid and reliable for the purpose for which it is being offered (*i.e.*, determining the length of a jail sentence), and the defense has not had a fair opportunity to challenge its validity and reliability because the developer of the software successfully asserted trade-secret protection, then the judge is faced with weighing the consequences of using what may be untrustworthy information to make a decision that will impact the defendant's personal freedom for a long period of time. The consequence of "getting it wrong" in this situation is substantial.

These two scenarios illustrate the point that must be emphasized. The greater the risk of adverse consequences (and the greater the magnitude of those consequences) in relying on AI evidence that is of uncertain validity and reliability, the greater the need for the trial judge to carefully consider whether to admit the AI evidence for the purpose for which it was offered. This is where Fed. R. Evid. 403 comes into play. The AI evidence may be relevant, and it may be valid and reliable for a purpose other than that which it is being offered to prove, but if the risk of unacceptable consequences to the defendant substantially outweighs its probative value, it should be excluded.

6. Timing Issues

It should be clear at this point that determining whether AI evidence should be admitted in a trial is complicated, requires a great deal of information, and is not the type of issue that is well suited to being resolved in the middle of a trial, or on the fly. Preparation is critical, by both the proponent and opponent of AI evidence. And the judge needs time to hear the competing evidence, to carefully review the supporting materials, and to decide. But since there is no rule of evidence that specifically addresses AI evidence, nor do the Federal Rules of Civil and Criminal Procedure directly require the disclosure of AI evidence, there is a risk that it may not be disclosed soon enough for disputes about its admissibility to be determined before trial. It is true that a party that intends to call a witness who would meet the definition of an expert witness under Fed. R. Evid. 702, in order to lay the foundation for AI evidence, would have to disclose the witnesses' opinions and the basis therefore, which should give its adversary and the court some advanced notice that AI evidence is going to be introduced.[385] But expert disclosures often are more general about the subjects of the expert's intended testimony than the rules actually require, so that the intent to introduce AI evidence may not be clearly flagged far enough ahead of trial.

[385] *See* FED. R. CIV. P. 26(b)(4); FED. R. CRIM. P. 16(a)(1)(G).

That means that the parties should communicate well ahead of trial to determine if AI evidence is going to be offered at trial, and reach agreement (or bring the matter to the attention of the court) about when such AI evidence will be disclosed, the extent to which the party against whom the AI evidence will be admitted will have access to the information needed to assess and challenge its validity and reliability, and whether the proponent of the AI evidence will assert proprietary information or trade-secret protection to deny the production of such information to the opposing party. And the trial judge should inquire during the pretrial stages of the case whether AI evidence will be introduced, set a deadline for its production, as well as for challenges to its admissibility, rule on any trade-secret claims, and schedule a hearing well before trial to insure that the court itself is adequately informed and has sufficient time to make a principled decision as far in advance of trial as possible. Finally, a trial judge faced with ruling on the admissibility of AI evidence need not rely solely on the arguments of the attorneys for the parties and their experts but can appoint a court expert as allowed by Fed. R. Evid. 706[386], if the circumstances so warrant.

CONCLUSION

Although the explosion in the use of AI within increasingly large sectors of our society is of relatively recent vintage, it is here to stay. AI is in a state of such rapid advancement that the law of evidence governing the circumstances under which AI technology and its output should be admitted into evidence in civil and criminal trials is not well developed. A growing number of commentators have written about the potential problems and concerns that impact whether AI evidence should be admitted, but there are few court decisions that have squarely addressed the admissibility of AI evidence in proceedings governed by the Federal Rules of Evidence or their state-law equivalents. But this will change, in due course, as it is inevitable that AI technology will be at the heart of disputes that will increasingly find their way into court. When this happens, lawyers and judges must be prepared to address the evidentiary issues that influence whether the AI evidence is to be admitted. Since AI systems are complex and highly technical, most lawyers and judges will be ill equipped for this task unless they have at least a rudimentary understanding of what AI is, how it operates, scientific and statistical evaluation, and the issues that need to be addressed in order to make decisions about its validity and reliability, and hence its admissibility. And, since there are, at present, no rules in the Federal Rules of Evidence that directly address AI evidence, lawyers and judges must rely

386 *See* FED. R. EVID. 706.

on the rules that do exist to provide an analytical framework to assist them with the challenges that await them when they must confront these issues. Our aim has been to lend a helping hand in this process. We have tried to describe in language that is not overly technical what AI is, the types of AI that presently exist, some of the challenges AI can pose, the principles that govern whether an AI system produces valid and reliable output, the issues that need to be considered when determining its evidentiary value in trials, and the available rules of evidence which—while not perfect for the task—are sufficient to insure fair outcomes, if followed. It is our hope that this article will be useful to lawyers and judge alike and will help to promote fair outcomes in trials in which AI evidence is sought to be admitted. At minimum, we hope that we have shown that when it comes to determining whether AI evidence should be admitted into evidence in civil and criminal trials, lawyers and judges cannot evaluate AI from a state of fundamental ignorance. In time, the court decisions will come, and there may even be new rules of evidence that give more specific guidance. But, in the meantime, we hope that this article will serve as a starting place.

TAB 2D

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THE GPTJUDGE: JUSTICE IN A GENERATIVE AI WORLD

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Abstract

Generative AI ("GenAI") systems such as ChatGPT recently have developed to the point where they are capable of producing computer-generated text and images that are difficult to differentiate from human-generated text and images. Similarly, evidentiary materials such as documents, videos and audio recordings that are AI-generated are becoming increasingly difficult to differentiate from those that are not AI-generated. These technological advancements present significant challenges to parties, their counsel, and the courts in determining whether evidence is authentic or fake. Moreover, the explosive proliferation and use of GenAI applications raises concerns about whether litigation costs will dramatically increase as parties are forced to hire forensic experts to address AI-generated evidence, the ability of juries to discern authentic from fake evidence, and whether GenAI will overwhelm the courts with AI-generated lawsuits, whether vexatious or otherwise. GenAI systems have the potential to challenge existing substantive intellectual property ("IP") law by producing content that is machine, not human, generated, but that also relies on human-generated content in potentially infringing ways. Finally, GenAI threatens to alter the way in which lawyers litigate and judges decide cases.

This article discusses these issues, and offers a comprehensive, yet understandable, explanation of what GenAI is and how it functions. It explores evidentiary issues that must be addressed by the bench and bar to determine whether actual or asserted (*i.e.*, deepfake) GenAI output should be admitted as evidence in civil and criminal trials. Importantly, it offers practical, step-by-step recommendations for courts and attorneys to follow in meeting the evidentiary challenges posed by GenAI. Finally, it highlights additional impacts that GenAI evidence may have on the development of substantive IP law, and its potential impact on what the future may hold for litigating cases in a GenAI world.

Introduction

In the past few months, generative artificial intelligence ("GenAI") has come to the forefront of the news media and captivated the public's attention. Students are using OpenAI's

ChatGPT to do their schoolwork for them, to the alarm of teachers and school boards.[1] An administrator at Vanderbilt University used ChatGPT to write a message to the university community in response to tragic shootings at Michigan State, which sparked outrage.[2] Websites are routinely using images generated by Midjourney[3] and Stable Diffusion,[4] and cover artists and other illustrators are suddenly fearing for their livelihoods.[5] Clarkesworld, a major science fiction magazine, had to close its doors to new submissions, after an influx of AI-generated stories prevented it from performing its normal review process for new manuscripts.[6] Increasingly lifelike pornographic videos and still images are being created using AI systems that

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[1] Rob Waugh, *'Half of school and college students are already using ChatGPT to cheat': Experts warn AI tech should strike fear in all academics*, Daily Mail (Mar. 26, 2023), https://www.dailymail.co.uk/sciencetech/article-11899475/Half-students-using-ChatGPT-cheat-rise-90.html; Arianna Johnson, *ChatGPT in Schools: Here's Where It's Banned—And How It Could Potentially Help Students*, Forbes (Jan. 31, 2023), https:forbes.com/sites/ariannajohnson/2023/01/18/chatgpt-in-schools-heres-where-its-banned-and-how-it-could-potentially-help-students/?sh=2b5bb4f76e2c.

[2] Sam Levine, *Vanderbilt apologizes for using ChatGPT in email on Michigan shooting*, The Guardian (Feb. 22, 2023), https://www.theguardian.com/us-news/2023/feb/22/vanderbilt-chatgpt-ai-michigan-shooting-email.

[3] Midjourney Home Page, https://www.midjourney.com/home/?callbackUrl=%2Fapp%2F.

[4] Stable Diffusion Online Home Page, https://stablediffusionweb.com/.

[5] Rob Salkowitz, *AI Is Coming For Commercial Art Jobs. Can It Be Stopped?*, Forbes (Sept. 16, 2022), https://www.forbes.com/sites/robsalkowitz/2022/09/16/ai-is-coming-for-commercial-art-jobs-can-it-be-stopped/?sh=3bc8d48b54b0.

[6] Alex Hern, *Sci-fi publisher Clarkesworld halts pitches amid deluge of AI-generated stories*, The Guardian (Feb. 21, 2023), https://www.theguardian.com/technology/2023/feb/21/sci-fi-publisher-clarkesworld-halts-pitches-amid-deluge-of-ai-generated-stories.

incorporate the faces and bodies of celebrities and other pop culture figures into the media they are generating.[7]

These systems did not come out of nowhere. Systems that simulate creativity or that generate text have been a thriving branch of computer science research for decades. But in the past few years, this technology has become increasingly powerful. The quality of these systems is now such that it is challenging to tell computer-generated images from those produced by human illustrators or photographers,[8] or to separate text generated by a computer from that written by a human author.[9] Similarly, evidentiary materials—including documents, videos, audio recordings, and more—that are AI-generated are becoming increasingly difficult to distinguish from those that are non-AI generated.

While it may seem like it will be years before GenAI will appear in your courtroom, do not be lulled into false complacency. These cases will be coming your way much sooner than you think, and you need to be ready for them. By way of example, imagine the following scenarios.

Coming Soon to a Court Near You

Several days before entering her final undergraduate semester, Keisha, a pre-law student at Georgetown University, received a devastating email from the Dean's Office accusing her of cheating on her political science honors thesis during the preceding semester. The work in question was an essay she had submitted concerning U.S. federal government policy related to biometric data collection, which she had written with the help of ChatGPT, a GenAI tool that responds to dialogue-styled prompts with narrative text.[10] Keisha responded to the email arguing that under the University's academic guidelines, writing with the unauthorized help of another *person* would be considered cheating, but there were no rules prohibiting other forms of assistance, such as artificial intelligence, and that she had both personally prepared the prompts provided to ChatGPT and reviewed the final work product that was submitted. The University also disciplined Keisha on another ground: She had fabricated material and attributed it to a real source. Although Keisha had proofread and edited the essay produced by ChatGPT, she did not cross-check all of the references because ChatGPT cited the sources with such authority; it never

[7] Moira Donegan, *Demand for deepfake pornography is exploding. We aren't ready for this assault on consent*, The Guardian (Mar. 13, 2023), https://www.theguardian.com/commentisfree/2023/mar/13/deepfake-pornography-explosion.
[8] *See, e.g.*, Simon Ellery, *Fake photos of Pope Francis in a puffer jacket go viral, highlighting the power and peril of AI*, CBS News (Mar. 28, 2023), https://www.cbsnews.com/news/pope-francis-puffer-jacket-fake-photos-deepfake-power-peril-of-ai/.
[9] *See* Jan Hendrik Kirchner et al., *New AI classifier for indicating AI-written text* (Jan. 31, 2023), https://openai.com/blog/new-ai-classifier-for-indicating-ai-written-text.
[10] *Cf.* Pranshu Verma, *A prof falsely accused his class of using ChatGPT. Their diplomas are in jeopardy.*, The Washington Post (May 18, 2023), https://www.washingtonpost.com/technology/2023/05/18/texas-professor-threatened-fail-class-chatgpt-cheating/.

occurred to her that they might be faulty AI "hallucinations."[11] After having been rejected on all her law school applications—ostensibly as a result of the failing grade on her thesis and the violation of Georgetown's academic integrity rules—Keisha initiated a lawsuit against the University. In her complaint, she alleges that her friend, who is not a native English speaker, has routinely used tools like spellcheck and Grammarly,[12] and has never been disciplined for receiving unauthorized assistance. One of Keisha's claims is that the distinction between what she did and what the other student did is unfair and discriminatory. Keisha's case has been assigned to you.

Sam is a freelance artist who works with many different forms of digital media. Recently, he noticed that several of his friends had changed their online profile photos to drawings of themselves and he decided to do the same. While scrolling through TikTok, he noticed a familiar drawing in a video about an app that could transform photographic selfies into drawings. If it weren't for the remnants of a blurred logo at the top right corner, Sam might not have been able to confirm that this AI-generated drawing was based on a sketch he had posted online a few years earlier. After discussing his experience with other artists in his local community, Sam realized that this trend could threaten the livelihoods of many artists other than just himself. The app in question integrated DALL-E 2,[13] which can create unique images using training datasets that are taken—without consent—from artists' work found on the Internet. Using this as a starting point, Sam and a coalition of artists filed a lawsuit against several GenAI companies with similar AI models, alleging copyright infringement. The suit includes as defendants not only the companies that built the AI models, but also the companies that collected the data and trained the GenAI algorithms, the company that developed the app he visited, and the individual who made the TikTok video that contained his artwork. The case is assigned to you. It is a case of first impression in your district because to date, there has been no precedent

[11] *See* Ziwei Ji et al., *Survey of Hallucination in Natural Language Generation*, 55:12 ACM Computing Survey 1-38 (2022), https://dl.acm.org/doi/pdf/10.1145/3571730.
[12] Grammarly Home Page, https://www.grammarly.com/.
[13] DALL-E 2 Homepage, https://openai.com/product/dall-e-2.

on whether training on Sam's and his colleagues' data reflects "fair use,"[14] nor any case that addresses who might be liable under these facts.[15]

The elderly have long been easy targets of telephone scams and phishing emails, but GenAI adds a whole new dimension to this problem. Barb, 81, and Henry, 84, are residents of a nursing home in Florida. They recently received an urgent voicemail message appearing to be left by their grandson, Adam, a graduate student at the University of Minnesota. In the message, Adam explained that he was returning home from a party the night before when he was arrested for driving while intoxicated. He stated that he was being held in jail and needed money for bail and to hire an attorney. He pleaded with his grandparents to wire him $12,000. After they receive the message from Adam, Barb and Henry listened to it again with a nursing home administrator, who helped them call their bank to arrange for the transfer of $12,000. Adam has a YouTube channel where he posts instructional videos on craft beermaking. It turns out that a scammer entered Adam's voice from some of his YouTube videos into Murf.AI,[16] an AI voice-cloning tool, and was able to convincingly synthesize his voice to defraud his grandparents.[17]

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[14] Under U.S. copyright law, "fair use" permits the unlicensed use of copyright-protected work under certain circumstances, such as in some non-commercial or educational contexts, including news reporting, teaching, and research. The issue of fair use of prior photographs in subsequent graphic art was addressed by the Supreme Court on May 18, 2023, in *Andy Warhol Foundation for the Visual Arts, Inc.* v. *Lynn Goldsmith, et al.*, 598 U.S. __ (2023), https://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf. In its opinion, the Court ruled 7-2 that Warhol's reliance on one of Goldsmith's photographs of Prince as an "artistic reference" point in his series of 16 silk-screen images of the musician (known as "the Prince Series") infringed on Goldsmith's copyright and was not fair use because Warhol did not sufficiently transform Goldsmith's original photograph in his derivative work. Usic The dissent wrote that the majority's decision "will stifle creativity of every sort. It will impeded new art and and music and literature. It will thwart the expression of new ideas and the attainment of knowledge. It will make our world poorer." *Id.* at 36. Many commentators believe that this outcome could have a profound impact on copyright law; in particular, it could affect the extent to which GenAI systems that rely on copyrighted images infringe on copyright holders' rights. *See, e.g.*, Paul Szynol, *The Andy Warhol Case That Could Wreck American Art*, The Atlantic (Oct. 1, 2022), https://www.theatlantic.com/ideas/archive/2022/10/warhol-copyright-fair-use-supreme-court-prince/671599/.

[15] *See, e.g.*, Complaints in *Getty Images (US), Inc.* v. *Stability AI, Inc.*, No. 1:23-cv-00135-UNA (D. Del. Feb. 3, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrlkmwnve/GETTY%20IMAGES%20AI%20LAWSUIT%20complaint.pdf, and *Anderson, et al.* v. *Stability AI Ltd., et al.*, No. 3:23-cv-00201 (N.D. Cal. Jan. 13, 2023), https://stablediffusionlitigation.com/pdf/00201/1-1-stable-diffusion-complaint.pdf.

[16] Murf.AI Voice Cloning Product Page, https://murf.ai/voice-cloning.

[17] *See, e.g.*, Pranshu Verma, *They thought loved ones were calling for help. It was an AI scam*, The Washington Post (Mar. 5, 2023), https://www.washingtonpost.com/technology/2023/03/05/ai-voice-scam/. *See also* Gene Marks, *It sounds like science fiction but it's not: AI can financially destroy your business*, The Guardian

Barb and Harry are suing the nursing home and the bank for negligence. The case has been assigned to you. Among other issues for you to consider, there is a dispute over the authenticity and admissibility of the voicemail message from Adam. The nursing home is seeking to have it admitted into evidence. Barb and Harry argue that in addition to the unfair prejudice they will suffer if the fake voicemail is admitted into evidence, when the cost of a forensic expert to analyze and testify about the voicemail is added to their mounting legal fees, the costs will exceed the amount of any recovery they might obtain. What do you do?

Finally, Maria is an undocumented immigrant living in the Bronx, New York. Her baby has been colicky for a few days in a row and appears to be growing increasingly distressed. Maria does not want to go to the local hospital emergency room because of her immigration status and lack of insurance. Instead, she logs on to a search engine that has been augmented with a chatbot feature that uses a large language model ("LLM") and describes the baby's symptoms. The algorithm does not show Maria any pre-existing webpages, rather, it automatically generates an English narrative response to her specific query. In her case, the response suggests giving the baby an aspirin and indicates that the baby should be fine in the morning. However, the baby becomes severely ill the next morning and develops a fever of 104 degrees. Maria rushes to the closest emergency room with her baby. The baby eventually recovers, but Maria is told that the baby will have a long-term cognitive disability because of the delay in receiving appropriate medical treatment. Maria sues the creator of the search-engine algorithm, arguing that it bears responsibility for the advice she received. If the company had merely linked to existing web pages, arguably it would have avoided any liability under Section 230 of the Communications Decency Act of 1996,[18] but in this case, because the search engine provided Maria with a single narrative response (rather than providing a series of links), Maria's counsel argues that it is responsible for damages. The search-engine company argues that because the chatbot feature contains a warning and disclaimer concerning its accuracy, Maria should have realized that the response was not authoritative and therefore, she could not reasonably rely on it. Moreover, because the chatbot was trained on a large dataset of existing Internet information that the search-engine company did not create, they claim that they are not responsible for damages.[19] The case has been assigned to you.

(Apr. 9, 2023), https://www.theguardian.com/business/2023/apr/09/it-sounds-like-science-fiction-but-its-not-ai-can-financially-destroy-your-business; Joseph Cox, *How I Broke Into a Bank Account with an AI-Generated Voice*, Vice (Feb. 23, 2023), https://www.vice.com/en/article/dy7axa/how-i-broke-into-a-bank-account-with-an-ai-generated-voice.

[18] 47 U.S.C. § 230(c)(i). *See* The Electronic Frontier Foundation, *Section 230*, https://www.eff.org/issues/cda230.

[19] There has already been at least one lawsuit brought in response to defamatory statements made by Chat-GPT. *See*, *e.g.*, Cassandre Coyer, *ChatGPT Made Up Sexual Harassment, Bribery Charges About Users. Can It Be Sued?*, Legaltech news (May 9, 2023), https://www.law.com/legaltechnews/2023/05/09/chatgpt-made-up-sexual-harassment-bribery-charges-about-users-can-it-be-sued/. Many commentators—including the two congressional leaders who co-authored the law—do not believe that Section 230 will serve as a successful defense for AI-powered chatbots that defame because they do not merely supply third-party

These examples are not far-fetched and raise novel and complex issues with which the courts will have to grapple in the near future.

What is This Stuff and Where Did it Come From?

Algorithms for simulating creativity have long been a natural interest of computer science researchers. The mathematical properties of music and language have been a focus of this area; researchers have attempted to reproduce the vocabulary and style of existing composers and authors, or even to use computers to derive entirely new styles of artistic work.[20] Over time, these methods have moved on to other media: video, visual art, animation, and more, and they have intersected with the same technology used to make deepfakes.[21] Not only can contemporary algorithms make a movie clip in the style of a famous director, but they can also incorporate the realistic likenesses of particular Hollywood stars into that video, where those simulated actors say things the real actors never said.

These algorithms have undergone a revolution in the past few years, due largely to more sophisticated algorithms for the generation of new content, and better algorithms for training the models to represent the underlying properties of existing human-generated base materials (*e.g.*, methods referred to as "deep learning"[22]). Other major developments include the massive

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content, but rather, they generate new information. *See* Cassandre Coyer, *ChatGPT Faces Defamation Claims. Will Section 230 Protect AI Chatbots?*, Legaltech news (May 22, 2023), https://www.law.com/legaltechnews/2023/05/22/chatgpt-faces-defamation-claims-will-section-230-protect-ai-chatbots/?kw=ChatGPT%20Faces%20Defamation%20Claims.%20Will%20Section%20230%20Protect%20AI%20Chatbots?.

[20] *See, e.g.*, Simon Colton and Geraint A. Wiggins, *Computational Creativity: The Final Frontier*, 242 Front. Artif. Intell. 21-26 (2012), https://computationalcreativity.net/iccc2014/wp-content/uploads/2013/09/ComputationalCreativity.pdf; Kemal Ebcioğlu, *An expert system for harmonizing chorales in the style of J. S. Bach*, 8:1-2 J. Logic Programming 145, (1990), https://www.sciencedirect.com/science/article/pii/074310669090055A?via%3Dihub; Pamela McCorduck, *Aaron's Code: Meta-Art, Artificial Intelligence, and the Work of Harold Cohen* (W.H. Freeman 1990); Margaret A. Boden, *Artificial Intelligence and Natural Man*, ch. 11 (The Harvester Press 1977).

[21] *See, e.g.*, Sebastian Berns et al., *Automating Generative Deep Learning for Artistic Purposes: Challenges and Opportunities*, Proceedings of 12th Int'l Conference on Computational Creativity ("ICCC '21") 357-66 (2021), https://computationalcreativity.net/iccc21/wp-content/uploads/2021/09/ICCC_2021_paper_37.pdf; Simon Colton et al., *Generative Search Engines: Initial Experiments*, Proceedings of 12th Int'l Conference on Computational Creativity ("ICCC '21") 237-46 (2021), https://computationalcreativity.net/iccc21/wp-content/uploads/2021/09/ICCC_2021_paper_50.pdf; Ahmed Elgammal et al., *CAN: Creative Adversarial Networks Generating 'Art' by Learning Styles and Deviating from Style Norms*, arXiv:1706.07068v1 [cs.AI] (June 23, 2017), https://arxiv.org/pdf/1706.07068.pdf.

[22] "Deep learning" is a type of machine learning based on artificial neural networks in which multiple layers of computer processing are used to extract progressively higher-level features from data. *See, e.g.*, Frank Emmert Strieb et al., *An Introductory Review of Deep Learning for*

decline in costs both for collecting and storing training data and improved technology for building huge training data sets.[23]

Generative AI is a specific subset of AI used to create new content based on training on existing data taken from massive data sources—primarily the Internet—in response to a user's prompt, or to replicate a style used as input.[24] The prompt and the new content may consist of text, images, audio, or video. The speedy development of GenAI has shocked the public because of how well it fares on creative tasks like writing poetry and drawing images, and how well it can create synthesized content of real people.

Another big change has been the remarkable fluency with language that current AI models show; as recently as four years ago, language models would routinely "forget" basic parts of the conversations they were having with human partners or would incomprehensibly babble in the middle of answering a question. Now, these models are so facile with language that they can comfortably produce sentences that are indistinguishable from those of a human, and can "recall" earlier parts of a conversation with ease.

The first GenAI approaches that were introduced involved text-to-text, that is, a user input a textual question or instruction, and the AI returned a textual, often narrative, response by predicting the words in a sentence. There have been many such large language models ("LLMs") offered by Silicon Valley tech companies, including Google's Language Model for Dialogue Applications ("LaMDA" or "Bard"),[25] Meta's Large Language Model Meta AI ("LLaMA"),[26] Microsoft's Bing AI ("Sydney"),[27] and perhaps the most well-known of all, Open AI's Generative Pre-trained Transformer ("GPT") series.[28]

While AI may have leapt into the general public's awareness only in the past six months, with the release of ChatGPT at the end of November 2022,[29] significant advancements in the field of GenAI can be traced back to as early as the 2010s. In 2014, the GenAI framework,

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Prediction Models With Big Data, 3 Front. Artif. Intell. 1-23 (2020), https://www.frontiersin.org/articles/10.3389/frai.2020.00004/full.

[23] *See, e.g.*, Leo Gao et al., *The Pile: An 800GB Data Set of Diverse Text for Language Modeling*, arXiv:2101.00027 [cs.CL] (Dec. 31, 2020), https://arxiv.org/abs/2101.00027.

[24] *See, e.g.*, Giorgio Franceschelli and Mirco Musolesi, *Creativity and Machine Learning: A Survey*, arXiv:2014.02726 (July 5, 2022), https://arxiv.org/abs/2104.02726; Ian J. Goodfellow et al., *Generative Adversarial Networks*, arXiv:1406.2661 [stat.ML] (June 10, 2014), https://arxiv.org/abs/1406.2661.

[25] *See* Eli Collins, *LaMDA: our breakthrough conversation technology*, The Keyword Blog (May 18, 2021), https://blog.google/technology/ai/lamda/.

[26] *See Introducing LLaMA: A foundational 65-billion parameter large language model*, Meta AI Blog, (Feb. 24, 2023), https://ai.facebook.com/blog/large-language-model-llama-meta-ai/.

[27] *See Introducing the New Bing* (2023), https://www.bing.com/new#features.

[28] *See GPT-4 is OpenAI's most advanced system, producing safer and more useful responses* (2023), https://openai.com/product/gpt-4.

[29] *See* OpenAI, *Introducing ChatGPT* (Nov. 30, 2022), https://openai.com/blog/chatgpt.

Generative Adversarial Networks ("GAN"),[30] took a huge step forward in creating images, videos, and audio that appeared authentic. In this new framework, two networks "compete"; a generative network drafts candidates and the discriminative network evaluates those candidates against true data to try to distinguish them. On the generative network's side, this leads to generated content that is more true-seeming. On the discriminative network's side, this leads to new findings about the characteristics that improve accuracy in matching the training data.

In 2017, Google introduced the transformer architecture,[31] which was another breakthrough in computer processing of natural language. Transformers do not require pre-labelled training data and can be trained in parallel, allowing much faster training than previous AI architectures. Many now well-known models, like the GPT series, are built using transformers, and each of the new GPT models is trained on progressively more data and is able to more accurately model human language than its predecessor(s). Another important change that began with GPT-3 is the use of reinforcement learning,[32] a process where external (*i.e.*, human) feedback is used to change the output of an AI model. In the case of LLMs, the addition of reinforcement learning allowed OpenAI, the creator of the GPT models, to endeavor to avoid having its models produce improper or offensive outputs.

ChatGPT—the model that took the Internet by storm—interacts with users in a dialogue style and is built on top of GPT-3.5. Because of its ability to understand user input, it can keep a natural flow of conversation, answering follow-up questions and responding to feedback along the way. ChatGPT amazed people because it completely shattered the notion that technology could not be as creative as humans, if not more creative, and because it appeared to pass the Turing Test,[33] even convincing some that it was sentient.[34] ChatGPT can write poems in the

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[30] *See* Ian Goodfellow et al., *supra* n.23.

[31] *See* Ashish Vaswani et al., *Attention is All You Need*, arXiv:1706.03762 [cs.CL] (Dec. 6, 2017), https://arxiv.org/abs/1706.03762.

[32] *See generally, e.g.*, Marco Wiering and Martin Otterlo (eds.), *Reinforcement Learning: State-of-the-Art* (Springer 2012), https://link.springer.com/book/10.1007/978-3-642-27645-3

[33] The "Turing test," first described by Alan Turing in 1950, asks a human to determine which of two conversational partners is a human and which is a computational agent; an agent satisfies the test if it can confuse its conversational partner into thinking it is human. *See* Alan Turing, *Computational Machinery and Intelligence*, LIX (236) Mind 433-60 (Oct. 1950). Turing, himself, referred to his idea as the "imitation game," however others since then have reserved that moniker for one particular version of the test. The Turing test is the most influential test for intelligence in computers, although it has been widely criticized. *See id.*; *see also, e.g.*, Alison Pease and Simon Colton, *On impact and evaluation in computational creativity: a discussion of the Turning Test and an alternative proposal*. In Dimitar Kazakov and George Tsoulas (eds.), *Proceedings of AISB '1: computing and philosophy* 15-22 (2011), https://discovery.dundee.ac.uk/en/publications/on-impact-and-evaluation-in-computational-creativity-a-discussion. If you would like to try your hand at chatting for two minutes and trying to figure out whether your conversational partner is a fellow human or a chatbot, *see human or not? A Social Turing Game*, AI21labs, https://www.humanornot.ai/.

[34] *See Google fires software engineer who claims AI chatbot is sentient*, The Guardian (July 23, 2022), https://www.theguardian.com/technology/2022/jul/23/google-fires-software-engineer-

style of Shakespeare and excerpts from a song in the style of Justin Bieber, all within a few seconds. Nonetheless, there are still many limitations to ChatGPT. Although it is designed to acknowledge its shortcomings rather than spout misleading or biased information, sometimes it still confidently answers questions like "Which is heavier, 1kg of feather or 1kg of iron?" by incorrectly insisting that 1kg of iron is heavier. (It is obvious to most humans that since both are 1kg, their weight is the same, even though, in general, iron is heavier than feathers!) Chat GPT can also miss biases inherent in its own responses to leading questions, or invent citations and references to publications or authors that do not exist. Its faulty responses are often referred to as "hallucinations."[35]

Another example of models that use GPT-3 is DALL-E 2,[36] a deep learning model that can respond to specific textual prompts by producing responsive images. However, while DALL-E 2 can generate images from prompts like "Draw an illustration of a baby daikon radish in a tutu walking a dog," whether it reaches an actual understanding of the language in the prompt is questionable. It has limitations in dealing with negation and in making inferences using common sense. For instance, the following images generated by DALL-E 2 show how irrelevant or meaningless the images can be in response to open-ended prompts that require actual understanding of the instruction, or where DALL-E 2 has insufficient image reference data associated with a complex, abstract concept included in a prompt.

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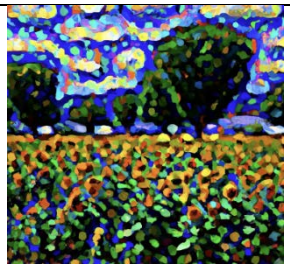
who-claims-ai-chatbot-is-sentient. *See also* Matt Meuse, Bots like ChatGPT aren't sentient. Why do we insist on making them seem like they are?, CBC Radio (Mar. 17, 2023), https://www.cbc.ca/radio/spark/bots-like-chatgpt-aren-t-sentient-why-do-we-insist-on-making-them-seem-like-they-are-1.6761709.

[35] *See* Ziwei Ji et al., *supra* n.11.

[36] *See* Aditya Ramesh et al., *Hierarchical Text-Conditional Image Generation with CLIP Latents*, arXiv:2204.01625 [cs.CV] (Apr. 13, 2022), https://arxiv.org/abs/2204.06125.

 Draw admissible evidence	 Draw admissible evidence in the style of Van Gogh	 Draw admissible evidence in the style of Picasso
 Draw inadmissible evidence	 Draw inadmissible evidence in the style of Van Gogh	 Draw inadmissible evidence in the style of Picasso

On the other hand, VALL-E, a model for text-to-speech ("TTS") synthesis focuses on the task of generating audio from a given text prompt and a "ground truth," an audio of the intended speaker that is at least three seconds in length.[37] Previously, TTS required clean data from a recording studio to produce output, meaning a lot of available data could not be used for training. This is no longer the case, as VALL-E now accepts a wide variety of training data and leverages it to make better generalizations. To the naked ear, the generated audio is indistinguishable from the original speaker because VALL-E accounts for background noise in addition to just matching the speaker's voice.

All of these are merely examples of what can currently be done with GenAI. GPT-4, which was released on March 14, 2023, is claimed to be 40% more likely to produce factual responses than its predecessor.[38] Nonetheless, there is a lack of clarity of how GPT-4 was trained, and the data set on which it was trained. It can generate complex computer code and can also directly identify properties of input images. While ChatGPT scored at the tenth percentile on the U.S. bar exam, GPT-4 passed it easily, scoring at the 90th percentile.[39]

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[37] *See* Chengy Wang et al., *Neural Codec Language Models are Zero-Shot Text to Speech Synthesizers*, arXiv:2301.02111 [cs.CL] (Jan. 5, 2023), https://arxiv.org/abs/2301.02111.
[38] *See* Open AI, *GPT-4 Technical Report*, arXiv.2303.08774 [cs.CL] (Mar. 27, 2023), https://arxiv.org/abs/2303.08774.
[39] Stephanie Wilkins, *How GPT-4 Mastered the Entire Bar Exam, and Why That Matters*, Legaltech News (Mar. 17, 2023), https://www.law.com/legaltechnews/2023/03/17/how-gpt-4-mastered-the-entire-bar-exam-and-why-that-matters/?kw=How%20GPT-4%20Mastered%20the%20Entire%20Bar%20Exam%2C%20and%20Why%20That%20Matters.

Moreover, with the release of ChatGPT plugins on March 23, 2023,[40] ChatGPT is no longer limited to outdated information; it can interact with real-time data to perform tasks in conjunction with other tools, like booking a trip using Expedia or purchasing items on Instacart. Still, we are nowhere near the end of the development of these tools.[41] Not only can GenAI be expected to get better at what it does, it will also be able to take on increasingly complex tasks, with varying degrees of human involvement.

Some Issues for Judges to Ponder

A. Do We Need New Rules of Evidence to Address GenAI?

When cases such as those described in the hypotheticals above reach the courts—and they will with alarming speed—judges will be called upon to make determinations about the authenticity and admissibility of evidence that may be produced by GenAI applications, or that may be truly human-generated or of unknown origin but challenged as deepfake. There is no question that proffering, challenging, and ruling on digital evidence just got harder.

In the main, the existing Federal Rules of Evidence and their state counterparts are written to provide general guidance to trial judges and attorneys in a vast array of cases, and only occasionally do they provide rules geared specifically to any particular type of technical evidence. This is because revising the Federal Rules of Evidence and their state counterparts is a time-consuming process, while technology in general—and GenAI in particular—change at a breakneck pace.[42] While there have been recent calls to amend the Federal Rules of Evidence to eliminate the role of the jury in determining the authenticity of digital and audiovisual evidence

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Compare GPT-4's performance with the "[j]ust over 78% of U.S. law school graduates who took the bar exam for the first time in 2022," and passed, which was "down slightly from the 80% first-time pass rate in 2021 and represents a 6 percent decline from 2020's first-time pass rate of 84%." Karen Sloan, *U.S. bar exam pass rate drops for first-time takers*, Reuters (Feb. 28, 2023), https://www.reuters.com/legal/legalindustry/us-bar-exam-pass-rate-drops-first-time-takers-2023-02-27/. In Ontario, Canada, where three of the authors reside, "the bar exams pass rate is north of 90 per cent. . . ." Alexander Overton, *Time for an end to the bar exams for Canadian lawyers*, Canadian Lawyer (May 14, 2021), https://www.canadianlawyermag.com/news/opinion/time-for-an-end-to-the-bar-exams-for-canadian-lawyers/356144.

[40] ChatGPT plugins Homepage, https://openai.com/blog/chatgpt-plugins.

[41] "OpenAI has officially stated that GPT-4.5 will be introduced in 'September or October 2023' as an 'intermediate version between GPT-4 and the upcoming GPT-5.'" Luke Larson, *GPT-5: release date, claims of AGI, pushback, and more*, digital trends (Apr. 14, 2023), https://www.digitaltrends.com/computing/gpt-5-rumors-news-release-date/.

[42] *See* Paul W. Grimm, Maura R. Grossman, and Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 Nw. J. Tech. & Intell. Prop. 9, 84 (2021), https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/2/ (hereinafter "Grimm, Grossman & Cormack").

in response to the appearance of deepfakes,[43] such a change would involve a substantial departure from the current evidentiary framework and would take considerable time to adopt, making it infeasible as a practical solution. We simply cannot change the rules of evidence with the introduction of each new technological development. Meanwhile, cases involving evidence known to be the product of GenAI applications, and evidence of unknown or challenged origin, but potentially AI-generated—*e.g.*, deepfake evidence—will reach the courts, and judges and attorneys will undoubtedly be required to address this evidence under the current rules of evidence.

Under the existing Federal Rules of Evidence, the key issues that must be addressed in determining the admissibility of GenAI evidence—as with any evidence—are: (i) relevance (Fed. R. Evid. 401), (ii) authenticity (Fed. R. Evid. 901 and 902), (iii) the judge's role as an evidentiary gatekeeper (Fed. R. Evid. 104(a)), (iv) the jury's role as a decider of contested facts relating to the authenticity of evidence (Fed. R. Evid. 104(b)), and (v) the need to exclude evidence that, while relevant, is unfairly prejudicial (Fed. R. Evid. 403).

Judges need to bear in mind that the Rules of Evidence were intended to be applied flexibly, "to promote the development of evidence law,"[44] meaning that the existing rules should not be rigidly applied in the face of technological advancements. Instead, they should be adapted to permit their application to new technologies and the evidentiary challenges that accompany them, such as those now posed by GenAI and deepfake evidence.[45] If this approach is to be followed, then in addition to the Fed. R. Evid. cited above, judges must also be informed by the rule that requires them to be the gatekeepers determining the admissibility of scientific, technical, and specialized evidence (Fed. R. Evid. 702). This rule, in its current version—and in its soon-to-be amended version[46]—requires the trial judge to ensure that scientific and technical

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[43] 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 (Feb. 2023), https://repository.uchastings.edu/hastings_law_journal/vol74/iss2/3/.

[44] Fed. R. Evid 102.

[45] For a comprehensive analysis of these issues as they relate to AI evidence, *see* Grimm, Grossman & Cormack, *supra* n.42, at 84-105.

[46] The proposed changes to Fed. R. Evid. 702 scheduled to take effect on December 1, 2023, are subtle, but very significant. The amendment adds the language "[if] the proponent demonstrates to the court that it is more likely than not that" the proposed expert's scientific, technical, or specialized knowledge will help the finder of fact to understand the evidence or decide a fact that is in issue, the expert's testimony is based on sufficient facts or data, the expert's testimony is the product of reliable principles and methods, and that the "expert's opinion reflects a reliable application of" the principles and methods to the fact of the case. *Proposed Amendments to the Fed. R. Evid.[], Rule 702 (Testimony by Expert Witness)*, Advisory Comm. on Evid. Rules, Memorandum to the Standing Comm. (May 15, 2022), in Comm. on Rules of Prac. & Proc., Agenda Book, Appendix A: Rules for Final Approval, at 891-96 (June 7, 2022), https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf. The new rule clarifies that the proponent of the expert evidence has the burden of demonstrating its helpfulness, factual sufficiency, reliable basis, and reliable application to the facts of the case by a "preponderance" of evidence (*i.e.*,

evidence that is beyond the ability of lay juries to understand without expert assistance, but will be helpful to the jury in deciding the issues they must resolve, is based on sufficient facts, supported by reliable methodology, which has been reliably applied to the facts of the particular case.[47] In determining whether the methodology or principles that underly the scientific or technical evidence are "reliable,"[48] judges must ensure that the evidence is both *valid* (*i.e.*, accurately measures or reflects what it is supposed to measure or reflect) and *reliable* (*i.e.*, is consistently accurate when applied under substantially similar facts and circumstances). Finally, but perhaps most importantly, when evaluating the admissibility of evidence of disputed origin that potentially is GenAI or deepfake evidence, trial judges must pay particular attention to the need to avoid the unfair prejudice that can occur if insufficiently valid and reliable evidence is allowed to be presented to the jury. Thus, Fed. R. Evid. 403 is particularly important in assessing the authenticity of potential GenAI or deepfake evidence. We outline below the steps that judges should follow when faced with determining the admissibility of such evidence.

B. What's a Judge to Do? New Wine in Old Bottles!

As a preliminary matter, when exercising their gatekeeping function to rule on challenged evidence that is being offered as "authentic," but which, in fact, could be GenAI evidence—deepfakes being the most common example—as well as evidence that is acknowledged to be GenAI, but its validity or reliability is challenged, judges should use Fed. R Evid. 702 and the *Daubert* factors[49] to evaluate the validity and reliability of the challenged evidence and then

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more likely than not). In addition, it underscores the obligation of the trial court to determine (under Fed. R. Evid. 104(a)), as a condition of admissibility of the scientific, technical, or specialized evidence, that the proponent has met its burden before the fact finder is allowed to consider the evidence in the first place. In this regard, the Advisory Committee's Note to the proposed rule change reflects the view of the Evidence Rules Advisory Committee that federal judges had not adequately been fulfilling this preliminary screening role under Fed. R. Evid. 702. *See id.*, Committee Note at 892-93.

[47] *See* Grimm, Grossman & Cormack, *supra* n.42, at 95-97.

[48] The rules of evidence conflate two distinct but related concepts—validity and reliability—under the single umbrella term "reliability." Technical evidence has *validity* if it accurately does what it was designed to do; it has *reliability* if it consistently is accurate when applied to the same or substantially similar circumstances. AI evidence needs to have both validity and reliability. *See* Grimm, Grossman & Cormack, *supra* n.42, at 48.

[49] The *Daubert* Factors were added to the Fed. R. Evid. in 2000, following the U.S. Supreme Court's decisions in *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167 (1999). While Fed. R. Evid. 702 was not meant to codify the *Daubert* decision, the factors discussed therein relating to the determination of the reliability of scientific or technical evidence are instructive in determining whether Fed. R. Evid. 702's reliability requirement has been met. The *Daubert* Factors are: "(1) whether the expert's technique or theory can be or has been tested . . .; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific [or technical] community." Advisory Committee Note, Fed. R. Evid. 702 (2000). For further discussion on

make a careful assessment of the unfair prejudice that can accompany introduction of inaccurate or unreliable technical evidence. Under such an approach, a showing that evidence is merely more likely than not what it purports to be (*i.e.*, the standard of mere preponderance) should not be determinative of admissibility. The court must also consider the potential risk, negative impact, or untoward consequences that could occur if the evidence turns out to be fake, or insufficiently valid and reliable. In other words, when the risk of an unfair or erroneous outcome is high, and the evidence of authenticity is low, the evidence should be excluded. Judges who follow the following steps will be in the best position to make these important determinations.

1. STEP 1: *Scheduling Order*. When issuing a scheduling order in a civil or criminal case, the court should set a deadline requiring a party that intends to introduce evidence that is or could potentially be based on a GenAI application, to disclose the nature of that evidence to the opposing party and the court sufficiently in advance of trial or a hearing for the opposing counsel to determine whether they intend to challenge the admissibility of that evidence, and whether the opposing counsel intends to seek discovery in order to frame a challenge to such evidence. Similarly, the scheduling order should include a deadline for the party against whom the actual or potential GenAI evidence will be introduced to advise the proponent of that evidence, and the court of its intent to challenge the evidence and to request discovery in order to challenge its admissibility.

   When discovery is sought but is opposed by the proponent of the challenged evidence, the court should hold a hearing (which may be informal or formal, as needed) to determine what discovery is requested, the objections to that discovery, and to issue an order outlining the discovery (if any) that will be permitted. If ordering discovery, the court should consider issuing a protective order to protect confidential trade secrets relating to any applicable AI system, algorithm, or data, if requested to do so. The scheduling order should set a deadline for the completion of the discovery and deadlines for the party intending to challenge the proffered evidence as AI-generated or deepfake to file a motion challenging the evidence, as well as the proponent's opposition to the motion to exclude, and the moving party's reply.

   A slightly different approach is necessary in those cases where a party is offering evidence that it does not acknowledge to be the product of a GenAI application (*i.e.*, evidence that the non-offering party may allege to be deepfake evidence but the offering party believes is human-generated or genuine). In such cases, the offering party will not meet the deadline in the scheduling order for disclosure of GenAI evidence because it contends that the evidence is not the product of such technology. Nonetheless, the pretrial order will include a deadline for disclosure of witnesses and other evidence the parties intend to introduce, and the potential deepfake evidence will have been subject to discovery under Fed. R. Civ. P. 34 or Fed. R. Crim. P. 16(a)(1)(E) and 16(b)(1)(A). The

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the usefulness of the *Daubert* factors in determining whether to admit AI Evidence, *see* Grimm, Grossman & Cormack, *supra* n.42, at 95-97.

party that contends that evidence that has been disclosed and/or produced during discovery is, in fact, a deepfake would then be able to request a conference with the court pursuant to Fed. R. Civ. P. 16 or Fed. R. Crim. P. 16.1 to request discovery in order to challenge the possible deepfake evidence, and the court would then proceed as set forth above for cases where a party acknowledges that it intends to introduce GenAI evidence.

2. STEP 2: *The Hearing*. When a challenge is made to the introduction of evidence as AI-generated or deepfake, the court should set an evidentiary hearing to develop the facts necessary to rule on the admissibility of the challenged evidence. Because the outcome of this ruling may have a substantial effect on whether there will be a trial, the hearing should be scheduled far enough in advance of trial for the evidentiary record to be made and evaluated by the judge, and for a ruling made on the admissibility of the challenged evidence. These hearings can be involved, and the court should schedule enough time to ensure that the record is sufficiently complete. At the hearing, the proponent must meet their burden of establishing the relevance of the evidence (under Fed R. Evid. 401), and its authenticity, by at least a preponderance of the evidence (under Fed. R. Evid. Rules 901 and 902). The opposing party should have the opportunity to introduce evidence challenging the relevance and authenticity of the proffered evidence, especially with respect to its validity and reliability, including any challenges to the methodology or principles underlying the data, training, or development of the AI system that generated the evidence. The proponent of the evidence should have the opportunity to rebut this evidence. Finally, the court should require the proponent of the evidence and the opposing party to address the potential risk of unfair or excessive prejudice that could result from introducing the proffered evidence—particularly if it should turn out to be invalid, unreliable, or a deepfake—based on the evidentiary record established at the trial.

3. STEP 3: *The Ruling*. Following the hearing, the court should carefully consider the evidence introduced and arguments made at the hearing and issue a ruling. In so doing, the court must assess whether the proponent of the evidence sufficiently met its burden of authenticating the evidence. The ruling should address the relevance, authentication, and prejudice arguments, and the court should pay particular attention to its conclusions regarding the validity and reliability of the challenged evidence and weigh the relevance of the proffered evidence against the risk of an unfair or excessively prejudicial outcome. Where the evidence may be highly prejudicial, a mere preponderance may very well be insufficient. The judge should take full advantage of the analytical factors found in Fed. R. Evid. 702 and the *Daubert* factors in assessing the validity and reliability of the evidence.

   On the question of authenticity, if the court determines that the facts are such that a reasonable jury could find that the challenged evidence more likely than not is authentic, but that a reasonable jury also could find that the challenged evidence more likely than not is not authentic, then this presents an issue of conditional relevance under Fed. R. Evid. 104(b). The rule requires the disputed facts regarding authenticity to be presented

to the jury for its ultimate determination of authentication,[50] but only if the judge rules that, based on the hearing, there is not unfair or excessive prejudice to the opposing party

[50] Fed. R. Evid. 104(b) deals with circumstances in which the relevance of proffered evidence depends upon the existence of a particular fact or facts, a situation sometimes referred to as "conditional relevance." *See* Advisory Committee Note to Fed. R. Evid. 104(b) (1975). Rule 104(b) itself provides that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." Rule 104(b) must be considered in concert with Fed. R. Evid. 104(a), which states that "[t]he court must decide any preliminary question about whether . . . evidence is admissible." These two rules allocate the responsibility for determining the admissibility of evidence between the trial judge and the jury, when the underlying facts that establish the relevance of proffered evidence are challenged. The Advisory Committee Note to Rule 104(b) helpfully discusses this allocation of responsibility as follows: "If preliminary questions of conditional relevancy were determined solely by the judge, as provided by subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfilment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration." In the context of evidence that is challenged as deepfake, the judge must initially assess whether the proponent has proffered sufficient facts that the challenged evidence is authentic, namely that the party introducing the evidence has shown, more likely than not, that it is what they claim it is. If the judge concludes that this threshold has not been established, the evidence is excluded. However, if the judge decides that this threshold has been established, the evidence is admitted for the jury to consider, but the opposing party may introduce evidence to rebut the proponent's authenticity evidence. If, after considering the proponent's and the opponent's evidence, the jury concludes that the evidence is not authentic (*i.e.*, it is a deepfake), then the judge instructs the jury to disregard it and not to consider it in reaching their verdict. Fair enough in the abstract, but the jury will already have been exposed to the deepfake evidence, and—as we will explain (*infra* at 19 & nn. 55, 56)—it may not be so easily disregarded when the jury deliberates. As the saying goes, you cannot "unring a bell." It is our position that when judges undertake their Fed. R. Evid. 104(a) preliminary evaluation of whether the jury may hear evidence that is challenged as a deepfake, they also should consider the evidence proffered by the party opposing the evidence as to why it contends that it is fake, and then employ Fed. R. Evid. 403 to assess whether allowing the jury to consider the potential deepfake evidence under Fed. R. Evid 104(b) would expose the opposing party to unfair or excessive prejudice. If it would, then the judge should not allow the potential deepfake to be presented to the jury. In making this determination, the judge should evaluate the importance of the potential deepfake evidence when considered in light of all the other evidence that has been or will be admitted. If the potential deepfake evidence is corroborated by other evidence that is admissible, then the danger of unfair or excessive prejudice is considerably lessened. But if the potential deepfake is the only evidence

in allowing the jury to consider the evidence, given the relevance of the disputed evidence, and the potential for an erroneous or unfair outcome if the jury considers it. If the judge determines that allowing the jury to decide the disputed authenticity of the evidence raises too great a risk of unfair or excessive prejudice to the party against whom the evidence is being offered, the judge should exclude it, exercising their authority under Fed. R. Evid. 104(a) to be the gatekeeper of what the jury is allowed to consider.

The proposed changes to Fed. R. Evid 702, which become effective on December 1, 2023, make clear that highly technical evidence, such as that involving GenAI and deepfakes, create an enhanced need for trial judges to fulfill their obligation to serve as gatekeepers under Fed. R. Evid. 104(a), to ensure that only sufficiently authentic, valid, reliable—and not unfairly or excessively prejudicial—technical evidence is admitted. This role requires the judge to hold the proponent of the evidence to its obligation to meet the foundational requirements of Fed. R. Evid. 401, 901, and 702. This is especially so because, with the proliferation of deepfake evidence and the increased public awareness of it, courts must keep in mind that the cost of failing to fulfill their gatekeeping role may result in juries believing inauthentic deepfake evidence, or, conversely disbelieving authentic evidence, because it has been wrongly characterized as deepfake by the party against whom it has been introduced. Either circumstances undermines accurate factfinding and fair trial outcomes.

While the focus of this article thus far has been on evidentiary issues, GenAI can be expected to raise additional questions for the court. We will briefly touch on a few of them.

C. Will Every Case Now Require an GenAI Expert?

The aforementioned increase in evidentiary hurdles imposed on both the proponent of actual or suspected GenAI or deepfake evidence, as well as the challenger of such evidence, can be expected to require—at least for the immediate future—a greater need for technical and forensic experts who are well versed in GenAI and deepfakes. This will obviously serve to increase the cost of litigation in an already unaffordable justice system, with a vanishingly small number of trials. These hurdles can be expected to cause a crisis for criminal defendants and public defenders who simply cannot afford the kinds of expensive experts that will be needed to mount a proper defense. It may also lead to more appeals based on a claim of ineffective assistance of counsel. Right now, the technology available is insufficiently accurate or reliable to detect AI-generated or deepfake content; even OpenAI admits that its detector should not be used as a primary decision-making tool.[51]

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offered to prove a fact that is critical to the resolution of the dispute, then the danger of unfair or excessive prejudice is great.

[51] *See* Kirchner et al., *supra* n.9 ("**Our classifier is not fully reliable.** In our evaluations on a 'challenge set' of English tests, our classifier correctly identifies 26% of AI-written (true positives) as 'likely AI-written,' while incorrectly labeling human-written text as AI-written 9% of the time (false positives)." (emphasis in original)). *See also* Ann-Marie Alcántara, *AI-Created*

We are already locked in an intractable arms race where adversarial attacks are proliferating at the same if not greater speed than secure solutions; in fact, at present, the development of better GenAI detectors may actually contribute to the development of GenAI that is harder to detect. This is because, as explained above,[52] one approach for advancing GenAI uses GAN networks, and better detection algorithms also mean better training material for GenAI. So, it is not just an arms race, it is a permanent deadlock.

While an extended discussion of the role of experts in this new GenAI world is beyond the scope of this paper, it is worth noting that if the parties' experts do not provide the judge with sufficient information concerning the validity, reliability, or prejudice factors to allow the judge to rule, the judge can appoint a Fed. R. of Evid. 706 expert or (under its inherent authority), a court-appointed technical advisor to educate the court on the GenAI or technology at issue.[53]

D. Will Juries Still Be Able to Do Their Jobs?

GenAI and deepfake evidence can also be expected to throw a monkey wrench in the role of juries tasked with determining the proper weight to give evidence admitted from black-box AI systems that they little understand, and to audio, video, and documentary evidence that they can no longer assess or trust using their own senses. Research has already demonstrated that humans are unable to reliably distinguish AI-generated faces from real faces in photographs and find the AI-generated faces to be more trustworthy.[54] Audiovisual evidence is particularly scary. Studies have shown that "jurors who hear oral testimony along with video testimony are **650%** more likely to retain the information," and that "video evidence powerfully affects human memory and perception of reality."[55] Thus, even when people are aware that audiovisual evidence might be fake, it can still have an undue impact on them because they align their perceptions and

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Images Are So Good Even AI Has Trouble Spotting Some, W.S.J. (Apr. 11, 2023), https://www.wsj.com/articles/ai-created-images-are-so-good-even-ai-has-trouble-spotting-some-8536e52c?mod=e2twd.

[52] *See supra* at 7 & n.30.

[53] *See generally, e.g.*, Robert L. Hess II, *Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Judge's Inherent Power to Appoint Technical Advisors*, 54 Vand. L. Rev. 547 (2001), https://scholarship.law.vanderbilt.edu/vlr/vol54/iss2/8/; Samuel H. Jackson, *Technical Advisors Deserve Equal Billing With Court Appointed Experts in Novel And Complex Scientific Cases: Does The Federal Judicial Center Agree?*, 28 Env'tl. L. 431 (1998), https://www.jstor.org/stable/43266661.

[54] *See* Sophie J. Nightingale and Hany Farid, *AI-synthesized faces are indistinguishable from real faces and more trustworthy*, 119:8 PNAS 1-3 (2022), https://www.pnas.org/doi/10.1073/pnas.2120481119; *see also* Zeyu Lu et al., *Seeing is not always believing: A Quantitative Study on Human Perception of AI-Generated Images*, arXiv:2304.13023 [cs.AI] (Apr. 25, 2023), https://arxiv.org/abs/2304.13023 (showing that "*humans cannot distinguish between real photos and AI-created fake photos to as significant degree. . . .*" (emphasis in original)).

[55] Rebecca A. Delfina, *supra* n.43, at 311 & nn.101, 102 (emphasis added).

memories to coincide with what they saw and heard on the recording in spite of their skepticism.[56]

Moreover, because the evidence placed before them now has a real likelihood of deceiving them, jurors are also more inclined to suspect the veracity of genuine evidence—a consequence of "truth decay"[57]—leading to cynicism and decision-making that may be based on conscious or unconscious biases, stereotypes, affective responses to the parties or their counsel, and other unknown and uncontrolled factors.

In a recent law review paper that we referenced earlier, Loyola Law School Professor Rebecca Delfino expressed concern about the emergence of "the deepfake defense,"[58] which Bobby Chesney and Danielle Citron had previously termed "the liar's dividend," in their prescient 2019 paper.[59] Essentially, the idea is that as people become more aware of how easy it is to manipulate audio and visual evidence, defendants will use that skepticism to their benefit.[60] The "deepfake defense" has already been offered in several cases, one in which lawyers for Elon Musk sought to argue that a YouTube video that had been posted online for seven years—which contained statements made by their client at a tech conference in 2016—could easily have been altered, and the other, by two of the defendants on trial for their participation in the January 6th insurrection, who attempted to argue that videos showing them at the Capitol on that date could have been created or manipulated by AI.[61] In both cases, the Court was not having any of it, but this issue poses a real threat to the justice system, particularly in criminal cases.

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[56] *See* Kimberly A. Wade et al., *Can Fabricated Evidence Induce False Eyewitness Testimony?*, 24 Applied Cog. Psych. 899 (2010), https://onlinelibrary.wiley.com/doi/10.1002/acp.1607. This study showed the profound impact video can have on reconstructing personal observations. Sixty college students who were placed in a room to engage in a computerized gambling task were each later shown a digitally altered video depicting another subject cheating, when none had actually done so. Nearly half of the subjects were willing to testify that they had personally witnessed another subject cheating in real life after viewing the fake video. *See also* Hadley Liggett, *Fake Video Can Convince Witnesses To Give False Testimony*, WIRED (Sept. 14, 2009), https://www.wired.com/2009/09/falsetestimony/ (reporting on study).

[57] Bobby Chesney and Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Calif. L. R. 1753, 1754, 1781 n.128 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954#.

[58] *See* Rebecca Delfino, *supra* n.43, at 310-13.

[59] *See supra* n.57, at 1758 ("[D]eep fakes make it easier for liars to avoid accountability for things that are in fact true.").

[60] Shannon Bond, *People are trying to claim real videos are deepfakes. The courts are not amused*, npr (May 8, 2023), https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused.

[61] *See id.*

E. Is GenAI a Boon to Access to Justice or Does It Present a Whole New World of Opportunity for Bringing Vexatious Lawsuits?

Gen AI systems can now assist would-be litigants who lack legal representation—the vast majority of the parties in civil cases in state and local courts today,[62] and often individuals from racialized or otherwise marginalized communities—in identifying claims and in drafting complaints and other pleadings, and this is undoubtedly a welcome development. These individuals can now use GenAI to determine whether they satisfy the elements of various claims and generate customized language specific to individual circumstances and specific jurisdictions. But along with this potentially positive impact, malicious *pro se* filers also can now prepare simultaneous filings in courts around the country, permitting them to flood the courts with dozens of potentially duplicate, frivolous submissions. Their pleadings may even include citations to cases that do not exist. Apparently, "[d]ebt collection agencies are already flooding courts and ambushing ordinary people with thousands of low-quality, small-dollar cases. Courts are woefully unprepared for a future where anyone with a chatbot can become a high-volume filer, or where ordinary people might rely on chatbots for desperately-needed legal advice."[63] The goal, in some of these cases, is to "[t]urn hard-to-collect debt into easy-to-collect wage garnishments. . . . The easiest way for that to happen? When the defendant doesn't show up, defaulting the case. . . . When a case does default, many courts will simply grant whatever judgment the plaintiff has requested without checking whether the plaintiff has provided adequate (or any) documentation that the plaintiff owns the debt, that the defendant still owes the debt, or whether the defendant has been properly notified of the case."[64]

DoNotPay—an early self-help application that first appeared in 2015 to help fight parking tickets, and that touts itself as "The World's First Robot Lawyer," which can "sue anyone at the press of a button"[65]—recently found itself in hot water when a Chicago law firm brought a putative class suit against the company in San Francisco state court for practicing law without a license and violating California's unfair competition law.[66] Regardless of whether one

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[62] *See* Anna E. Carpenter et al., *America's Lawyerless Courts*, ABA Law Practice Magazine (July 18, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/july-august/americas-lawyerless-courts/.

[63] Keith Porcaro, *Robot Lawyers Are About to Flood the Courts*, WIRED (Apr. 13, 2023), https://www.wired.com/story/generative-ai-courts-law-justice/.

[64] *Id.*

[65] DoNotPay Homepage, https://donotpay.com/.

[66] Sara Merken, *Lawsuit pits class action firm against 'robot lawyer' DoNotPay*, Reuters (Mar. 9, 2023), https://www.reuters.com/legal/lawsuit-pits-class-action-firm-against-robot-lawyer-donotpay-2023-03-09/. The case has since been removed to federal district court in the Northern District of California. *See Faridian* v. *DoNotPay Inc.*, 3:2023-cv-01692 (N.D. Ill. Apr. 7, 2023), https://dockets.justia.com/docket/california/candce/4:2023cv01692/410868.

views GenAI as a genuine boon to access to justice,[67] or as a sharp instrument for bludgeoning one's opponents, the justice system is ill-equipped to manage a massive influx of new cases that may be chock full of defects, false affidavits, faulty notarizations, incomplete paperwork, inadequate documentation, and so on, and like science fiction magazine Clarkesworld discussed above,[68] may buckle under the weight of such submissions.

F. Will Substantive Intellectual Property Law Have to Change to Accommodate GenAI?

GenAI can be expected to give rise to numerous novel questions involving substantive intellectual property ("IP") law, which we can only briefly mention in passing here.[69] The U.S. Copyright Office has repeatedly issued policy guidance stating that material generated by AI is not eligible for copyright protection, as the goal of copyright is to protect efforts engaged in by *humans*; since AI does not engage in creative labor, it cannot create copyrighted works.[70] The Copyright Office has distinguished, in particular, between works "produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author," and those created "by a human being."[71] However, as creators start to incorporate GenAI work product as a component of their creative processes, this straight-line separation may become increasingly hard to define.

A recent test case is illustrated by the copyright registration mess involving Kristina Kashtanova, who created a comic book, *Zarya of the Dawn*, using Midjourney as the GenAI art creator, and registered a copyright for the book, including the Gen-AI-created images. The copyright, which was originally granted, was subsequently withdrawn and replaced by a copyright grant only for the comic book's text, as well as the selection, coordination, and

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[67] *See, e.g.*, Andrew T. Holt, *Legal AI-d to Your Service: Making Access to Justice a Reality*, JETLaw Blog (Feb. 4, 2023), https://www.vanderbilt.edu/jetlaw/2023/02/04/legal-ai-d-to-your-service-making-access-to-justice-a-reality/.

[68] *See supra* at 1 & n.6.

[69] For more detailed discussions, *see, e.g.*, Perkins Coie, *A New Generation of Legal Issues Part 1: The Latest Chapter in Copyrightability of AI-Generated Works* (Jan. 26, 2023), https://www.perkinscoie.com/en/news-insights/a-new-generation-of-legal-issues-part-1-the-latest-chapter-in-copyrightability-of-ai-generated-works.html; Perkins Coie, *A New Generation of Legal Issues Part 2: First Lawsuits Arrive Addressing Generative AI* (Apr. 20, 2023), https://www.perkinscoie.com/en/news-insights/first-lawsuits-arrive-addressing-generative-ai.html.

[70] See *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 37 CFR Part 202, 88:51 Fed. Register 16190, 16191 (Mar. 16, 2023), https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf ("In the Offices' view, it is well established that copyright can protect only material that is the product of human creativity. Most fundamentally, the term 'author,' which is used in both the Constitution and the Copyright Act, excludes non-humans.").

[71] *Id.* at 16190.

arrangement of its written and visual elements.[72] "The images themselves, however, 'are not the product of human authorship,' and the registration originally granted for them has been canceled. To justify its decision, the Copyright Office cite[d] previous cases where people weren't able to copyright words or songs that listed 'non-human spiritual beings' or the Holy Spirit as the author—as well as the infamous incident where a selfie was taken by a monkey."[73] Meanwhile, the Copyright Office also has stated that merely writing prompts to AI systems definitely will not qualify the resultant work for any copyright protection.[74]

Another issue arises with respect to the existing copyrights of materials used for training GenAI systems. It is not clear whether training on a collection of art, music, or text qualifies as "fair use," particularly if it competes in the same market as the original work,[75] and the providers of several visual GenAI systems have already been sued by artists who are concerned that their own back catalogs are being used—without permission—to train models that compete with their own work.[76] Questions of compensation for copyright holders are clearly ripe for litigation, as is

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[72] *See* Richard Lawler, *The US Copyright Office says you can't copyright Midjourney AI-generated images*, The Verge (Feb. 22, 2023), https://www.theverge.com/2023/2/22/23611278/midjourney-ai-copyright-office-kristina-kashtanova.

[73] *Id.* (quoting Feb. 21, 2023 letter from Robert J. Kasunic, Associate Register of Copyrights and Director of the Office of Registration Policy & Practice, U.S. Copyright Office, to Kris Kashtanova's lawyer, Van Lindberg, at 4, available at https://www.copyright.gov/docs/zarya-of-the-dawn.pdf). *See also* Sarah Jeong, *Appeals court blasts PETA for using selfie monkiey as 'an unwitting pawn,'* The Verge (Apr. 24, 2018), https://www.theverge.com/2018/4/24/17271410/monkey-selfie-naruto-slater-copyright-peta.

[74] *See* Feb. 21, 2023 letter from Robert J. Kasunic, *supra* n.72, at 8-9. *See also* Perkins Coie, *Whose Copyright Is It Anyway? Copyright Office Stakes Out Position on Registration of AI-Generated Works*, (Mar. 21, 2023), https://www.perkinscoie.com/en/news-insights/whose-copyright-is-it-anyway-copyright-office-stakes-out-position-on-registration-of-ai-generated-works.html.

[75] *See, e.g.*, Mark A. Lemley and Bryan Casey, *Fair Learning*, SSRN (Jan. 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3528447; Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining Is Lawful*, 53 Univ. of Cal., Davis 893 (2019), https://lawreview.law.ucdavis.edu/issues/53/2/articles/files/53-2_Carroll.pdf; Benjamin L.W. Sobel, *Artificial Intelligence's Fair Use Crisis*, SSRN (Sept. 4, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032076. For two of the authors' take on the application of the fair-dealing exception in the Canadian Copyright Act in this context, *see* Dan Brown, Lauren Byl, and Maura R. Grossman, *Are machine learning corpora 'fair dealing' under Canadian Law?*, Proceedings of the 12th Int'l Conference on Computational Creativity ("ICCC '21") 158-62 (2021), https://uwspace.uwaterloo.ca/bitstream/handle/10012/17708/ICCC_2021_paper_68.pdf?sequence=1&isAllowed=y.

[76] *See* cases cited at *supra* n.13, and in Perkins Coie, *A New Generation of Legal Issues Part 2*, *supra* n.69. *See also, e.g.*, Thomas James, *Does AI Infringe Copyright?*, Cokato Copyright Attorney: The Law Blog of Thomas James (Jan. 24, 2023), https://thomasbjames.com/does-ai-infringe-copyright/; Blake Brittain, *Lawsuits accuse AI content creators of misusing copyrighted*

determining how copyright holders can opt out having their own materials be used as training data for GenAI models.

An additional concern is that the output of AI-generated art systems may infringe or dilute existing trademarks; for example, in response to a prompt, Midjourney might create a character that looks a little too much like Mickey Mouse or She-Ra, or that uses the Nike swoosh symbol. In these circumstances, there are real questions about who (if anyone) might be liable for that, and what a take-down procedure might look like in the GenAI context.[77]

The outcome in the *Getty Images* case referenced above[78] may provide some guidance about whether the incorporation of a trademark in AI-generated output can constitute trademark infringement or give rise to a trademark dilution claim under 15 U.S.C. §1125(c). The *Getty Images* Complaint alleges that Stability AI infringed several of Getty Images' registered and unregistered trademarks by its generation of images that are likely to cause confusion or otherwise suggest that Getty Images granted Stability AI the right to use its marks or that Getty Images in some way sponsored, endorsed, or is otherwise associated, affiliated, or connected with Stability AI and its AI-generated images.[79] The Complaint also alleges trademark dilution, resulting from Stability AI's inclusion of a "Getty" watermark on AI-generated images that lack the quality of images that a customer would find on the Getty website.[80] Finally, the Complaint asserts that these improper uses cause both dilution by blurring (*i.e.*, lessening the capacity of Getty's mark to identify and distinguish goods and services) and by tarnishment (*i.e.*, by harming the reputation of Getty's mark by association with another mark).[81]

G. What About the GPTJudge and Their GPTLaw Clerk?

Finally, we are left to ask if it is permissible for judicial officers to use Chat-GPT or another GenAI system to research and/or draft opinions? At least three judges admit to having done so, asking the system "whether an autistic child's insurance should cover all the costs of his medical treatment,"[82] whether "an unusually high level of cruelty [in committing an assault and murder] should count against granting bail,"[83] and whether there was "any 'legitimate public

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work, Reuters (Jan. 17, 2023), https://www.reuters.com/legal/transactional/lawsuits-accuse-ai-content-creators-misusing-copyrighted-work-2023-01-17/;

[77] *See* Licensing International, *What Does AI Mean for Trademarks?* (Feb. 22, 2023), https://licensinginternational.org/news/what-does-ai-mean-for-trademarks/.

[78] *See supra* at 3 n.8.

[79] See Perkins Coie, *A New Generation of Legal Issues Part 2*, *supra* n.69.

[80] *Id.*

[81] *Id.*

[82] Luke Taylor, *Colombian judge says he used ChatGPT in ruling*, The Guardian (Feb. 3, 2023), https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling. According to reports, ChatGPT concurred with the judge's final decision, responding "Yes, this is correct. According to the regulations in Colombia, minors diagnosed with autism are exempt from paying fees for their therapies." *Id.*

[83] Adam Smith et al, *Are AI chatbots in courts putting justice at risk?*, Context (May 4, 2022), https://www.context.news/ai/are-ai-chatbots-in-courts-putting-justice-at-risk.

interest' for journalists posting online photos of a 'woman showing parts of her body' without her consent."[84] At first blush, one might think, "what's the problem?" since we know that GPT-4, at least, passed the bar exam,[85] so "why not?"

The first concern is that ChatGPT can provide different answers to the same question at different times—if not hallucinate citations and other fictitious responses—and that it was trained on an unknown dataset from the Internet that contains no data past 2021.[86] But, there are other, more serious problems with this approach. If the judge or their clerk were to describe the facts and the law and prompt GenAI for the correct outcome, this could raise an Article III judicial vesting-clause problem, since the U.S. Constitution Art. III §1 vests the judicial power of the United States in its federal courts and their duly appointed judges—not in AI. Even if the GenAI system were not being used to render the final decision in a case or controversy, and was instead used in a manner similar to how a judge or their clerk might undertake an Internet search concerning the facts in a case before them, this could easily run afoul of the American Bar Association's Model Code of Judicial Conduct Rule 2.9(C).[87] Using the GenAI system for independent research without informing counsel or providing them with an opportunity to object to arguments that are not in the record, may very well expose the Court to sources of information that have not been put in evidence by the parties, or that raise other due process issues.[88]

Accordingly, the best advice we can give at this point is to exercise extreme caution—much like early advice concerning judicial use of social media—until a body of judicial ethics opinions is developed.

What the Future Holds

While we obviously have no crystal ball that can predict the future development of GenAI technology over the next few years, there is no doubt that it will revolutionize many fields, not the least of which will be the legal and justice systems. Generating fake but

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[84] *Id.*

[85] Daniel M. Katz, *GPT-4 Passes the Bar Exam*, SSRN (Mar. 15, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233.

[86] *See* OpenAI, *supra* n.27 ("Chat GPT is fine-tuned from a model in the GPT-3.5 series, which finished training in early 2022.").

[87] Model Rule 2.9(C) addresses Ex Parte Communications. It states that "A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be noticed." ABA Model Code of Judicial Conduct: Canon 2. https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications/.

[88] *See* ABA Standing Committee on Ethics and Prof'l Responsibility, Formal Op. 478 – *Independent Factual Research by Judges Via the Internet* (Dec. 8, 2017), https://www.abajournal.com/images/main_images/FO_478_FINAL_12_07_17.pdf. *See also* Avalon Zoppo, *ChatGPT Helped Write a Court Ruling in Colombia. Here's What Judges Say About Its Use in Decision Making*, Nat'l Law J. (Mar. 13, 2023), https://www.law.com/nationallawjournal/2023/03/13/chatgpt-helped-write-a-court-ruling-in-colombia-heres-what-judges-say-about-its-use-in-decision-making/.

believable text, audio, and video of ordinary people spouting lies, misinformation, or defamatory content, committing crimes, or breaking the law will become feasible for just about any person with a working computer. So, too, will anybody be able to generate competent pleadings, in a matter of minutes, with great benefit to access to justice coming alongside the risk of many more vexatious filings flooding court dockets. As a result of these technological developments, our current approaches to managing cases and evidence may need to change. The legal status of AI-generated art (in particular, with respect to copyright eligibility, copyright infringement, and trademark infringement and/or dilution) will need to be resolved. Judges themselves will have to sort through AI-generated pleadings and arguments, including perhaps even using an AI clerk to filter out or respond to junk claims or imaginary citations (if and when this becomes possible). Judges may eventually join the revolution, using new GenAI systems to help them decide their cases or draft their opinions more effectively and efficiently, after problems involving inaccuracy and bias are resolved. And one day, judges may even be replaced by AI,[89] giving new meaning to the phrase "having one's day in court."

[89] Tara Vazdani, *From Estonian AI judges to robot mediators in Canada, U.K.*, The Lawyer's Daily, https://www.lexisnexis.ca/en-ca/ihc/2019-06/from-estonian-ai-judges-to-robot-mediators-in-canada-uk.page. Indeed, OpenAI's release of the research and code for its new text-to-3D model, Shap-E—while we were in the midst of writing this piece—may even allow judges to be printed at some point! *See* Avran Piltch, *OpenAI's Shap-E Model Makes 3D Objects From Text or Images*, tom's HARDWARE (May 4, 2023), https://www.tomshardware.com/news/openai-shap-e-creates-3d-models.

TAB 3

TAB 3A

Advisory Committee on Evidence Rules
Minutes of the Meeting of April 28, 2023
Thurgood Marshall Federal Judiciary Building
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 28, 2023 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. Shelly Dick
Hon. Mark S. Massa
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Hon. Marshall L. Miller, Principal Associate Deputy Attorney General, Department of Justice
Arun Subramanian, Esq.
James P. Cooney III, Esq.
Rene Valladares, Esq., Federal Public Defender

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
H. Thomas Byron III, Esq., Rules Committee Chief Counsel
Timothy Lau, Esq., Federal Judicial Center
Bridget M. Healy, Esq. Administrative Office of the U.S. Courts
Shelly Cox, Management Analyst, Administrative Office of the U.S. Courts
Christopher I. Pryby, Esq., Rules Clerk
Anton DeStefano, Office of Military Justice
Cammy Goodwin, Wheeler Trigg O'Donnell LLP
Kaiya Lyons, American Association for Justice
Sue Steinman, American Association for Justice
John McCarthy, Smith Gambrell & Russell LLP

Present via Microsoft Teams
Professor Daniel J. Capra, Reporter to the Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Elizabeth J. Shapiro, Esq., Department of Justice
John Hawkinson, Journalist

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting and invited all participants to introduce themselves. He explained that the Reporter would be participating on Microsoft Teams.

The Chair then explained that Judge Shelly Dick, Judge Tom Schroeder, and Arun Subramanian would all be rotating off the Committee. The Chair thanked all three for their terrific service to the Committee and noted that all three would be greatly missed. Mr. Subramanian thanked the Chair for his leadership and thanked Professors Capra and Richter for their educational materials. He noted that he hoped to return to the Committee in the future. Judge Schroeder stated that his service on the Committee was one of the most rewarding things he had done as a judge. He was impressed by the work and the friendships and thanked the Chair and Professors Capra and Richter for their leadership and superb work. Judge Dick remarked that she had learned so much from her work on the Committee and commented that the agenda materials had made her a better judge. The entire Committee thanked all three for their wonderful service.

Approval of Minutes

A motion was made to approve the minutes of the October 28, 2022, Advisory Committee meeting. The motion was seconded and approved by the full Committee.

Report of Standing Committee Meeting

The Chair explained that he and the Reporter had reported to the Standing Committee on the progress the Evidence Advisory Committee was making on pending amendment proposals. He explained that comments received from the Standing Committee, if any, would be shared as the Committee discussed specific proposals.

II. Proposed Illustrative Aid Amendment

The Chair opened the discussion with the topic of illustrative aids and the proposal to add a provision to the Federal Rules of Evidence regulating their use. The Reporter directed the Committee's attention to page 93 of the agenda book to see the proposal published for notice and comment. He explained that illustrative aids are utilized in every trial and yet are not governed by any rule. He noted that the proposed amendment would bring some clarity and uniformity to the issue and would distinguish illustrative aids from demonstrative evidence offered to prove a fact and from Rule 1006 summaries designed to prove the content of voluminous writings or recordings. The Reporter explained that 130 public comments had been received on the proposal and that the agenda materials suggested changes to address issues raised in the public comment.

A. ***Notice of Illustrative Aids***

The Reporter reminded the Committee that the published amendment included a notice requirement for the use of illustrative aids that could be excused for good cause. He explained that much of the public comment opposed any notice requirement due to the impossibility of giving notice for certain illustrative aids created on the fly in the courtroom, as well as to concerns about attorney work product if notice were required of aids used in opening and closing arguments. Due to negative feedback on a notice requirement at the symposium hosted by the Committee in October 2022, the Committee determined at the Fall 2022 meeting to delete the notice requirement from the text of the amended rule. The Reporter explained that the deletion of the notice requirement would resolve most concerns raised in public comment. He proposed that the committee note could discuss the issue of notice and the importance of leaving it to the trial judge on a case-by-case basis to determine what notice, if any, is appropriate for a particular illustrative aid. The Reporter directed the Committee's attention to proposed note language designed to make this point on page 94 of the agenda materials.

One Committee member expressed support for deleting the notice requirement in the text of the amendment. He suggested that the note language should make clear that a notice requirement might apply to some illustrative aids and not apply at all to others. He opined that the note should clarify that the trial judge remains free to pick and choose according to the type of illustrative aid. The Chair commented that the note language proposed by the Reporter was very flexible and would capture the trial judge's discretion to craft notice requirements fit for all the different types of illustrative aids. The Committee member replied that the note should be clearer that notice does not apply to all types of aids. The Reporter pointed to the language in the proposed note stating that the amendment "leaves it to trial judges to decide *whether, when, and how* to require advance notice of an illustrative aid."

The Chair explained that some members of the Standing Committee had suggested that the Committee might be abandoning the notice requirement too quickly but that other members had disagreed, arguing that the Committee was right to delete the notice requirement. The Chair explained that the amendment would get stopped at the Standing Committee level if it included a notice requirement. The Reporter agreed, noting that most trial judges already require notice of illustrative aids such that the amendment loses little by omitting a notice requirement. Several members of the Committee agreed that notice was typically already required for anything that wasn't created during trial testimony. They pointed out that a failure to require notice results in disruption to the trial because the court needs to break to allow opponents to view and object to an illustrative aid. The Reporter emphasized that the notice requirement in the published amendment was the red flag that drew negative attention to the amendment and that eliminating it would chart a constructive path forward. Committee members agreed to delete the notice requirement from the text of the amendment and to include the proposed note language on page 94 of the agenda materials emphasizing the trial judge's discretion in handling notice.

One Committee member queried whether subsection three of the proposed amendment requiring illustrative aids to be made a part of the record was necessary. The Chair responded that it was because many trial judges do not make aids a part of the record. He noted that the failure to make illustrative aids part of the record hampers appellate review.

B. *Extending the Amendment to Opening Statements and Closing Arguments*

The Reporter next raised the question of extending the amendment to cover aids used during opening statements and closing arguments. He explained that this issue was controversial during public comment due to concern about disclosing work-product material to be used in opening and closing to opposing counsel in advance. With the notice requirement gone, this concern disappears. The Reporter noted that illustrative aids used during opening and closing are subject to regulation in the same manner as other trial aids and that there was no reason to treat them differently with respect to the balancing test used to determine their utility. In addition, he noted that it would be problematic for the amendment to regulate illustrative aids used during trial testimony and for the court to regulate illustrative aids used during opening and closing outside the rule. The Reporter directed the Committee's attention to proposed changes to the rule text and committee note on pages 96 and 97 of the agenda materials to extend the amendment to cover opening statements and closing arguments.

One Committee member noted that the proposed changes would extend the rule to cover a "party's argument" and expressed concern that this would *not* cover opening statements because opening statements are supposed to be a forecast of the evidence and *not* an argument. He suggested adding language to specifically cover "forecasts of the evidence" as well as a "party's argument." The Reporter explained that this concern was addressed by the proposed committee note that would state that the amendment governs the use of an illustrative aid at any point in trial, "including opening statements and closing argument." Committee members agreed to this solution.

C. *Is the Amendment "Hostile" to Illustrative Aids?*

The Reporter informed the Committee that several public comments emphasized the importance of illustrative aids for juror understanding and suggested that the amendment was discouraging illustrative aids. He noted that there was no intent to be hostile to illustrative aids. To the contrary, the goal of the amendment was to bring clarity and uniformity to the consideration of illustrative aids by articulating the standard courts already use to evaluate them in rule text. He conceded that the notice requirement could be seen as an obstacle to illustrative aids. The Reporter suggested that the deletion of the notice requirement would reduce concerns about hostility to illustrative aids.

The Reporter explained that the balancing test included in the amendment to evaluate illustrative aids could also encourage or discourage illustrative aids depending upon how it is drafted. Specifically, he noted that the amendment was published with the modifier "substantially" in brackets. Including the term "substantially" would align the balancing test with the balance used in Rule 403 and would favor use of illustrative aids, rejecting them only if the risk of unfair prejudice "substantially outweighs" their utility. Thus, a balancing test that includes the modifier "substantially" is the most encouraging of illustrative aids. In contrast, removing the term "substantially" would reject illustrative aids whenever their utility is outweighed to *any extent* by the risk of unfair prejudice, etc. A balancing test that eliminates

"substantially" would be less encouraging of illustrative aids. The Reporter pointed out that it would also differ slightly from the test outlined in Rule 403, perhaps creating confusion.

To further address concerns about the amendment's hostility to illustrative aids, the Reporter suggested including the modifier "substantially" in the balancing test and adding language to the committee note stating, "Illustrative aids can be critically important in helping the trier of fact understand the evidence or the argument and this rule should be read to promote their use."

One Committee member queried whether the amendment would simply put the Rule 403 balancing test into the illustrative aids rule. The Chair responded that the Rule 403 test was distinct from the test used in the amendment because Rule 403 deals with the admissibility of evidence. Because illustrative aids are not evidence, the test in the amendment assesses the utility of the illustrative aid in assisting comprehension rather than its probative value. Thus, the two tests remain distinct. Another Committee member opined that the language in the committee note "promoting" the use of illustrative aids should not be used. She noted that some illustrative aids can be inappropriate and should not be "promoted." The Chair agreed, explaining that the amendment should be regulating illustrative aids and not promoting them. He suggested deleting the final part of the sentence in the committee note stating "and this rule should be read to promote their use." The Committee agreed with the Chair's suggestion. The Chair remarked that there is some irony in the public comment that the amendment is "hostile" to illustrative aids. He noted that adding a rule regulating juror questions was thought to "promote" the practice, while adding a rule regulating illustrative aids was seen as "hostile" to the practice.

The Reporter recommended that the Committee add the word "substantially" to the text of the Rule. The Federal Public Defender reminded the Committee that the agenda materials referenced Judge Campbell's argument against including the term "substantially." He opined that, because illustrative aids are not evidence (and are merely aids to comprehension), they should not be allowed to inject *any* risks into the trial process. Unlike evidence with probative value, illustrative aids should be rejected if they introduce prejudice or confusion at all. The Federal Public Defender argued that the modifier "substantially" should be omitted from the amendment. The Principal Associate Deputy Attorney General agreed, arguing that aids should only be used if they help and should not be permitted if, on balance, they cause delay, confusion, or prejudice. He also pointed out that lawyers create many illustrative aids in advance and have the ability to control what they include. He suggested that the test in the rule ought to strike the appropriate balance to direct lawyers' efforts.

The Chair explained that he appreciated the theory but expressed concern about deleting the modifier "substantially" because it would create a more stringent test for illustrative aids than the one used for evidence. He noted that the line between what is demonstrative evidence and what is merely an aid can be elusive and that a balancing test that treats the two differently would place more pressure on proper classification. If the same balancing test is applied to both, the classification is less significant and creates fewer opportunities for error. Another Committee member agreed with the Chair, asking why the amendment should require more of a mere aid than it requires of evidence. He noted that rejection of the "substantially" modifier could undermine the use of illustrative aids and create concerns about hostility to the practice described

in public comment. Another Committee member argued that the case against using the modifier "substantially" could be made in the Rule 403 context as well. He expressed a preference for keeping the balance between Rule 403 and the amendment the same to avoid confusion. A majority of the Committee agreed that adding the modifier "substantially" was the superior alternative.

The Reporter noted that some public comment suggested that the language "The court may allow" was hostile to illustrative aids because it suggested that parties must first ask the court for permission to use aids. The comment suggested changing the language to read: "A party may use an illustrative aid if . . . ." The Reporter explained that the majority of the Evidence Rules utilize the "court may allow" language and that it doesn't require advance permission in practice. The Chair agreed, explaining that nobody asks for advance permission except in a motion *in limine*. The Committee agreed to retain the "court may allow" language.

D. ***Including a Definition of Illustrative Aids***

The Reporter explained that some public comment suggested that the amendment should define illustrative aids. He explained it would be challenging to come up with a comprehensive definition that would encompass all possible types of illustrative aids. The Reporter explained that he would be hesitant to include a precise definition in rule text but suggested that the committee note could include a sentence in the first paragraph loosely defining illustrative aids. The proposed sentence would read: "An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument."

The Chair asked whether the sentence would need to refer to any "visual presentation." Another Committee member responded that an illustrative aid need not be "visual" and could be an "auditory" aid. The Reporter inquired whether it would be better to refer to "material" as opposed to a "presentation." The Committee member suggested it could be a musical composition played for the jury that wouldn't be "material." Another participant asked whether the word "item" would work. The Reporter noted that "item" sounds like evidence and that illustrative aids are not evidence. The Committee decided to characterize illustrative aids as "any presentation offered not as evidence, but rather to assist the trier of fact to understand evidence or argument."

E. ***Is a Rule Necessary?***

The Reporter explained that several public comments suggested that there is no need for a rule regulating illustrative aids because courts already regulate their use in the absence of a specific rule. He explained that the reason to add a specific rule was to bring some clarity and uniformity to the regulation already being done by the courts and to place the standard routinely utilized by courts in accessible rule text rather than requiring parties to hunt for standards in the case law. The Committee agreed that adding a rule on illustrative aids was helpful.

F. ***Adding a Cross-Reference to Rule 1006***

The Reporter reminded the Committee that courts are not infrequently confused about the difference between an illustrative aid and a summary admitted to prove the content of voluminous records under Rule 1006. He explained that an amendment to Rule 1006 had also been published to help distinguish the two and that the Rule 1006 proposal contained a cross-reference to the illustrative aid rule. The Reporter informed the Committee that some public commenters thought that the illustrative aid rule should contain a parallel reference (or direction-finder) back to Rule 1006 to provide further clarity. He explained that a fourth subsection could be added to the illustrative aid amendment as reflected on page 104 of the agenda materials to serve this purpose. The Reporter explained that the Rules do not contain any other two-way references, and that lawyers are likely to start with Rule 1006 when they seek to use a summary (which will direct them to the illustrative-aid provision if they cannot meet the Rule 1006 foundation). Still, he noted that the double cross-references could help the novice. The Reporter noted that the style consultants had preferred not to add a cross-reference to the illustrative aid rule but were not opposed to it if the Committee wished to include it. Committee members noted that the companion amendments to Rules 1006 and 611 were designed to clear up confusion and that cross-references in both rules would create the most clarity. All members agreed that the cross-reference to Rule 1006 should be added to the text of the illustrative-aid amendment.

G. ***Moving the Amendment to Article I***

The Reporter explained that some public comments suggested moving the illustrative-aid amendment out of Rule 611(d) where it was placed for purposes of publication. The Reporter reminded the Committee that the proposed amendment was included in Rule 611 because trial judges have utilized their authority under Rule 611(a) to regulate illustrative aids. Public comment noted that Article VI of the Federal Rules of Evidence governs "Witnesses" and that the illustrative-aid rule does not deal with witnesses. Public comment suggested moving the illustrative-aid rule to Article X. The Reporter opined that Article X would not be a good fit both because the new rule could get lost at the back of the rulebook and because Article X deals with the best-evidence rule, which is also not connected to illustrative aids.

The Reporter suggested that Article I containing "General Provisions" might be a better fit and that the new rule on illustrative aids would be more visible in the front of the rulebook. He suggested that the Committee could consider whether to propose the illustrative-aid amendment as new Rule 107. All Committee members favored adding the illustrative-aid amendment as Rule 107 for the reasons suggested by the Reporter.

H. ***The (Not so) Elusive Line Between Illustrative Aids and Demonstrative Evidence***

A Committee member noted that a new paragraph had been proposed for the committee note regarding the "elusive distinction" between illustrative aids and demonstrative evidence as reflected on page 109 of the agenda materials. The Committee member suggested that the point of the amendment was to create a clear line and to tell litigants that illustrative aids are *not evidence* and that they must comply with the Federal Rules of Evidence to admit something as evidence. He expressed concern that the new note paragraph could create confusion, particularly

with respect to sending aids to the jury room. If trial judges are told that the line between evidence and aids is a fuzzy one, they may be inclined to send more back to the jury room. The Chair responded that the distinction is quite clear in theory but can be difficult in application. Still, he explained that the proposed paragraph was drafted to respond to public comment and may do little to help in applying the rule. Accordingly, the Chair said he was inclined to delete the paragraph from the note. Another Committee member suggested that the second sentence of the paragraph regarding the "elusive" distinction might be deleted, with the remainder of the paragraph retained. A different Committee member favored deleting the entire paragraph because it would not help a trial judge solve a problem. The Chair agreed, characterizing the paragraph as more of a "P.R. campaign" than useful. The Committee agreed to delete the entire proposed paragraph from the note.

I. ***"Trier of Fact"***

The Reporter explained that the amendment published for notice and comment referenced the "finder of fact" but that the Rules typically refer to the "trier of fact." He suggested that the term should be changed to conform to the convention utilized throughout the Rules. The Committee agreed.

J. ***"Admitted Evidence"***

A Committee member noted that Rule 107(a) on page 119 of the agenda materials references presenting an illustrative aid to help the trier of fact understand "admitted evidence." He suggested that this terminology would not fit when an aid is used to explain evidence that has not yet been admitted or is presented simultaneously with the aid. The Chair agreed with the concern and suggested deleting the modifier "admitted" from subsection (a) such that it would read "to help the trier of fact understand evidence or argument." Committee members concurred. The Reporter also noted that Rule 107(b) had been slightly modified due to a helpful suggestion from Judge Bates such that it now reads: "An illustrative aid *is not evidence and* must not be provided to the jury during deliberations unless . . . ."

K. ***Illustrative Aids in the Jury Room***

The Reporter noted that the amendment published for notice and comment provided that illustrative aids should not go to the jury room during deliberations absent consent of all parties or a finding of good cause by the trial judge. One Committee member queried why something that is *not evidence* should ever go to the jury room absent the consent of all parties. The Chair explained that it does happen, noting that in a recent trial there was a helpful map used throughout the trial that was permitted in the jury room over objection. Another Committee member agreed that jurors refer to the illustrative aids throughout trial and then want to have access to them while deliberating. A different Committee member expressed concern about this reality, arguing that the jury always *wants* the illustrative aids but that government PowerPoint slides shouldn't go to the jury room over a defense objection nonetheless. He queried whether "good cause" exists under the amendment merely because the jury asks for an illustrative aid. He further suggested that allowing illustrative aids into the jury room opens the door to mischief.

Another Committee member echoed these concerns, asking whether the amendment would bestow discretion to allow nonevidence in the jury room.

The Chair opined that the Committee could not prohibit sending illustrative aids to the jury room over objection without republishing the amendment because that would effect too big a change to the proposal. Judge Bates agreed that the Committee could not ban sending illustrative aids to the jury room except in the case of consent without republication. He stated that the Committee should feel free to republish the amendment if it felt that was the appropriate result because it was important to wait to get the right rule. A Committee member opined that the existing proposal was satisfactory given that any illustrative aid sent to the jury room would be accompanied by a limiting instruction cautioning the jury that it is not evidence. The Chair agreed, emphasizing that the aid is something the jury has been allowed to view during the trial. A Committee member asked why *all* illustrative aids shouldn't be sent to the jury room under that theory. He opined that consent is a different situation but that a "good cause" exception could be problematic. The Principal Associate Deputy Attorney General explained that in complex organizational prosecutions, nonargumentative aids like organizational charts are commonly very helpful to the jury simply to keep names and parties straight. The Chair agreed, describing a complex tax-malpractice case in which jurors needed an illustrative aid to understand the relationships among parties. Another Committee member asked whether any other Rules allow admission with consent. The Reporter stated that consent wasn't expressly used in other provisions but that it makes sense in dealing with illustrative aids and tees up an exception for "good cause."

The Chair then queried whether the Committee would need to republish the amendment if the "good cause" standard were strengthened slightly to an "exceptional circumstances" standard. Judge Bates opined that slight tweaking of the standard would be fine without republication but not a wholesale change. The Reporter reminded the Committee that it did discuss the possibility of a prohibition on sending illustrative aids to the jury room absent consent prior to publication of the proposal and rejected a prohibition. The Chair asked whether the text of the amendment could be retained but the committee note strengthened to signal that judges should not send illustrative aids to the jury room absent consent frequently but that the rule conferred some discretion to do so.

The Reporter directed the Committee's attention to the final paragraph of the committee note on page 121 of the agenda materials addressing illustrative aids in the jury room and suggested that it already signaled sparing transmission to the jury absent consent. The Chair asked whether the note language was too generous. Judge Bates opined that modification of the note language would not require republication. A Committee member proposed retaining the "good cause" standard in rule text but modifying the note reference to sending an illustrative aid to the jury room whenever the jury asks for it. Professor Coquillette stated that the historic standard used to determine whether republication is necessary is "whether the public would feel ambushed by a change" about which they were unable to provide commentary. The Reporter noted that the issue of the circumstances under which an aid could go to the jury room *was* included in the published amendment and that it was commented on by some. He suggested that the Committee could change the requirement in the rule text without another round of publication if it so desired but that he understood the Committee did not wish to do so. The

Reporter for the Standing Committee opined that republication would be necessary for a change to the rule text but that no republication would be needed for modifications to the committee note. The Reporter suggested deleting the examples of "good cause" in the committee note that stated that the trial judge's discretion "is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid." Committee members who were concerned with the good-cause exception were satisfied by that solution. Other Committee members also agreed.

L. *Final Proposal*

The Reporter explained that the question for the Committee was whether to recommend adoption of Rule 107 on pages 119–122 of the agenda materials with the agreed-upon changes. One Committee member suggested deleting the words "exercise its discretion" from the final sentence of the committee note discussing the "good cause" exception, and all agreed. Another member suggested adding the word "statement" after "opening" in the penultimate paragraph of the committee note. In the third paragraph on page 120 of the agenda materials, the Chair suggested adding the word "may" so that the second sentence would begin: "Examples may include". He also suggested removing the commas from around "during deliberations" in the last sentence of the second paragraph on page 120. In the first sentence of that second paragraph, the Chair also recommended deleting the word "separate" so that it would read "two categories."

Another Committee member asked whether the paragraph in the note regarding sending illustrative aids to the jury room should state that the court "should" give a limiting instruction instead of "must" give one. The Reporter responded that Rule 105 on limiting instructions uses the word "must" and that the note should use the same word to remain consistent. The Chair agreed. The Rules Clerk suggested that the language of Rule 107(b) would allow the trial judge to decline to send an illustrative aid to the jury room even *with consent* due to the combination of the language "must not"–"unless." The Reporter noted that the stylists had approved the language, and the Chair recommended leaving the text as it is. Judge Bates recommended deleting the word "other" in the fifth line of the first paragraph of the committee note because illustrative aids are not evidence and so do not explain "other evidence." Judge Bates also suggested removing the comma between "voluminous, admissible" in Rule 107(d) and to ensure that all references to "voluminous admissible" information in Rules 107 and 1006 are consistent.

Another Committee member commented that the example of PowerPoint presentations had been removed from the examples listed in the third paragraph of the committee note. He noted that PowerPoint presentations are the most frequently used illustrative aid and questioned its removal. The Reporter agreed that PowerPoint presentations are common illustrative aids currently but explained that the Rules have to avoid referencing specific technologies that could become outdated. While PowerPoint presentations are certainly regulated by the amendment, it is best not to refer to them directly. On that note, another Committee member suggested removing the reference to "blackboard" drawings in the note. All Committee members agreed.

With all the discussed changes, the Committee unanimously approved new Rule 107.

III. Rule 1006 Summaries

Professor Richter directed the Committee's attention to Tab 3 of the agenda book and the proposed amendment to Rule 1006. She reminded the Committee that the Rule 1006 proposal was a companion amendment to the illustrative aid amendment to address confusion in the courts regarding the distinction between a summary offered as an illustrative aid and one offered as alternate proof of the content of voluminous materials. She explained that courts sometimes incorrectly caution juries that Rule 1006 summaries are "not evidence." In order to prove the content of materials too voluminous to be conveniently examined in court, Rule 1006 summaries *must* be admitted as evidence and the amendment so provides. In addition, Professor Richter reminded the Committee that courts sometimes refuse to permit a Rule 1006 summary when the underlying voluminous materials it summarizes are not admitted into evidence at trial. Because the Rule 1006 summary is supposed to offer *alternative* evidence of the content of underlying voluminous materials, those underlying materials need not be admitted into evidence. In contrast, some courts refuse to allow use of a Rule 1006 summary if underlying materials *have been* admitted into evidence. Professor Richter explained that the amendment would permit a Rule 1006 summary to be used upon a proper foundation "whether or not" the underlying materials have been admitted into evidence.

Professor Richter noted two changes to the proposed amendment since it was published for notice and comment. First, she explained that the materials underlying a Rule 1006 summary must be *admissible* even if they need not be *admitted*. Because courts displayed no confusion regarding this element of the Rule 1006 foundation, the original published amendment did not specify this requirement. Because other elements of the Rule 1006 foundation were made express in the amendment, the Committee concluded at the Fall 2022 meeting that it was best to include this part of the foundation in rule text as well. The word "admissible" was placed in Rule 1006(a) after the word "voluminous" to clarify that the underlying materials must be admissible. In addition, the Committee made one stylistic change to a sentence in the final paragraph of the committee note distinguishing between illustrative aids and Rule 1006 summaries.

Professor Richter explained that only seven comments were received on Rule 1006 and that they were mostly supportive of the amendment. A few commenters suggested that the Committee should include the requirement that the underlying records be "admissible" in rule text. As already noted, this change was made by the Committee at its Fall 2022 meeting.

Another commenter suggested that the committee note regarding the application of Rule 403 to Rule 1006 summaries ought to be strengthened. This commenter suggested that inaccurate and argumentative summaries inherently lack probative value such that they should not be admitted through Rule 1006. Professor Richter explained that the Committee could consider modifying the committee note as shown on page 149 of the agenda materials to address this concern. Alternatively, Professor Richter noted that courts have long required Rule 1006 summaries to accurately reflect underlying voluminous content and be nonargumentative. She suggested that the Committee might consider placing this portion of the Rule 1006 foundation in rule text given that all other aspects of the foundation were included in the text.

The Chair expressed reluctance to include "accurate and nonargumentative" in rule text as part of the Rule 1006 foundation. He explained that everything presented in chart form can be said to be "argumentative." He offered the example of a chart blowing up text messages. He noted that even "accurate" texts could be said to be "argumentative" because they were enlarged and made more compelling. He also offered an example of a chart showing presents given to child victims by a defendant that included a picture of a victim with a present. The Chair also opined that the modification to the committee note suggested by public comment was not helpful because even argumentative summaries have *some* probative value. Accordingly, the Chair stated that he was inclined to stick with the published version of the note and rule with respect to the issue of accurate and nonargumentative summaries. All Committee members agreed.

A Committee member queried whether the word "admissible" was necessary in the heading of subsection (a) now that the modifier "admissible" had been placed in rule text. Professor Richter explained that the two uses of the term "admissible" referred to distinct concerns and that both references are needed. The heading refers to the fact that the Rule 1006 summary is itself "admissible as evidence" and should not be accompanied by a limiting instruction cautioning the jury against its substantive use. The term "admissible" in rule text refers to the fact that the *underlying voluminous material* summarized must meet admissibility requirements. Accordingly, both references are necessary. The Committee agreed.

Professor Richter next informed the Committee that one public comment had suggested adding a specific time-period for the production of the underlying voluminous materials to the other side under Rule 1006(b). She noted the sparing use of specific time-periods in the Evidence Rules due to the need for flexibility in the trial process as well as the lack of a time-counting provision in the Rules. She explained that the Committee had carefully considered utilizing a specific time-period during the amendment process for the notice provision of Rule 404(b) in 2018 and had rejected the concept. For those reasons, Professor Richter suggested that the Committee not add a specific time-period to Rule 1006(b).

Professor Richter alerted the Committee to the fact that recent amendments to notice provisions in Rule 404(b) and Rule 807 had utilized language ensuring that an opponent receive a "fair opportunity to meet the evidence." She suggested that the Committee could consider whether to add similar "fair opportunity" language to the text of Rule 1006(b) or to the committee note to create consistency among recent amendments. She pointed out bracketed material in Rule 1006(b) on page 148 of the agenda materials as well as a proposed addition to the committee note on page 149 of the agenda to track the "fair opportunity" standard. The Reporter explained that the Criminal Rules Committee had recently borrowed the "fair opportunity" language for an amendment to the Criminal Rules.

All Committee members agreed that Rule 1006(b) should not include a specific time-period within which to produce underlying materials. The Federal Public Defender opined that the "fair opportunity" language would be helpful, however, and should be included. The Chair agreed that the "fair opportunity" language could provide help in a criminal case where the government dropped a set of voluminous materials underlying a summary on the defense on the eve of trial. Another Committee member argued that the "fair opportunity" language should not be included in the rule text. He stated that a "reasonable time" and a "fair opportunity" mean the

same thing, such that adding "fair opportunity" language would be redundant. Another Committee member disagreed, explaining that there is a difference between a "reasonable time" and giving the opponent a "fair opportunity" to meet the evidence. He suggested that the production of underlying materials presents Confrontation Clause issues in a criminal case and that including "fair opportunity" language reminds judges and litigants of those issues.

Another Committee member noted that the notice provisions in Rules 404(b) and 807 require "pre-trial" disclosure. He suggested that Rule 1006 could include a pretrial production requirement as well. The Chair disagreed, stating that the production could be permitted at trial and that it would be problematic to add a pre-trial requirement to Rule 1006. The Reporter noted that issues of pre-trial notice were more significant in the Rule 404(b) and Rule 807 contexts such that there could be a good reason for a pre-trial requirement in those contexts and not in Rule 1006.

Another Committee member pointed to draft language in Rule 1006(b) on page 148 of the agenda requiring a "fair opportunity to meet the evidence." He queried whether "the evidence" referred to the Rule 1006 summary or to the underlying documents. Professor Richter explained that it referred to the summary because production of the underlying documents is necessary for the proponent to evaluate the foundation for the Rule 1006 summary. The Chair asked whether the language was sufficiently clear that "the evidence" refers to the summary.

A Committee member opined that it was better to omit the "fair opportunity" language from the rule text because it was superfluous. Another Committee member disagreed, stating that he felt strongly that the "fair opportunity" language added an important component to the production requirement. He argued that it might be perfectly "reasonable" for the government to turn over voluminous documents two days before trial because a summary could be prepared close to trial but that two days would not give the defense a "fair opportunity" to meet the summary. The Federal Public Defender agreed, noting that a fair opportunity is important when the government turns over thousands of documents. Another Committee member argued that the Federal Rules of Criminal Procedure will require pretrial production in any event. Still, another Committee member stated that it was a habit of the government in criminal cases to turn over a lot at the end and that it is important for Rule 1006 to clarify that the opponent should have a "fair opportunity" to meet a summary. A Committee member asked whether it was possible for production to take place at a "reasonable time" but still deny the opponent a "fair opportunity" to meet the evidence. Another Committee member responded in the affirmative, suggesting that the government in a criminal case might be perfectly reasonable in producing underlying information when it does but that the time might yet be inadequate for the recipient to respond to the summary. Another Committee member proposed keeping the "fair opportunity" language out of the text of Rule 1006(b) but putting a modified paragraph in the committee note ensuring a "fair opportunity" to meet the summary. Committee members agreed that this would be a reasonable solution. The members arguing for "fair opportunity" language in rule text were satisfied with this outcome so long as the note provides that the court "must ensure" that all parties have a fair opportunity to meet the summary.

The Committee unanimously approved the proposed amendment to Rule 1006 with the agreed-upon changes.

IV. Rule 613(b) Extrinsic Evidence of Prior Inconsistent Statements

Professor Richter directed the Committee's attention to Tab 4 of the agenda materials and the proposed amendment to Rule 613(b). The amendment would require a witness to receive an opportunity to explain or deny a prior inconsistent statement *before* the opponent may offer extrinsic evidence of the statement unless the court allows the opportunity to be delayed or eliminated entirely. Professor Richter explained that this prior foundation requirement would align the rule with the common-law practice with respect to extrinsic evidence of prior inconsistent statements. She informed the Committee that there were only four public comments offered on Rule 613(b).

The public comment offered three suggestions for altering the proposal. The first opined that the amendment would give trial courts unbridled discretion to deviate from the prior-foundation requirement and proposed some limit on the court's authority to do so, such as "good cause." Professor Richter explained that this change could easily be made but suggested that there was no need to cabin the trial judge's discretion to depart from the prior-foundation rule. Since the requirement was primarily designed to protect the efficiency of the trial process, there would seem to be no need to restrict a judge's ability to forgive a prior foundation in circumstances where the judge felt it was appropriate and that it would not create inefficient disruptions. Further, Professor Richter noted that the amendment to Rule 613(b) would align the provision with the Rule 611(b) scope-of-direct rule, which requires parties to confine cross-examination questions to the subject matter of the direct and matters affecting credibility unless the judge orders otherwise. Both provisions would state default rules with broad discretion granted to the trial judge to deviate. The Chair agreed, noting that there was no need to require the trial judge to make findings to support a decision to depart from the prior foundation requirement. All Committee members concurred that there should be no "good cause"—or other limit—placed on the trial judge's discretion to depart from the prior-foundation requirement.

Professor Richter explained that another commenter had proposed adding a requirement to the committee note that a party seek leave of court to offer extrinsic evidence of a prior inconsistent statement before offering a witness an opportunity to explain or deny. The commenter opined that a litigant should not be permitted to simply offer extrinsic evidence first in the hopes of drawing no objection and should be required to seek advance permission. Professor Richter explained that this change would be easy to make as well but recommended against it. She noted that the Rules generally require no prior permission for offering evidence except in the case of Rule 412 governing the sexual history of sexual assault victims. She noted that the decision to ask for permission reflected a strategic choice rather than a requirement of the Evidence Rules. The Chair agreed and the Committee was unanimous that no "prior permission" requirement should be added to the note.

Finally, Professor Richter explained that one commenter recommended deleting the reference to preventing "unfair surprise" as a justification for the prior-foundation requirement from the committee note, arguing that a prior foundation does not necessarily minimize surprise and that unfair surprise recalls a bygone era of gentility in impeachment that no longer applies. She agreed with the comment and suggested that the reference to "unfair surprise" be deleted

from the committee note. The Committee unanimously agreed and unanimously approved Rule 613(b) with that single change.

V. Rule 801(d)(2) and Party–Opponent Statements Offered Against Successors

The Reporter introduced the amendment to Rule 801(d)(2) that would make the statements of a declarant that would be admissible against the declarant or against the declarant's principal admissible against a successor party whose claim, defense, or liability is directly derived from that declarant or that principal. The Reporter explained two minor proposed modifications to the amendment. First, he noted that the term "defense" should be added to the text of the rule because sometimes a party derives a defense only from a predecessor party and would derive no claim or liability. All Committee members agreed to add the word "defense" to the text of the amendment. The Reporter then noted a minor change to the first sentence of the committee note to better clarify the declarant-as-agent scenario. All agreed to this change to the note language as well.

The Reporter explained that there were some public comments on Rule 801(d)(2). The Magistrate Judges' Association suggested using the term "successor in interest" in rule text to make clearer the intent of the amendment to admit statements admissible against predecessor parties against their successors. The Reporter agreed that the "successor in interest" term might be more succinct but explained that the Committee should not use that terminology because the former-testimony hearsay exception uses the term "predecessor in interest" to describe the relationship required to allow admissibility of former testimony in civil cases. He explained that the "predecessor in interest" language has been interpreted very flexibly by the courts to require only motivational symmetry between parties and not a true legal relationship. The Reporter noted that flexible treatment makes sense in the context of the former-testimony exception because it is grounded in notions of reliability. In contrast, he explained that a true legal relationship is necessary in the context of Rule 801(d)(2) because it is grounded in notions of adversarial fairness and not in reliability. Admission against a successor is only "fair" for purposes of Rule 801(d)(2) if there is a true legal relationship. Therefore, he suggested that the Committee should not use the term "successor in interest" in Rule 801(d)(2). The Committee agreed.

Next, the Reporter noted a potential interpretive problem highlighted by the Rules Clerk. The Reporter explained that if a declarant–agent made a work-related statement after being fired by a corporation, that statement would be admissible against the declarant–agent personally, but not against the corporation. If the corporation were acquired, the declarant–agent's statement should not be admissible against the successor where it would not have been admissible against the predecessor corporation. The Rules clerk suggested that the double conjunctive in the text of the amendment could be read as allowing the statement to be admitted against the successor if it would be admissible against *either* the declarant–agent *or* the predecessor corporation. The Reporter expressed skepticism that a court would read the rule that way. But he noted that the text of the rule could be modified as illustrated on page 169 of the agenda materials to clarify that the statement must be admissible against the party *from whom the successor* derives its claim or liability. Alternatively, the Committee could add a sentence to the committee note as illustrated on page 169 of the agenda materials to deal with the potential issue. The Reporter

stated his preference to add note language only to avoid further complicating the text of the amended rule.

The Chair agreed with the Reporter and proposed leaving the text of the amendment as published, adding only the word "defense" as previously discussed, and using note language to address the concern about the double conjunctive. The Committee unanimously agreed to propose the amendment with only those changes.

VI. Rule 804(b)(3) "Corroborating Circumstances"

Professor Richter directed the Committee's attention to Tab 6 in the agenda materials and introduced the proposed amendment to Rule 804(b)(3), the statements-against-interest hearsay exception. She reminded the Committee that the exception requires a proponent to show "corroborating circumstances clearly indicating the trustworthiness" of a statement against criminal interest offered in a criminal case. She explained that courts conflict about the information that may be utilized to make this finding. Most consider both the inherent guarantees of trustworthiness surrounding the making of the statement (such as its timing, spontaneity, and motivations) as well as independent information corroborating or contradicting it. Some courts refuse to consider evidence independent of the statement, however. To resolve this conflict, and to align Rule 804(b)(3) with the 2019 amendment to Rule 807, the amendment clarifies that courts should use independent evidence, if any exists, as well as inherent guarantees of reliability in looking for "corroborating circumstances clearly indicating" the trustworthiness of a statement against interest.

Professor Richter explained that only five comments were received on the amendment, but that several of them expressed confusion over the use of the term "corroborating" twice in the amended language. The amendment references the *finding* required for admission of statements against criminal interest in criminal cases: "corroborating circumstances clearly indicating" trustworthiness. The amendment also references "corroborating" evidence in describing the *information* courts may use in making that finding. The amendment used the term twice to track the language of the 2019 amendment to Rule 807 and to avoid using different language to describe the same concept in two different rules. Commenters were confused, however, as to the distinction between the two uses of the same term: "corroborating." Professor Richter explained that the language of the amendment might be slightly altered to avoid two references to "corroborating," explaining that the Chair had proposed using the term "supporting" to describe the independent evidence courts may look to in finding "corroborating circumstances." Professor Richter noted that the Committee could also consider adding a paragraph to the committee note instructing courts and litigants on the distinction. The Reporter added that Rule 807 does not have the same "corroborating circumstances" finding that is part of Rule 804(b)(3) and that it may make sense to vary the language slightly for that reason.

The Chair noted that clear drafting was challenging in the context of this amendment because the "corroborating circumstances" finding was a term of art that had been in the hearsay exception since it was first enacted and could not be changed and also because the Committee wanted to track the language used to describe the same concept in Rule 807. He suggested that amendment language describing evidence "that supports or contradicts" the statement could be

superior to the published language. The Reporter noted that the word "supported" is also used earlier in the rule, but that he thought "supports or contradicts" was superior to using the term "corroborating" twice in the amendment. Committee members posed alternative terminology, such as "consistent" evidence, "confirming" evidence, or evidence that "reinforces" the statement. Ultimately, Committee members found these alternative word choices too weak or too strong to capture the notion of "corroborating" evidence and agreed that "any other evidence that supports or contradicts" the statement best captures the intended concept. With that modification to the text of the rule, the Committee agreed not to add a new paragraph to the committee note distinguishing "corroborating circumstances" from "corroborating evidence."

The Committee agreed to make other, modest changes to the committee note to replace the term "corroborating" with the term "supporting" where appropriate and to signal to courts and litigants that the amendment remains consistent with the 2019 amendment to Rule 807 despite its use of slightly different language. The Committee approved the proposed amendment unanimously with those changes.

VII. Procedural Safeguards for Juror Questions

The Reporter directed the Committee's attention to Tab 7 of the agenda materials and the issue of procedural safeguards when jurors are permitted to ask questions at trial. He reminded the Committee that there was a symposium on the issue at the Fall 2022 meeting in Phoenix. The Standing Committee expressed concern that an evidence rule offering procedural safeguards for jury questions might encourage more use of jury questions. The Reporter explained that he had been asked to examine two issues regarding juror questions: 1) how common is the practice of permitting juror questions? and 2) have appellate courts found error in the procedural safeguards used by the courts that have allowed the practice?

As to the first question, the Reporter noted the difficulty in obtaining precise data about prevalence but posited based upon available data that 15-20% of federal courts allow juror questions at least in some cases. The practice appears more common in civil cases than in criminal cases. He explained that the practice is used in many states and by law in some, including Washington and Arizona. As to the second question, the Reporter explained that there have been appellate errors found with respect to the use of juror questions in four major areas: 1) failure to allow lawyers to object to juror questions; 2) active solicitation or encouragement of more juror questions; 3) allowing jurors to interrupt testimony to proffer their own questions; and 4) allowing too many juror questions.

The Reporter directed the Committee's attention to the draft Rule 611(e) on page 202 of the agenda materials that would set forth procedural safeguards required to be used when juror questions are allowed. He emphasized that the amendment would *not* regulate whether juror questions should be permitted but would provide protections when a judge chooses to allow them. He noted that the terminology "when a question is submitted" had been changed to "if a question is submitted" to more clearly signal that the amendment is not encouraging juror questions. He explained that the committee note was also modified to emphasize that the amendment is not designed to promote juror questions.

The Chair stated that the proposed rule had been sent to the Standing Committee and that Standing had sent it back to the Advisory Committee. The Standing Committee identified no concerns with the procedural safeguards articulated in the proposed rule, but some members did not favor juror questions and were concerned that covering the practice in a rule would encourage the practice to be adopted more widely. The Chair explained that the question for the Advisory Committee was whether to send the proposal up to Standing again, explaining that changes had been made and additional research performed, or whether to give up on the proposed amendment for the time being.

Ms. Shapiro offered the results of her survey of criminal chiefs in U.S. Attorneys' offices regarding the practice. She explained that the criminal chiefs all brought up both pros and cons to the practice of allowing jury questions. Some like the practice, others do not. She said that the sense was that the practice is more common in the western half of the country, that more federal judges allow jury questions in jurisdictions where state courts do, and that more judges are experimenting with the practice. She noted that Judge Bates had expressed concern that jury questions could tip off prosecutors to a gap in the evidence needed to carry their burden of proof in criminal cases. Ms. Shapiro reported that criminal chiefs did not a perceive a benefit to one side or the other in a criminal case and opined that juror questions could help or hurt either side depending on the case.

Judge Bates suggested that perhaps federal defenders ought to be surveyed about whether *they* think juror questions give the prosecution an advantage. He asked how important the prevalence of the practice is to the Committee in proposing a rule regulating it, querying whether use in 5% of federal courts is sufficient or whether something above 20% is necessary to make the proposed rule a priority. Judge Bates suggested that almost all jury questions are focused in four places: New Mexico, Arizona, Alaska, and the Eastern District of Michigan. The Chair noted that the data on the use of jury questions is incomplete, recounting that judges from Kansas City and Arkansas have reported regular use of jury questions. The Chair opined that a rule would be urgently needed if 50% of federal judges were permitting jury questions and that a rule would be less necessary if the number were 10% or less.

The Reporter suggested that the prevalence of a particular issue is not necessarily the most important driver for an amendment. He noted that the issue of use of party–opponent statements against successors covered by the proposed amendment to Rule 801(d)(2) is one that arises rarely. Still, having the Rules applied fairly and uniformly is an important objective that should be promoted even in circumstances that arise less frequently. A Committee member commented that an amendment governing jury questions would be qualitatively different from an amendment to a hearsay exception. He noted that the hearsay exceptions are well-accepted and used frequently such that getting them right is critical. But he argued that the practice of allowing juror questions fundamentally changes the nature of a trial and for that reason is only permitted by a minority of courts. The Committee member opined that the real question is whether jury questions should be allowed at all and that the Committee should not be regulating a practice that should not be adopted.

Judge Bates asked whether the Advisory Committee could recommend a rule *banning* jury questions. He opined that the Committee probably would have the authority to do so as

questioning witnesses is a procedural question and not a substantive one. He noted that Rule 614 already regulates questioning by the trial judge and that the Rules could likely regulate questioning by the jury. Another Committee member added that there is no split of authority regarding juror questions for the Committee to resolve and that recommending a rule regulating the practice could encourage it. Another Committee member suggested that the Committee should be more focused on the *trend* with respect to jury questions than on the practice's current *prevalence*. She suggested that if the trend was more toward experimentation with jury questions, the Committee could take two approaches. It could seek to get ahead of the trend and regulate the practice before it becomes more prevalent, or it could wait and allow the courts to hash it out further before weighing in.

Another Committee member asked what the optimal mechanism of regulation would be. He suggested that a Federal Rule of Evidence is a very formal and extreme method of regulation and that a benchbook could be a superior method of recommending safeguards around jury questions. The Federal Public Defender agreed that issues of uniformity are important and that concerns regarding juror questions in criminal cases deserve consideration. He suggested that the Committee should let things play out in the courts and that a benchbook could be a helpful method of imposing some safeguards in the meantime. The Reporter explained that the question of benchbooks has been raised in Committee before but that the Committee does not draft benchbooks or guidelines. The role of the Committee is to recommend rules changes. Professor Coquillette agreed. Tim Lau of the FJC pointed out that a judicial survey was the optimal way for the Committee to get a more accurate sense of the prevalence of the practice of allowing juror questions. He also noted that prevalence is a nuanced issue. Some courts might allow juror questions but very infrequently. Others might allow them in most cases. Some courts that permit jurors to ask questions may receive very few questions, while others may receive many. Mr. Lau suggested that a judicial survey might reveal more granular data and trends.

A Committee member stated that he had been in favor of studying a possible amendment to regulate jury questions but that he was concerned that the practice could alter the nature of a trial and that a rule could have the unintended consequence of encouraging the practice. If an amendment were to be proposed, he suggested that it should consider the allowable scope of juror questions to eliminate questions that go beyond witness testimony. Another Committee member stated that it did not make sense to have a mandatory rule regulating a discretionary practice. He suggested that he would favor banning juror questions but at the very least opposed regulating a practice before deciding whether the practice should even be permitted. Another Committee member reported that his state permitted juror questions and that he has observed no ill effects but that he agreed that the Committee should probably decline to regulate at this point. A different Committee member stated his preference to table the issue for now, but to continue studying the practice to see whether a trend emerges that would justify reexamining the issue. Other members agreed and several suggested that the Reporter should explore other methods (such as a benchbook) of getting the needed safeguards to the judges who are allowing juror questions. Another Committee member suggested that a judicial survey by the FJC could also be useful in determining the true prevalence of the practice.

The Chair noted that efforts had been made to reduce the number of surveys sent to federal judges due to the sheer volume they receive. Judge Bates noted that a survey would make

sense if prevalence were the issue with which the Committee was struggling. But if the Committee is not interested in going forward at this time regardless of prevalence, a survey would not make sense. Judge Bates suggested that the Committee could communicate the need for benchbook safeguards for juror questions to the FJC. The Reporter queried whether the FJC would think that benchbook coverage of juror questions would promote the practice. Committee members all agreed to table the proposal. Judge Kuhl commented on the significant, excellent work done by the Reporter on the issue and suggested that it should be shared with circuit committees that draft pattern instructions as well as with the FJC for possible inclusion in a benchbook. Mr. Lau suggested that the Reporter's work could be forwarded to the benchbook committee that is currently working on a new edition. With that, the issue of an amendment regulating juror questions was tabled.

VIII. Closing Matters

The Chair announced that the fall meeting will be held on October 27, 2023. He noted that with all pending proposals concluded, the Committee will be working with a clean slate. He explained that the Reporter will invite a half dozen Evidence scholars to the fall meeting to present their ideas for updating the Rules. The Reporter noted that two topics on the agenda for the fall meeting will be: 1) the issue of deepfakes and authentication and 2) the possibility of expanding the Rule 801(d)(1)(A) hearsay exception to encompass more inconsistent statements. The Chair suggested finding an expert on artificial intelligence and deepfakes to educate the Committee. The meeting was then adjourned.

TAB 3B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 6, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Washington, D.C., on June 6, 2023. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter
Professor Liesa L. Richter, Consultant

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Demetrius Apostolis, Rules Committee Staff Intern; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director, Federal Judicial Center ("FJC"); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice ("DOJ") on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed members of the public who were attending in person. He also welcomed new Standing Committee member Judge Paul Barbadoro and bade farewell to two members soon to depart the committee, Robert Giuffra and Judge Carolyn Kuhl. Judge Kuhl and Mr. Giuffra gave brief departing comments, and Judge Bates thanked them for their service.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2023, meeting.**

Judge Bates remarked that a chart tracking the status of rules amendments commenced on page 52 of the agenda book. Mr. Thomas Byron, Secretary of the Standing Committee, noted that the latest set of proposed rule amendments had been transmitted from the Supreme Court to Congress in April.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Catherine Struve reported on this item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Professor Struve recalled that this project had benefited from discussions in the advisory committees, from which important questions arose about the practical logistics of electronic access to the courts. Armed with those questions, she and Dr. Tim Reagan of the FJC held conversations with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. Professor Struve expressed appreciation for Dr. Reagan's expert guidance concerning these inquiries.

One of their primary areas of inquiry was whether there is any reason to require traditional service by a self-represented litigant on other litigants who already receive notices of electronic filing ("NEFs"). Among the districts whose personnel they interviewed, seven districts exempt self-represented litigants from making such traditional service on CM/ECF participants: the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, the District of South Carolina, and the District of Utah.

In those districts, exempting self-represented litigants from paper service added no burden on the courts' clerk's offices. When self-represented litigants file non-electronically, the clerk's offices already scan those paper filings and upload them to CM/ECF. There are some exceptions to the exemption from making traditional service; notably, filings under seal that are not available to other litigants via CM/ECF must be served on the other litigants by traditional means, but in those circumstances the courts require paper service by anyone making such a sealed filing. That would be true for either a self-represented litigant or a CM/ECF participant.

Professor Struve observed that the exemption from making traditional service exists only when the recipient is receiving NEFs (because they are enrolled either in CM/ECF or in a court-

provided electronic-noticing system). A self-represented litigant who does not receive NEFs will need to be served by traditional means. A filer who is receiving NEFs will learn from the NEF who, if anyone, must be served by traditional means. But if a paper filer is not receiving NEFs, one must ask how that filer will know whether any other litigants in the case are also not receiving NEFs. The universal answer from court personnel was that it just is not an issue.

She thought that this question would likely be an issue only in a vanishingly small number of cases—in part because there would need to be multiple self-represented litigants in the case. She also believes there are ways to craft an exemption from the traditional service requirement to take care of that situation and to ensure that anybody who needs traditional service does get it without burdening non-CM/ECF-filing self-represented litigants with superfluous paper service. She plans to convene a Zoom working-group meeting over the summer to discuss a potential amendment about an exemption from service.

Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF. About six or seven of the districts covered in the interviews offer some degree of access to CM/ECF for self-represented litigants. At least two of those districts do not require any special permission from the court, and the other districts allow it with court permission. Interviewees from those districts identified a number of benefits from providing that access. It decreased the number of paper filings, saved the court time from scanning documents, avoided the need to have the court serve orders in paper, and averted disputes about what was actually filed and whether a filing had all its pages. There were some reports of burdens as well as notes about the need to make sure there is adequate staffing for technical support and training. There were also some interesting anecdotes about how the courts deal with inappropriate filings. But overall, the report from these districts was positive. As one respondent put it, the benefits outweigh the risks.

Professor Struve further reported that courts are experimenting with increasing electronic access by disaggregating the elements of access via CM/ECF and providing them "à la carte." For example, some courts permit other means of electronic submission through upload or through email, and interviewees from those courts listed a number of benefits from those programs. One prominent benefit was not having to scan paper filings. She noted that many of the respondent districts also provided their own electronic-noticing systems, which benefited the courts because the recipients of NEFs no longer need to receive paper copies of court orders.

Electronic-Filing Deadline

Judge Bates reported on this item.

Judge Michael Chagares, currently the Chief Judge of the Third Circuit, first raised this suggestion some years ago in his capacity as Chair of the Appellate Rules Committee. The suggestion was to change the presumptive electronic-filing deadline set by the time-counting rules to a time earlier than midnight. The objective was to promote a positive work environment for young associates who were working until midnight to get court filings done. A joint subcommittee considered this suggestion, but it did not take any action at the time.

Recently, the Third Circuit adopted a local rule making the filing deadline earlier in the day. The Standing Committee has therefore referred the matter back to the joint subcommittee,

which needs to be recomposed. The joint committee will re-examine the issue and decide whether to propose a rules amendment or perhaps whether it might be better to let the experiment in the Third Circuit run its course for a couple of years to see how things go.

A judge member noted that the Third Circuit's new local rule has elicited an almost entirely negative reaction from members of the bar. A practitioner member argued that this rule change, though well-intentioned, would not make people's lives better. Moving the deadline earlier will simply ruin the night before. Setting the deadline at five o'clock will really wreak havoc for many practitioners. Moreover, even if this deadline is not so bad for appellate lawyers—whose briefing schedule is more predictable and who are not engaged in fact development—it would play out differently in the district courts.

District-Court Bar Admission Rules

Judge Bates reported on this item. Several of the advisory committees received a proposal from Alan Morrison and others on a unified bar-admission rule. The proposal would make admission to one federal district court good for all federal district courts. It would also centralize the disciplinary process that goes along with court admissions.

A joint subcommittee has been formed with representatives from the Advisory Committees on Civil, Criminal, and Bankruptcy Rules to review the proposal over the course of the next year or two. That review may also require some work by the FJC. Professors Struve and Andrew Bradt will be the reporters for the joint subcommittee. Judge Bates thanked them and the members of the joint subcommittee for their work.

An academic member commented that a similar proposal had come up in the past and had a very fraught life. A consultant agreed with the academic member's remarks. A previous proposal had managed to unify all the local and state bar associations in America against it.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Jay Bybee and Professor Edward Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in West Palm Beach, Florida, on March 29, 2023. The advisory committee presented three action items and two information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 70.

Action Items

Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) and Conforming Changes to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits. Judge Bybee introduced this item. The advisory committee sought final approval of these proposed amendments, which appeared starting on page 103 of the agenda book.

The advisory committee had received a handful of public comments, which were listed in pages 72–75 of the agenda book. The advisory committee did not recommend any changes in response to those comments.

The proposal consolidates Rule 35 into Rule 40. It does not make any substantive changes to the basis for seeking rehearing from the panel or rehearing en banc. The proposal tries to simplify and clarify the rules, particularly in response to several comments received about the multitude of pro se filings.

A judge member agreed with the rule's statement that rehearing en banc is disfavored. The member asked for additional background on that language. Judge Bybee noted that the language was already in the rule; the proposal did not add it. The judge member observed that some of the public comments had disagreed with that language. Professor Hartnett responded that the advisory committee had been unmoved by those comments because they were at such odds with the usual, uncontroversial practice in the courts of appeals.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 32, 35, and 40 and the Appendix of Length Limits.**

Amendment to Rule 39 (Costs). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 149 of the agenda book.

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court invited the advisory committee to clarify what costs are recoverable on appeal and who has the responsibility for allocating those costs. This proposed amendment does so. It makes a change in nomenclature by clarifying the distinction between "allocating" costs and "taxing" costs. "Allocating" means deciding who is going to pay, and "taxing" means deciding how much is going to be paid. The responsibility for taxing is divided, under the rules, between the district courts and the courts of appeals. The proposed amendment also clarifies the procedure for asking the court of appeals to reconsider the question of allocation.

A question not addressed by the proposed rule is what to do about requiring disclosure of the costs associated with a supersedeas bond, which was the context for *Hotels.com*. In that case, there was a very large bond, whose costs were shifted from one party to the other after the case was over. It was possible that the party that had not sought the bond was going to end up with significant costs that it may not have anticipated.

As the advisory committee considered this rule, it could not come up with a good mechanism within the appellate rules for ensuring that disclosure, so the proposed amendment does not address it. It is fairly rare, but when it does come up, it can be a serious problem, so the advisory committee recommended that the Civil Rules Committee consider whether an amendment to Civil Rule 62 might address disclosure.

An academic member asked whether any thought had been given to whether the change in terminology ("allocating" versus "taxing") might cause confusion. Judge Bybee reported that the advisory committee had carefully considered potential transition costs and had concluded that clarifying the terminology is worthwhile.

A judge member expressed concern that the phrasing "allocated against" (e.g., "if an appeal is dismissed, costs are allocated against the appellant") did not sound right. A style consultant

agreed, saying that the usual expression would be "allocated to." Professor Hartnett responded that "against" is in the existing language (e.g., "costs are taxed against the appellant"), and he explained that the advisory committee wanted to make clear who is on the hook to pay. Allocating something "to" someone might suggest that that person is receiving money rather than having to pay it. Judge Bybee agreed, and he suggested that if the public comments push back against the phrasing, the advisory committee could look for an alternative.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 39 for public comment.**

Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 128 of the agenda book.

Judge Bybee explained that appeals from the bankruptcy court generally go either to the district court or to the bankruptcy appellate panel ("BAP") in those circuits that have established one. But under 28 U.S.C. § 158(d)(2), a party may instead petition for direct review by the court of appeals.

Judge Bybee turned first to the proposed amendment to Rule 6(a), governing direct appeals from a district court exercising original jurisdiction in a bankruptcy matter. He drew attention to an important difference between bankruptcy appeals practice and ordinary civil appeals practice – namely, that the bankruptcy rules set a markedly shorter deadline (14 days instead of 28 days) for certain postjudgment motions that reset the appeal time. The proposed amendment to Rule 6(a) provides fair warning that the bankruptcy rules govern. The proposed committee note also provides a chart setting out relevant Bankruptcy Rules and applicable motion deadlines.

Judge Bybee next highlighted the proposed amendment to Rule 6(c), which governs permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Alluding to the fact that current Rule 6(c)(1) renders most of Rule 5 applicable to such appeals, Judge Bybee stated that Rule 5 did not fit this context very well. Instead, the advisory committee proposes amending Rule 6(c) to address petitions for review in the court of appeals. The changes are fairly extensive. The advisory committee had a subcommittee with specialists in bankruptcy appellate work who have carefully reviewed the proposal.

The representatives of the Bankruptcy Rules Committee said that they supported the proposal.

Professor Struve thought the proposal would helpfully address some real difficulties and complexities. She thanked the Appellate Rules Committee chair and reporter and also their colleagues on the Bankruptcy Rules Committee for their superb work. Judge Bates echoed that sentiment.

Judge Bates asked why the proposed amendments would change "bankruptcy case" to "bankruptcy case or proceeding" and whether that change should be explained in the committee note. Professor Hartnett responded that the advisory committee wanted to ensure that the rule would cover appeals from both bankruptcy cases and adversary proceedings within those cases.

He suggested that the proposed committee note's reference to "clarifying changes" encompassed this feature of the proposed amendments.

Judge Bates then asked whether the phrase "motions under the applicable Federal Rule of Bankruptcy Procedure" in proposed Rule 6(a) should say "Rules" because motions may be made under more than one rule. Professor Hartnett deferred to the style consultants on that, and the change was made.

An academic member asked whether the advisory committee had discussed and decided to endorse the First Circuit's position in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 83 (1st Cir. 2021) (holding that "the Bankruptcy Rules"—including their shorter postjudgment motion deadlines and the implications of those deadlines for resetting appeal time—"apply to non-core, 'related to' cases adjudicated in federal district courts under section 1334(b)'s 'related to' jurisdiction"). Professor Hartnett responded that, leaving aside whether that case was correctly decided under the current rules, the advisory committee had been informed by bankruptcy specialists that the First Circuit reached the right outcome, so the advisory committee wanted to make that position explicit in the rule going forward.

Professor Hartnett noted one edit: in the committee note to subdivision (b), removing "(D)" in the sentence "Stylistic changes are made to subdivision (b)(2)(D)," on page 90, line 209, of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 6 for public comment with the above-noted changes to the text of subdivision (a) ("Rules") and the committee note to subdivision (b).**

Information Items

Amicus Disclosures. Judge Bybee reported on this item. The advisory committee again sought advice from the Standing Committee. The feedback received at the Standing Committee's January 2023 meeting was helpful. The proposal was still a working draft and not yet ready for the Standing Committee's full consideration.

On behalf of the advisory committee, Judge Bybee posed two questions for the Standing Committee. The first question related to draft Rule 29(b)(4) on page 99 of the agenda book. The draft rule required disclosure of any party, counsel, or combination of parties and counsel who contributed 25% or more of the gross annual revenue of an amicus filer in the prior 12-month period. At the January discussion, the Standing Committee asked whether the advisory committee should use a lookback period of the last 12-month period or the prior calendar year. Contrary to what appeared to be the Standing Committee's sentiments in January, the advisory committee believed that the prior 12-month lookback period works better because, although using the calendar year would be easier, disclosure could also be more easily avoided using a calendar year.

The second question related to draft Rule 29(d), governing disclosure of relationships between *nonparties* and an amicus filer. The advisory committee drafted two alternatives, labeled alpha and beta. Option alpha would require an amicus to disclose a contribution by anyone, including a member of an amicus organization, of over $10,000 that was earmarked for the

preparation of an amicus brief. Option beta would carry forward the existing rule, which requires disclosure of a contribution of earmarked funds but exempts contributions by members of the amicus. The thinking behind option alpha is that option beta makes it too easy to evade disclosure—someone who wants to fund an amicus brief need only become a member of the amicus group. In exchange, the floor for requiring disclosure of a contribution is increased to $10,000 under option alpha. That amount avoids requiring disclosure for a brief crowdfunded by many small contributions.

A practitioner member supported the advisory committee's rationale for the 12-month lookback period. The member also suggested that another option might be to require disclosure of contributions made *either* in the year the brief is filed or the year immediately prior. That way, the amicus could look at annual figures instead of having to create a new lookback window for each brief. Judge Bates asked whether that proposal would make the process of checking and making disclosures overly complicated. Professors Beale and Hartnett raised the question of what the right denominator for calculating the fraction of revenue contributed would be. Professor Bartell suggested using the entire period beginning January 1 of the calendar year before the date of filing.

A judge member preferred option alpha because option beta allowed someone to join an amicus and make a substantial contribution without disclosure being required.

Another judge member wondered whether trade associations keep clear demarcations of funds that are going to amicus work as opposed to general activities and how a donor would know to which of those uses its donations were directed. The member also thought that $10,000 in option alpha was a very high number. The member could understand not wanting to capture small amounts from crowdfunding, but why not a $5,000 or $7,500 floor?

On the first point, Professor Hartnett responded that the subdivision (b)(4) exception hinged more on the phrase "received in the form of investments or in commercial transactions in the ordinary course of business" than on the phrase "unrelated to the amicus curiae's amicus activities." A trade association's members' contributions are not generally thought of as investments or commercial transactions in the ordinary course of business.

As to the second point, the advisory committee had not settled on $10,000—that amount was set forth in brackets, along with $1,000 as another bracketed alternative. Advisory committee members who supported using $10,000 argued that, once the contribution reaches that number, the contributor is very likely to be driving the effort or at least to have a significant hand in it. Instead of funding coming from a broad membership base, it is coming from a small number of people who may not be representative of the entire membership. Some alternatives, such as a percentage of the cost of the brief, were also considered, but they were considered too difficult to implement.

The judge member again indicated a preference for a lower floor, something like $5,000 or $7,500, in case a small number of entities are pooling resources to be a collective driving force behind the brief. The member was also unsure what counted as a commercial transaction in the ordinary course of business. Funds could go into an entity, on a routine basis, to fund all of its activities, including the activities of its general counsel. The member was concerned that there would not be an administrable distinction between money to fund an amicus brief and money to fund the amicus's legal office.

Judge Bates remarked that the goal should be a rule that is clear to those subject to it. If it is unclear what funds do or do not trigger disclosure, the advisory committee should continue to talk about that.

A practitioner member thought that over-regulation of this area would be a big mistake. The committee seemed to be bringing into the realm of amicus briefs concepts that applied instead to lobbying a legislature. The best form of amicus-brief regulation is the discretion of Article III judges to read them or not read them. The advisory committee also ought to talk with at least the big trade associations to see whether the proposed requirements are feasible and how complicated it would be to implement them. And the proposed requirements will hurt smaller organizations.

The member asserted that proposed Rules 29(d) and (e) were a mistake. For example, lawyers who write amicus briefs for big trade associations do so for free or for a discounted amount—say, $5,000, $10,000, or maybe $20,000. They work on these briefs to be able to say that their work influenced a Supreme Court decision.

Judge Bybee asked the member to clarify whether the member was opposed to the beta alternative version of Rule 29(d), which tracked what is already in the current rule. The member responded that it was fine if it was already there, but the member would not try to set dollar or percentage thresholds.

Another practitioner member argued that proposed (b)(4) addressed a real concern—that is, situations in which big players in an amicus control its filings. As to the exception in proposed (b)(4), the member read it to exclude ordinary commercial transactions between the trade association and its members, such as renting space. If that reading is wrong, the member would view that as a problem.

As to (d), the practitioner member thought option alpha was both over- and underinclusive. A big problem with alpha was that it permitted nonmembers to contribute anything below $10,000 without triggering disclosure. The member thought that the concern was about background players who orchestrate large amicus campaigns by donating to many different organizations. The key control existing today (and in option beta) is that the organization can be seen as credibly speaking for its members—if a nonmember makes a contribution, the nonmember has to be disclosed.

The practitioner member said, though, that he is skeptical of tying disclosure requirements to contributions that are earmarked for a particular brief. Large organizations with large budgets will allocate a portion of annual dues to amicus briefs in general; no funds will ever be targeted to a single brief, so no disclosure will need to be made. Smaller groups or groups that do not regularly file amicus briefs probably will not have an allocation for those briefs in their budgets. If a case comes along that is important to them, they will have to "pass the hat" among their members, and they will have to disclose. So the rule's burden then falls disproportionately on different amicus groups. For many companies, disclosure will mean they will not contribute because they will not want to be singled out; and amici will be less willing to file if they will have to make a disclosure because they will believe disclosure will make the brief seem less credible. If the concern is with those who join just before or after contributing, perhaps the rule should expressly target that behavior.

Judge Bybee asked what contribution floor this practitioner member favored for option alpha. The member did not think crowdfunding was such a big issue, so the member suggested perhaps a $10 floor. Amicus briefs are not big profit centers, so they often do not cost that much. If the limit is $7,500, then four contributors who give $7,400 each can provide close to what the brief will cost without triggering disclosure. The contributors need not have anything to do at all with the amici, and that seems to be a problem. This member preferred option beta over option alpha.

A judge member remarked that the underlying concern is the opportunistic arrival of somebody who wants to control or have a voice in a particular case. Although having a set dollar amount might be attractive because it's arguably objective, the member did not know that it would address the concern.

Another judge member stressed the need for clarity, expressed doubt about how to apply a disclosure standard that hinges on the intent behind a contribution, and stated that requiring disclosure of an amicus's membership raises First Amendment issues. This member favored option beta.

Another judge member noted that in the courts of appeals, where amicus briefs are less common, those briefs may be more influential than they are in the Supreme Court. Anecdotally, amici can be very important and influential; this member reads amicus briefs. The member stressed once again that the committee should consider a lower dollar-amount threshold in option alpha. Another important reason to know about who is behind the brief is for recusal reasons—to ensure that a party for whom a judge should not decide cases does not come to the court through a third party instead. Asked for a preference between options alpha and beta, the member preferred option alpha because there needs to be an understanding of who is really driving amicus briefs; the member acknowledged the need for careful drafting of option alpha given, inter alia, potential First Amendment concerns. The member separately reiterated doubts about the meaning of the exception in proposed paragraph (b)(4).

Another judge member agreed that it was not clear what the exception in (b)(4) meant or how it would be calculated. That member also did not think that the courts of appeals were expressing a need for a change to Rule 29. The member has not sensed any problem with amicus briefs. Some members of Congress appear to be concerned about undisclosed backers funding multiple amicus briefs. By contrast, the problem that the member, as a judge, would be worried about is whether an amicus was merely another voice for a party in the case. The portion of the existing rule that would become proposed paragraph (b)(1) is aimed at the latter problem. Subdivision (d) instead tries to get at the concern voiced by the members of Congress. To solve that problem (and this member was not sure it was a problem in the courts of appeals), the existing language may be inadequate because it is limited to those who contribute or pledge money intended to fund the particular brief, as opposed to amicus briefs generally. Someone could set up arrangements so as not to pay for any particular brief; instead, they could just fund several organizations that file amicus briefs in dozens of cases. The member was not sure how best to address the concern voiced by the legislators.

Judge Bybee thanked the Standing Committee for its helpful input on these difficult problems.

Intervention on Appeal. Judge Bybee reported that the advisory committee will consider whether to add a new rule governing intervention on appeal. There currently is no rule, but the issue has come up several times in the courts of appeals. The issue was also recently briefed in the Supreme Court in a case that later became moot.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Rebecca Connelly and Professors Elizabeth Gibson and Laura Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in West Palm Beach, Florida, on March 30, 2023. The advisory committee presented eight action items and four information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 179.

Action Items

The Restyled Bankruptcy Rules. Judge Connelly introduced this item, and Professor Bartell reported on it. The advisory committee sought final approval of the fully restyled bankruptcy rules, which appeared starting on page 190 of the agenda book.

The restyling project had been an immense effort by the Restyling Subcommittee (chaired by Judge Marcia Krieger), the style consultants, and Rules Committee Staff. The total number of bankruptcy rules exceeded that of all the civil, appellate, criminal, and part of the evidence rules, combined. It was a major project.

Parts VII through IX of the restyled bankruptcy rules were published for public comment in August 2022. There were five sets of comments. The comments and any changes made since publication were shown in the agenda book starting on page 429.

The advisory committee was also asking for approval of Parts I through VI of the restyled rules. The Standing Committee had approved them already over the past two years with the understanding that the rules would return for approval after the entire restyling was completed.

There have been some modifications to the restyled Parts I through VI since those approvals were given. Some of the bankruptcy rules have been substantively amended since then, and the restyled rules now reflect those amendments. The style consultants also did a "top-to-bottom" review of all the rules, making additional stylistic and conforming changes. And the Restyling Committee also made corrections and minor changes.

The advisory committee did not believe that any of these updates to the proposed restyled Parts I through VI were substantive enough to warrant republication for public comment.

Judge Bates commented that the restyling project reflected a monumental collaborative effort by past and present members of the advisory committee, the leadership of the advisory committee and its Restyling Subcommittee, and the reporters and the style consultants on a sometimes-thankless yet important task.

Professor Kimble added that this is the fifth set of restyled rules over 30 years. The rules committees are done with comprehensive restyling, and that is cause for celebration.

Professor Garner noted that this is probably the most ambitious project in law reform and legal drafting that a rulemaking body like the Standing Committee had undertaken in the past 30 years. He noted that the late Judge Robert E. Keeton should be remembered for starting the restyling project in 1991–92. This could be the culmination of his ambition to see simpler, more straightforward rules.

An academic member commented that, as a prior reporter to the Bankruptcy Rules Committee, he participated in a minor restyling of the Part VIII rules. On account of that experience, he had dreaded the prospect of a complete restyling of the rules, and he wanted to congratulate everyone involved with this process. It went more smoothly than anyone could reasonably have hoped, so it really is a cause for celebration.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the restyled bankruptcy rules.**

Amendment to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), Conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423. Judge Connelly reported on this item. The advisory committee sought final approval of these proposed amendments, which appeared on pages 687–95 and 703–05 of the agenda book, and the accompanying form abrogation.

Rule 1007 sets deadlines for filing items in bankruptcy court. The change pertains to a requirement for individual debtors in Chapter 7 and Chapter 13 cases. To receive a discharge, a debtor must complete a course in personal financial management. The current Rule 1007 provides a deadline for the debtor to file a statement on an official form (Form 423) that describes the completion of the course. The proposed amendment would instead require that the course provider's certificate of course completion be filed.

Rules 4004, 5009, and 9006 would all need to be changed because they refer to a "statement" of completion, and they would need to refer to a "certificate" of completion. Further, Official Form 423 would be abrogated because it would no longer serve a purpose.

Professor Bartell noted that the provider of the course furnishes the certificate of course completion. Many of the course providers actually file the certificates directly with the court. But if a provider does not, then the debtor would have to file it instead. The advisory committee received no public comments on this set of proposed amendments.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 1007, 4004, 5009, and 9006, and the abrogation of Official Form 423.**

Amendment to Rule 7001 (Types of Adversary Proceedings). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 696 of the agenda book.

Rule 7001 lists the types of proceedings that count as adversary proceedings in a bankruptcy case. The amendment would exclude from the list of adversary proceedings actions

filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

This amendment responds to a suggestion by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). In that case, the Court decided that the automatic stay set by 11 U.S.C. § 362(a)(3) did not prohibit the city's retention of the motor vehicle of a consumer in a Chapter 13 bankruptcy case. Justice Sotomayor noted that a debtor could use a turnover action to recover such property, and opined that if the problem with bringing a turnover action is the delay and cumbersome nature of doing it as an adversary proceeding under Rule 7001, the rules committee could consider amending the bankruptcy rules. *Id.* at 594–95 (Sotomayor, J., concurring).

The amendment was published for comment this past year. The advisory committee received only one comment, which supported the amendment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 7001.**

New Rule 8023.1 (Substitution of Parties). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed new rule, which appeared starting on page 698 of the agenda book.

Rule 8023.1 would govern the substitution of parties when a bankruptcy case is on appeal to a district court or BAP. It had not been addressed previously in the rules. The rule is modeled after Federal Rule of Appellate Procedure 43.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved proposed new Rule 8023.1.**

Amendment to Official Form 410A (Mortgage Proof of Claim Attachment). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 706 of the agenda book.

This proposal amends a provision of the attachment for mortgage proofs of claim. The change would require that the principal amount be itemized separately from interest. Currently the form allows them to be combined on one line item, and the amended form would require separate lines. The advisory committee received one comment on the proposed amended form; it made no change to the proposed amendment after considering that comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410A.**

Amendment to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting on page 709 of the agenda book.

Rule 3002.1 pertains to cases involving individuals who have filed for Chapter 13 bankruptcy. Because of the structure of Chapter 13, mortgage debt is generally not discharged; but Chapter 13 debtors can cure mortgage defaults during the case. Even though a default can be cured, there can be confusion about the accounting of payments during a case and the status of the mortgage claim at the end of the case. That was the impetus behind the rule—to provide more information to the borrower and the lender about the status of mortgage claims in these cases.

Judge Connelly reminded the committee about the proposed amendments to Rule 3002.1 that had been published for comment in 2021. Those proposed amendments would have provided for a mandatory midcase notice issued by the Chapter 13 trustee and would have set a motion procedure for assessing a mortgage's status at the end of a Chapter 13 case. The advisory committee received numerous public comments, and the committee further revised the proposed amendments in response to those comments.

Although the revisions respond to comments submitted during the public-comment process, the advisory committee determined that the changes are significant enough to warrant republication. This is partly because the advisory committee has switched from a mandatory-notice scheme by one party, the Chapter 13 trustee, to optional motion practice throughout the case, by either the debtor or the trustee.

The end-of-case procedure is also changed to address concerns about the consequences for either failing to respond or failing to comply. The consequences are different enough that the committee thought it would benefit from additional public comments and also thought it was important to provide notice of the proposed changes.

Professor Gibson added that the advisory committee's years-long experience with this rule illustrates the value of notice and publication. Two organizations had suggested significant amendments to Rule 3002.1: the National Association of Chapter 13 Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy. Both organizations advocated a midcase assessment of the mortgage's status—the thought being that, if the debtor and the trustee found out then that, according to the creditor, the debtor had fallen behind in mortgage payments, there would be time to cure that before the case was over.

But the comment process revealed a lot of concern with that idea, especially from Chapter 13 trustees. A midcase review may not always be needed; there are other ways to get the information. And different districts handle postfiling mortgage payments differently—the debtor might continue to pay them directly to the mortgagee, or the trustee might make those mortgage payments. In districts with the former procedure, the trustee would not have information about payments made by the debtor. The biggest change is therefore that the midcase review is not mandatory anymore. It can occur at any time during the case, and either the debtor or the trustee can ask for it by motion. The subcommittee feels that these changes have improved the proposed amendments.

A judge member observed that the revised proposal adds a provision for noncompensatory sanctions. When the claim holder does not comply, there were already remedies making the other party whole, including attorney's fees, which would come at a cost to the claim holder. It is not clear why there should also be noncompensatory sanctions. The member also said that, if

something more like punitive sanctions were meant, a notice requirement should be considered, as is usually provided by the rules in such situations.

Judge Connelly said that the proposal for noncompensatory damages was in part a response to *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), which held that current Rule 3002.1 does not authorize punitive sanctions. The new language was intended to clarify that the bankruptcy court could in appropriate circumstances assess noncompensatory damages. Public comment on this provision would be useful.

Professor Gibson added that these are cases where the mortgagees are repeat players and that the failure to comply with the rule in multiple cases might create a need for declaratory, injunctive, and punitive relief to address the problem. Another judge member stated, however, that punitive relief seems qualitatively different from declaratory and injunctive relief. Notice should be required before imposing punitive relief, and consideration should be given to the scope and framework for such relief. Judge Connelly responded that the rule reflects the approach taken in Civil Rule 37, and stressed the need for judges to be able to address willful noncompliance with court orders. The judge member suggested the value of seeking comment specifically on whether notice should be required before an award of punitive fines.

On the issue of prior notice, Professor Gibson raised the possibility of prefacing the provision with "if, after notice and a reasonable opportunity to respond," which Rule 11 uses. Although this would not spell out all the procedure, Professor Gibson did not think the rule needed to do so. Professor Struve quoted Rule 3002.1(h)—"If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:"—which is followed by paragraph (h)(2). She wondered if this provision addressed the concern with notice.

A judge member thought it did address the notice issue but that it did not explain the need for the punitive sanction. If a mortgage holder was noncompliant, couldn't it end up not only paying attorney fees but also taking a haircut on its claim? Judge Connelly responded that there would not be a haircut on the claim, because the mortgage would survive the discharge. The member rejoined that proposed (h)(1) authorizes precluding the claim holder from presenting information that should have been produced, and argued that this could affect the claim. Judge Connelly responded that the rule would prevent the claim holder from presenting the omitted information as a form of evidence in a contested matter or an adversary proceeding in the bankruptcy case, but that is different from making the debt unenforceable after the case ends. Although the claim holder might not be able to present the evidence in the bankruptcy case the rule would not prevent use of the evidence in state-court foreclosure proceedings.

A judge member stressed that adequate notice would require specific mention of punitive relief if that was under contemplation. "Noncompensatory sanctions," this member suggested, was unduly vague. Judge Bates asked what was contemplated by "noncompensatory sanctions" beyond declaratory and injunctive relief. Professor Gibson and Judge Connelly responded that it would include punitive damages payable to a party.

As to rules that authorize noncompensatory sanctions, Professor Gibson suggested, for example, that under Civil Rule 11 a lawyer could be required to attend continuing legal education.

A practitioner member read the text of Civil Rule 11(c)(4) and pointed out that payments to a party under that rule seemed to be limited to reasonable attorney's fees and other expenses; the potential "penalty" contemplated by that rule is paid to the court. The practitioner member further agreed with previous comments that nobody would read "noncompensatory sanctions" to mean equitable relief. If there is a desire that equitable relief be available, it should be spelled out and, as under Civil Rule 11(c)(2), there should be an opportunity to cure.

An academic member offered background about why courts occasionally need "baseball bats" in these cases. This rule goes back to the mortgage crisis in 2007–08. Many people filed for Chapter 13 bankruptcy in large part to save their homes by curing a default on a mortgage in Chapter 13, while also maintaining their ongoing monthly payments. But it was a huge problem to figure out the exact amount owed on the mortgage, and it was extremely difficult to get mortgagees to give that information in a way that could be processed by trustees, debtors, and the courts. Ongoing compliance was also often an issue because there were not deep-pocketed lawyers on the debtor's side. The Chapter 13 trustee is often, but not always, in the mix, and the court has a huge flow of information that it has to track. The amounts of money in these cases are just not enough, even if clawed back, to get a mortgagee's attention, so a stronger measure is necessary to get that attention.

A judge member questioned whether, if there is no precedent under Rule 11 for imposing punitive damages payable to another party, there were any authority for a bankruptcy court to impose such a sanction. Does that need to be authorized by Congress? Is it implicit in the statute? Such an award, this member suggested, was not a traditional kind of ancillary relief used to enforce court powers, unlike a fine to the court or contempt.

Another judge member suggested that Rule 11 could provide a model for potential language—perhaps "reasonable expenses and attorney's fees caused by the failure, nonmonetary directives, and, in appropriate circumstances, an order to pay a penalty into court." (A practitioner member later made a similar suggestion.)

Judge Bates remarked that there is nothing in the committee note that explains what "noncompensatory sanctions" means or how declaratory or injunctive relief fits into the scheme. After looking at Rule 11, which is much more elaborate in terms of certain requirements than this rule would be, he wondered whether more thought needed to be given to it.

Judge Connelly explained that the proposed amendment responded to the *Gravel* opinion. The idea was to allow the bankruptcy court to award something beyond attorney's fees. The advisory committee did not specify what that would be—the language "noncompensatory sanctions" was meant to be general. Judge Connelly agreed that there should be something in the committee note about that language.

After further discussion, Judge Connelly asked whether, if the language "in appropriate circumstances, noncompensatory sanctions" were removed, the Standing Committee would give approval to publish the rest of the rule. Professor Gibson said she would prefer to go forward without the change to (h)(2) because the rest of this amendment is important. Deferring a vote on the rest of the rule would delay those changes for another year.

Professor Capra remarked that the approval is only for public comment. He further suggested that, in the future, the advisory committee say "award other appropriate relief," period, and then add all the explanation in the committee note. The Standing Committee even has the authority to put the language in brackets and then invite comments on it.

A judge member expressed support for shortening the provision to "award other appropriate relief." Professor Bartell expressed concern that if the "including" clause is removed, an unintended negative inference is created that other appropriate relief no longer includes an award of expenses and attorney's fees. Judge Bates expressed concern about whether this suggestion could increase the likelihood of needing to republish again later.

A practitioner member thought it seemed riskier to take out (h)(2) and not make it an issue if the Standing Committee would still have to discuss it again in six months. Having public comment helps the committees improve the rule. Also, in approving something for publication, the Standing Committee does not necessarily give that same language approval. It is worth seeing what the reaction to it would be. A judge member demurred to that suggestion, arguing that a proposal should not be sent out for comment if the committee knows it could not accept that proposal as drafted.

Professor Hartnett asked whether, if the advisory committee had in mind Civil Rule 37, the rule could cross-reference Bankruptcy Rule 7037. For example, "any of the sanctions permissible under Rule 7037." Professor Gibson responded that some of the sanctions under Rule 37 would not be applicable here; she would be reluctant to have only a general reference to Rule 7037. Professor Hartnett said that he thought "appropriate circumstances" might cover that problem.

Professor Cooper asked whether it would work to publish the rule as proposed and specifically invite comment on the issue. Judge Bates asked what risks would be involved with that approach and whether it would lessen the risk of having to do any republication. Professor Gibson thought it would lessen the likelihood of coming back with another amendment. Judge Bates thought that that approach would give the impression the Standing Committee has approved that language, and he did not have the sense that the Standing Committee is prepared to give approval to that language.

Professor Coquillette noted that, in the past, there has been concern when the Standing Committee permits publication of something that it really would not ultimately approve. The harm is that people might wonder about the rules process. Simply putting something out to attract comment when the committee really will not do it is not a good idea. It is different if there is a real possibility that reading the comments during the comment period could convince the committee to approve the proposal.

Professor Struve agreed with Professor Gibson that, leaving aside (h), the rest of the rule seemed likely to provide significant benefit to a population that is a concern for the whole bankruptcy structure. That benefit has already been delayed past one publication cycle. She also agreed with those who said it would be peculiar to send something out for comment that the Standing Committee could not see a way to approve. She also saw the point about flagging that a piece of the rule may be subject to change in the future; but she was not sure that sending out the proposal currently in the agenda book could avoid the need for republication in the event that the

process ends up putting forward some very different proposal. It might be cleaner, if the Standing Committee agrees that there is a strong normative case for doing so, to publish the rest of the rule without (h).

An academic member remarked that, although the Standing Committee is historically reluctant to change a rule and then immediately afterward publish an additional change, doing so in this case may not pose a serious problem because the sanctions piece is separable. And it would show that the rules process takes seriously concerns about authority, notice, and operation.

Professor Gibson noted that there was relatively little discussion by the advisory committee of (h)(2) as opposed to the rest of this rule. So the advisory committee would likely be satisfied with that outcome.

Judge Bates asked whether a change to the committee note would be needed as well because the note refers to (h)(2). Professor Gibson answered in the affirmative. A judge member asked whether it is typical or permissible to issue a committee note on a provision without amending the provision's text. The judge member wondered if the advisory committee could issue a committee note that "other appropriate relief" should be interpreted broadly to include more than just attorney's fees, instead of adding "noncompensatory sanctions" to the text. Professor Gibson responded that a change to a committee note cannot be made by itself.

A style consultant suggested adding the word "any" before "other appropriate relief" and deleting "and, in appropriate circumstances, noncompensatory sanctions." The committee note would then state that "any" was added to show that the advisory committee did not intend to limit the recovery to reasonable expenses and attorney's fees—a diplomatic way of saying that the amendment was intended to address the Second Circuit's erroneous decision.

Professor Marcus observed that the 2015 committee note to the amendment of Civil Rule 37(e) stated that the amendment rejected certain Second Circuit caselaw.

Judge Bates asked the advisory committee's representatives whether that kind of change would be consistent with what the Bankruptcy Rules Committee decided to do here and whether it would simply ignore the issues raised with respect to what the further relief is, instead letting the courts deal with that. Professor Bartell responded that it would be consistent with the advisory committee's decision and that it would also be consistent with other bankruptcy rules that also call for other appropriate relief upon a violation. Those rules do not say what procedural mechanisms must be adopted to impose that other relief, but that is consistent with how the phrase is treated in other bankruptcy rules. Judge Bates then asked whether there had been discussion of whether punitive damages fell within "other appropriate relief." Professor Bartell said that she had not researched the question, and Judge Connelly said that the advisory committee had not discussed it.

Professor Struve admired the elegance of the proposal to add "any" and a change to the committee note. But she did wonder, if there are instances of "other appropriate relief" sprinkled throughout the bankruptcy rules, whether adding "any" to this one would create an unwanted negative inference. The style consultant responded that the committee note's express statement about why "any" was added would be the reason for the difference. Judge Bates noted that some

judges look at only the text of the rules to determine what they mean, not the committee notes—would that lead to a possible view that they have two different meanings?

A judge member commented that, if the committee note only disapproves of the *In re Gravel* decision, it is not clear what the note actually does. If the note is going to say that certain actions are authorized, the member would want to know what those actions are. Judge Bates agreed that a vague committee note that does not say expressly what the amendment authorizes would lead to divergent comments that the advisory committee would ultimately have to resolve.

A judge member was leery of making any substantive changes or hints right now. Normally in the rules process, this would have been a proposal, and then the Standing Committee would give feedback to the advisory committee. People would have talked about Civil Rules 11 and 37. If there is a Rules Enabling Act obstacle to creating a punitive damage remedy, that would have been discussed. But all of that was skipped because of how this issue, through no one's fault, has arisen. The member would rather hold off six months or a year and then deal with this issue separately rather than today without any preparation.

Another judge member agreed and added that, depending on what the scope of the relief under paragraph (h)(2) is, there may be a need to change the procedural protections. Just changing a word is not going to deal with the problem.

Judge Connelly thanked the Standing Committee for the helpful discussion. The proposed changes to Rule 3002.1 apart from proposed subdivision (h)(2) create a new, necessary, and beneficial mechanism, one in which there has been an interest for a while. Seeking republication of those provisions, excepting those in paragraph (h)(2), is warranted now. Given the comments today, it would be more appropriate to return to the advisory committee for more robust, thorough evaluation of Rule 3002.1(h)(2). It is unclear whether that will result in a proposed amendment at some point. An amendment may even be premature in light of the developing caselaw.

A member moved to approve the proposed amendment, without the proposed changes to paragraph (h)(2), for publication, and another member seconded the motion. Judge Bates opened the floor to further discussion.

Professor Struve asked whether, despite omitting the proposed changes to paragraph (h)(2), the semicolon and word "and" at the end of paragraph (h)(2) would remain. Judge Connelly answered that, yes, the semicolon and "and" would remain.

An academic member encouraged the committee members to read the Second Circuit's *In re Gravel* case, both the majority opinion and the dissent (with which the member agreed). As far as the member knew, that is the first appellate decision with that particular holding. The member also thought the committee members should congratulate themselves because the rules process was working well. The *Gravel* decision was driven in part by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which potentially destabilized a bankruptcy court's ability to enter sanctions. It would be appropriate to give greater and deeper thought to *Taggart*'s implications when considering a potential sanctions regime.

After further discussion it was clarified that the committee note would be modified by deleting the third sentence in the last paragraph—"It also expressly states that noncompensatory sanctions may be awarded in appropriate circumstances."

Upon a show of hands, with no members voting in the negative: **The Standing Committee gave approval to republish the proposed amendment to Rule 3002.1 for public comment with the following changes: No amendments to (h)(2) were retained, except for adding a semicolon and the word "and" at the end; and the third sentence in the last paragraph of the committee note was struck.**

Amendment to Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared on page 728 of the agenda book.

The proposed amendment would amend subdivision (g) so as to dovetail with the proposed amendments to Appellate Rule 6(c) approved for publication for public comment earlier in the meeting.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 8006(g) for public comment.**

Official Forms Related to Rule 3002.1. Judge Connelly reported on this item. The advisory committee sought approval to publish these proposed official forms for public comment. The proposed official forms appeared starting on page 729 of the agenda book.

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are the companion official forms to proposed amended Rule 3002.1. None of these forms was affected by the decision (described above) to withdraw the request to publish the Rule 3002.1(h)(2) proposal.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R for public comment.**

Information Items

Suggestion to Require Complete Redaction of Social Security Numbers from Filed Documents. Professor Bartell reported on this item.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal-court filings should be scrubbed of personal information before they are publicly available. Portions of the letter suggested that the rules committees reconsider a proposal to redact entire Social Security numbers from court filings.

The Bankruptcy Code requires that Social Security numbers be included on certain documents either in whole or only partially redacted. *See* §§ 110, 342(c)(1). The advisory

committee cannot change those requirements because they are statutory, but there may be some circumstances where full redaction is possible and appropriate.

But the Advisory Committee has become aware that the Judicial Conference's Committee on Court Administration and Case Management ("CACM") has asked the FJC to design and conduct studies regarding the inclusion of certain sensitive personal information in court filings. Those studies would update the privacy study issued by the FJC in 2015. They would gather information about compliance with privacy rules and the inclusion of unredacted Social Security numbers in court filings. The advisory committee has decided to defer consideration of the suggestion while those new studies are underway.

Suggestion to Adopt a National Rule Addressing Debtors' Electronic Signatures. Professor Gibson reported on this item.

An attorney suggested the adoption of a national rule to allow debtors to sign petitions and schedules electronically without requiring their attorneys to retain the original documents with wet signatures.

But only a year ago, in its Spring 2022 meeting, the advisory committee decided not to take further action on a suggestion by CACM to consider a national rule on electronic signatures of non-CM/ECF users. The advisory committee decided then that a period of experience under local rules addressing e-signatures would help inform any national rule, and it reasoned that e-signature technology would also probably develop and improve in the meantime.

In light of that recent decision, the advisory committee decided to defer further consideration of this suggestion to a later date. Nothing has changed since a year ago. Also, the project on electronic filing by self-represented litigants may also have implications for the e-signature issue.

Suggestions Regarding the Required Course on Personal Financial Management. Professor Gibson reported on this item.

The advisory committee continues to consider suggestions concerning the course on personal financial management discussed earlier.

Professor Bartell's research has shown that, in a single year, thousands of debtors' cases were closed without a discharge because of the debtors' failure to file proof that they have taken this course. Debtors in that situation have to pay to reopen their cases to file the certificates. The Consumer Subcommittee has been considering whether and how the rules might be amended to decrease that number.

One question is whether to change the deadlines for the filing of those forms—now certificates of completion—or perhaps to require simply that they be filed by the point at which the court rules on discharge. There is also a rule that requires the court to remind debtors of this requirement if they haven't filed it within 45 days after the petition. Another question is whether the date for that notice reminder should be changed or whether more than one notice should be given.

Proposed Amendment to Rule 1007(h) to Require Disclosure of Postpetition Assets. Professor Gibson reported on this item.

The advisory committee continues to consider requirements to disclose assets acquired after a petition is filed in an individual Chapter 11 case or in a Chapter 12 or 13 case. In such cases, which may last several years, the Bankruptcy Code specifies that the property acquired by the debtor during that period is property of the estate.

The current rule requires filing a supplemental schedule for only certain postpetition assets obtained within 180 days after filing the petition. Judge Catherine McEwen, a member of the advisory committee, suggested an amendment to cover all postpetition property in individual Chapter 11, Chapter 12, and Chapter 13 cases.

The Consumer Subcommittee thought that one of the problems with such a rule is how to capture what property needs to be disclosed. It would be impossible to report everything that comes into a debtor's ownership over a three-to-five-year period. Should the rule mandate disclosing only certain types of property, such as only property that has a substantial impact on the estate? Also, courts that currently impose a disclosure requirement by local rule do so in different ways, so there is a lack of uniformity.

The Consumer Subcommittee was not sure there was a problem that needed to be solved. The issue was further discussed at the advisory committee meeting. There, Judge McEwen noted that the Eleventh Circuit has strong case law about judicial estoppel when a debtor has not revealed property in the bankruptcy case. Debtors can lose the right to pursue an undisclosed claim, such as a tort action based on a postpetition injury, and creditors can lose the benefit of such claims. By requiring disclosure, that problem could be avoided. So the advisory committee asked the subcommittee to consider the matter further.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robin Rosenberg and Professors Richard Marcus, Andrew Bradt, and Edward Cooper presented the report of the Advisory Committee on Civil Rules, which last met in West Palm Beach, Florida, on March 28, 2023. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 784.

Action Items

Amendment to Rule 12(a) (Time to Serve a Responsive Pleading). Judge Rosenberg reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 826 of the agenda book.

The amendment makes clear that the times to serve a responsive pleading set by Rules 12(a)(2)–(3) are superseded by a federal statute that specifies another time. It came about because some litigants in Freedom of Information Act cases had difficulty obtaining summonses that called for responsive pleadings within the statute's 30-day deadline; without the amendment, it was not clear if a statute prescribing a different time would apply to the United States under this rule.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 12(a).**

Amendments to Rules 16(b)(3) (Scheduling and Management) and 26(f)(3) (Discovery Plan) Related to Privilege Logs. Judge Rosenberg reported on this item. The advisory committee sought approval to publish these proposed amendments for public comment. The proposed amendments appeared starting on pages 828 and 846 of the agenda book.

These amendments deal with the privilege-log problem and address early in the case how the parties will comply with the requirements of Rule 26(b)(5)(A). The goal is to get the parties to address issues pertaining to privilege logs during their Rule 26(f) conference, in order to reduce burdens while still providing sufficient information about documents being withheld and to reduce the number of unexpected problems at the end of discovery.

The proposed amendments were presented for approval for publication at the Standing Committee's January 2023 meeting. There were concerns about the committee notes' length, so the advisory committee took the amendments back for further consideration. The notes are now half as long.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish for public comment the proposed amendments to Rules 16(b)(3) and 26(f)(3).**

New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The advisory committee sought approval to publish for public comment this proposed new rule, which appeared starting on page 831 of the agenda book.

Since 2017, the Multidistrict Litigation ("MDL") Subcommittee and the advisory committee have considered whether to propose a rule to govern MDLs. The MDL Subcommittee has heard many times from attorneys in both the plaintiffs' and defense bars, experienced and first-time transferee judges, and groups including Lawyers for Civil Justice and the American Association for Justice. Judge Rosenberg thanked them for all of the time and meaningful input that they have given the subcommittee. The proposed rule has been well received by all of these groups and was overwhelmingly supported by the transferee judges at the recent transferee-judge conference last fall.

Judge Rosenberg addressed a common question: why is an MDL rule needed? MDLs account for a large portion of the federal docket: 69.8% as of May 2023, up from about 1.3% in 1981. Many judges will be assigned MDLs and will look to the rules for guidance. The Judicial Panel on Multidistrict Litigation is making a concerted effort to expand assignments of MDLs to new judges, and there are more leadership appointments to diverse groups of lawyers. From January 1, 2019, to May 31, 2023, out of 96 new MDLs, 40 went to first-time transferee judges. In 2023 alone, the panel has centralized eight MDLs before eight different judges, six of whom are first-time transferee judges.

The advisory committee and the groups with which it has been working feel it is essential for the court to take an active and informed role early in an MDL proceeding. There are issues that become problematic unless addressed at the outset of the action, particularly in large MDLs.

Transferee judges have also expressed concern that they lack clear, explicit authority for some of the things that they are doing, which most agree are necessary to manage an MDL.

Rule 16 just addresses two-party litigation, and Rule 23 addresses class actions, but we have nothing for MDLs. Managing an MDL is broader than managing a non-MDL proceeding. It is critical for a transferee judge to have a more active management role in an MDL.

The advisory committee used a three-part test to determine whether to go forward with this new rule. First, is there a problem? Yes, there are circumstances in which courts start off on the wrong foot in an MDL and that could cause many problems down the road. Second, is there a rules-based solution? Yes, this proposed rule helps solve the problem by addressing issues early and laying the groundwork for effective case management. Third, would a rules-based solution avoid causing harm? Yes, the advisory committee believes that the proposed rule avoids harm by using the word "should" (with respect to the court's management of MDLs).

Rule 16.1 focuses the court and the parties on the management issues that can effectively move an MDL forward from an early point, yet the rule recognizes that not all MDLs are alike, that no one size fits all. So the rule is drafted to provide both helpful guidance and flexibility in managing the proceeding.

The advisory committee carefully considered the helpful comments of the Standing Committee at its January 2023 meeting, and many of those comments were incorporated into the revised rule.

In subdivision (a), the advisory committee settled on the word "should"—in most but not all MDLs, the court should schedule an initial management conference. The term "should" indicates that reality, while still providing some flexibility. "Should" has been interpreted as a clear directive in many instances and several of the civil rules already use it.

As for subdivision (b), the advisory committee's view is that appointing coordinating counsel helps the court get the case moving. The role of coordinating counsel is limited to the initial conference. The rule provides flexibility both to the court, to determine what issues coordinating counsel should address, and to the parties, to inform the court about the case's status. The advisory committee settled on "may" because an MDL may or may not need coordinating counsel for the initial management conference.

For subdivision (c), the advisory committee chose the first of the two alternatives of the version of Rule 16.1(c) presented at the January 2023 Standing Committee meeting. Most comments preferred this alternative, which lists a cafeteria-style menu of options (reflecting that there is no one-size-fits-all framework for an MDL). It is not a mandatory checklist. Paragraph (c)(1) was modified to say "whether leadership counsel should be appointed" rather than assuming they would be. More specifics were added to the subparagraphs and the committee note to clarify the issues to consider at the initial stages of the MDL. The committee note to paragraph (c)(1)(A) lists factors to consider when selecting leadership counsel. Paragraph (c)(4) was revised in direct response to comments from the Standing Committee about identifying issues, vetting claims, and exchanging information early in the case. Rather than the previous reference to "whether" the parties will exchange information, (c)(4) now refers to "how and when" they will do so. Paragraph

(c)(6) (concerning discovery) was modified to eliminate the word "sequencing" and make it more general. Paragraph (c)(9) is newly added. The court can play a significant role in making sure the settlement process is fair and transparent. Rule 16 already authorizes the court to play some role in the process. In paragraph (c)(12), the advisory committee did not include the word "special" with "master." It recognizes that the court may make decisions and appointments using its inherent authority. The committee note, in its opening paragraph, uses the phrase "just and efficient conduct" in response to a comment from the Standing Committee about directing the parties to adhere to the Rule 1 principles of just, speedy, and inexpensive determinations.

Professor Marcus added that this draft rule is the product of long deliberations, and the advisory committee needs public comment on it. Professor Bradt, as both an outsider and a recent insider to the process of developing the rule, thought it extraordinary how much information and outreach and response from interested parties there has been. He thought it an extensive and admirable process.

A practitioner member expressed continuing concerns about the proposal. The member's primary concern was with the committee note, which the member felt was doing the rulemaking rather than the rule. The member gave several examples of portions of the committee note that caused the member concern. These included examples of sentences that the member felt could be omitted as superfluous or confusing, language in the note indicating that a single management conference might suffice for a given MDL, a sentence discussing individual-class-member discovery in class actions, and language suggesting that the court may have a right to know about the status of settlement negotiations. The most important issue for the member was the standard for selecting leadership counsel. The committee note to subdivision (c)(1)(A), this member argued, should not require each leadership counsel to responsibly and fairly represent *all* plaintiffs, because there can be conflicts among the plaintiffs. Further, the criteria should include the number and value of claims that counsel represents in the MDL; when the leadership counsel include those representing the greatest financial interests, that can help avoid a problem with opt-outs.

Another practitioner member countered that the proposed Rule 16.1 fills an important gap. This member, too, could suggest specific changes, but would resist the temptation to do so because the proposed rule was ready for publication. The newer judges and practitioners who are playing important roles in contemporary MDL practice need such a rule, particularly in the absence of an updated version of the Manual for Complex Litigation. This member felt it was useful for the committee note to mention discovery in class actions, because MDLs often encompass class actions. Judge Bates responded that the other member had raised legitimate questions whether the committee note to a rule on MDLs should address discovery in class actions, and also whether the list of criteria for leadership counsel should include the size and number of claims represented.

A judge member stated that the rule is ready for publication. An effort is ongoing to broaden the MDL bench, and training for new judges is important. Professor Coquillette agreed that the rule was ready for publication and he congratulated the advisory committee, though he also expressed concern that committee notes should not try to fill the role of a treatise. Another judge member praised the rule for setting a conceptual framework and focusing on the basics. This member suggested requesting comment on the compensation of counsel. Taken together, this member said, the rule text and committee note might be read to authorize the use of common benefit funds, and there is debate on whether that mechanism can be used in an MDL. Another

judge member predicted that the rule would be very helpful but also warned that the committee note would be cited more often than the rule, because the note addresses the most nettlesome issues; if the committee wished to deal with those issues, this member suggested, it should do so in rule text. Judge Bates predicted that the committee would receive disparate comments on the notes' best practices advice, and wondered how it would address those contending viewpoints. Another judge member said that the rule was ready for publication, and it would help to protect district judges from being reversed on appeal, but this member voiced some uneasiness about the committee notes.

Judge Bates commented that the rule's title, "Managing Multidistrict Litigation," promises more than the rule delivers. The rule really concerns just the initial management conference.

The practitioner member who had initially raised several concerns asked to change, in the second paragraph of the committee note to paragraph (c)(1), the phrase "responsibly and fairly represent all plaintiffs" to "adequately represent plaintiffs." In the same paragraph, the member also asked to replace "geographical distributions, and backgrounds" with "geographical distributions, backgrounds, and the size of the financial interests of plaintiffs represented by such counsel." The member further suggested, in the second paragraph of the portion of the committee note to paragraph (c)(4), striking the third sentence (concerning discovery in class actions).

A judge member asked whether the practitioner member's suggested term "adequately" was intended to incorporate adequacy as the term is understood in Rule 23(a)(4)? In doing so, a lot of the class-action case law might implicitly be incorporated. The practitioner member responded that he found the terms "responsibly and fairly" problematic because those words do not appear anywhere else and their meaning is unclear. He also objected to addressing the appointment of leadership counsel in the committee note instead of in rule text. Judge Rosenberg confirmed that the advisory committee stayed away from "adequately" because it did not want there to be confusion with Rule 23.

As to the practitioner member's suggestion that the note to (c)(1) should advise the judge when selecting leadership counsel to keep in mind "the size of the financial interests of plaintiffs represented by … counsel," Judge Rosenberg noted that the next sentence, beginning with "Courts have considered the nature of the actions and parties," showed that the nature of the actions is contemplated as a factor, though perhaps it is not clear enough for the point being made about the size of the financial interest. She also did not know how a judge would know the size of the plaintiffs' financial interests. An early census might disclose the *number* of claims represented by someone under consideration for leadership, but would not disclose their size. The practitioner member responded that, in securities cases, it is done all the time for appointing lead counsel at the start of a case. Professor Marcus interjected that securities cases are different. An article by Professor Jill E. Fisch in the *Columbia Law Review* contrasted them with mass torts in particular. And some of the people attending this meeting had previously urged that it was important not to accept numbers as indicative of valid claims, whatever the size of the claims.

The practitioner member responded that, rather than having rules to deal with all of these difficult issues, the committee is burying those issues in the committee note. These topics are contentious, and the financial interest is a factor that a judge could take into account in a products-liability case or in any other MDL. If one lawyer represents $5 billion in claims and another

represents $100 million in claims, and the judge selects as lead counsel the one with $100 million, there will be opt-outs.

Judge Rosenberg still was not clear how a judge would know the financial value. And including language like that could encourage people to simply get lots of claims filed, even nonmeritorious ones, if the word on the street is that, if the judge sees that someone has a lot of dollars and a lot of claims, that person will get leadership. She understood the practitioner member's point and wondered if there were a way to word the committee note to capture it. The language was intended to be comprehensive and to take a lot of factors into account. The closest the committee note got was referring to the nature of the actions—looking at what the applicant for leadership has in the way of actions. Are there a lot of them? Are they high-enough value such that the applicant should be in leadership?

Judge Bates thought this to be a debatable point with merit to each side. There has not yet been a suggestion of language that resolves the debate; public comment may help.

A judge member remarked that mass-tort cases are not the same as securities cases. If a judge goes with the number or value of claims, that will favor those plaintiffs' counsel who have advertiser relationships. In the member's state, in coordinated proceedings in which counsel organize themselves, counsel do not always select as leaders the lawyers with the biggest numbers—they may not be the ones who will make the best presentation on the issues that will decide the case. The member agreed with Judge Rosenberg that relying on claim numbers or value could incentivize putting in massive numbers of cases. Further, a judge may not always know at the beginning who will have the most clients. Sometimes, particularly if there are both a federal and a state MDL, parties wait for the initial rulings to see where they want to file.

Professor Bradt observed that MDLs vary and are fluid. An MDL may be created at different times in a controversy's lifecycle. Sometimes an MDL is created after it is already known who will be involved, and sometimes an MDL is created very early in anticipation of the filing of a lot of future cases. Moreover, one of the things that the rule anticipates is that leadership is also fluid. As the circumstances of the case change, the transferee judge may find it necessary to change the leadership structure. The leadership piece of the rule is capacious in order to account for that.

The practitioner member who had been proposing revisions to the committee note suggested that, if the committee note stopped after paragraph one or paragraph two, the rule would then do what it was intended to do—identify topics for the initial conference. It would be a modest rule, not an attempt to cover the waterfront. But right now, the note is trying to cover the waterfront. Instead, a rule on each one of these topics should be made.

Judge Bates asked the advisory committee's representatives what changes, if any, they would like to adopt before asking the Standing Committee to approve the proposal for publication.

As to the rule's title ("Managing Multidistrict Litigation"), Judge Rosenberg remarked that the advisory committee had gone back and forth. Although the lion's share of the proposed rule is about the initial management, the rule does address later proceedings as well. For example, paragraph (c)(8) speaks of a schedule for additional management conferences with the court. So the advisory committee had stuck with "Managing Multidistrict Litigation" instead of "Initial

Management." A judge member suggested changing the rule's title to simply "Multidistrict Litigation." Rule titles usually do not include gerunds. Judge Rosenberg accepted this suggestion on behalf of the advisory committee.

Professor Marcus responded to a previous remark that there is always more than one management conference. He noted that the rule is not a command to have more than one. Paragraph (c)(8) lets the judge order the lawyers to provide a schedule for further management meetings. Subdivision (d) also advises the judge to be more flexible than under Rule 16 in making revisions to the initial management program. Of the two kinds of issues raised about the rule at today's meeting—smaller wording issues versus more fundamental issues about what should be included in the rule—the wording issues seemed more promising to look at today. Professor Marcus suspected that there would be a long compilation of public comments if the rule were published.

In response to a suggestion by Judge Bates, Judge Rosenberg stated that subdivision (c)'s text would say simply "any matter listed below" rather than "any matter addressed in the list below."

Professor Marcus agreed with Judge Bates that the reference to Rule 16(b) in the fourth paragraph in the committee note on paragraph (c)(1) should instead be a reference to Rule 16.1(b).

Judge Bates had asked whether paragraph (c)(6) should say "to handle discovery efficiently" instead of "to handle it efficiently"; after discussion with the style consultants, the advisory committee representatives decided not to make that change.

Judge Rosenberg agreed with Judge Bates that "Even if the court has not" in the committee note to paragraph (c)(9) should be changed to "Whether or not the court has."

A practitioner member asked if the advisory committee wanted to retain (in the second paragraph of the committee note to paragraph (c)(4)) the sentence about discovery from individual class members. Another practitioner member supported deleting that sentence because it concerned class actions, not MDLs. The practitioner member who had previously expressed support for keeping the sentence suggested that the problem with the sentence was its statement that "it is widely agreed" that such discovery is often inappropriate. There is nothing in Rule 23 law about this, but there is a lot of caselaw. This member suggested that perhaps better language would be, "For example, it may be contended that discovery from individual class members is inappropriate in particular class actions." An academic member questioned why the example should be included in the note. Whether it is accurate or not, it may be better to take it out or find another example. The practitioner member responded that it comes up in hybrid class MDLs in which there are both class actions and individual claims arising from the same product or course of conduct. The example is a way of reminding courts that they may be dealing with different standards, issues, terminology, and decisions based on whether they are dealing with the individual component or the class component of an MDL.

A practitioner member again raised the question whether all leadership counsel must responsibly and fairly represent all plaintiffs. Another practitioner member responded that it might be wiser to say that they will fairly and reasonably represent the plaintiffs or the group of plaintiffs they are appointed to represent. The reason there are diverse leadership groups in MDLs is that

some will represent class plaintiffs, for example, while others will represent a particular type of claim. "All" plaintiffs may be too literal.

Judge Rosenberg agreed that the proposed committee note should be modified to remove the word "all" in the phrase "responsibly and fairly represent all plaintiffs" in the second paragraph of the committee note to paragraph (c)(1). She also agreed that the second paragraph of the committee note to paragraph (c)(4) should be modified to remove the sentence about class-member discovery.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed new Rule 16.1 for public comment with one change to the title of the proposed rule (striking "Managing"), one change to the text of subdivision (c) (replacing "any matter addressed in the list below" with "any matter listed below"), and the following changes to the committee note as printed in the agenda book:**

- In the second paragraph of the note to paragraph (c)(1), "all" was struck from the phrase "responsibly and fairly represent all plaintiffs."

- In the fourth paragraph of the note to paragraph (c)(1), "Rule 16(b)" was changed to "Rule 16.1(b)."

- In the second paragraph of the note to paragraph (c)(4), the third sentence (which concerned class-member discovery and began "For example, it is widely agreed") was struck.

- In the note to paragraph (c)(9), the phrase "Even if the court has not" was changed to "Whether or not the court has."

Information Items

Discovery Subcommittee Projects. Professor Marcus reported on this item. This subcommittee is considering four issues, of which one may not pan out, and the others are in various states of evolution.

One issue is how to serve a subpoena. Rule 45(b)(1) says that service requires "delivering" the subpoena to the witness. Does that mean in-hand? By Twitter? Perhaps there are amendments that could improve the rule. Rules Law Clerk Chris Pryby wrote an excellent memorandum on state practices for serving subpoenas. The subcommittee will consider that new information.

Second, the subcommittee is considering whether to make rules about filings under seal. The agenda book shows how the subcommittee's thinking has evolved. When the subcommittee first learned about an Administrative Office project on sealed filings, the subcommittee thought it should wait for that project to finish; now the subcommittee has been told it should not wait. One question is: what standard should be used? The subcommittee's initial effort provides simply that the standard is not the same as that governing issuance of a protective order for information exchanged through discovery. Another question is: what procedures should be used? The subcommittee identified a wide variety of procedural issues, listed on pages 810–11 of the agenda book, that could be addressed by a uniform national rule. But the scope of what would ultimately

be addressed is uncertain. Professor Marcus asked for input on whether clerk's offices would welcome a national rule on this.

Third, Judge Michael Baylson submitted a proposal concerning discovery abroad under Rule 28 (Persons Before Whom Depositions May Be Taken). This is not a rule that most attorneys often deal with. The subcommittee is beginning to look at this proposal.

Finally, the FJC has completed a thorough study of the mandatory-initial-discovery pilot project. Its findings do not appear to support drastic changes to the rules. The subcommittee will consider whether any changes to the rules are warranted in light of the study.

* * *

After the Civil Rules Committee delivered this information item, it temporarily yielded the floor to the Evidence Rules Committee. The Report of the Civil Rules Committee continued after the conclusion of the Evidence Rules Committee presentation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Patrick Schiltz and Professors Daniel Capra and Liesa Richter presented the report of the Advisory Committee on Evidence Rules, which last met in Washington, D.C., on April 28, 2023. The advisory committee presented five action items and one information item. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 910.

Action Items

New Rule 107 (Illustrative Aids). Judge Schiltz reported on this item. The advisory committee sought final approval of new Rule 107, which appeared starting on page 920 of the agenda book.

Illustrative aids are not themselves evidence. They are instead devices to help the trier of fact understand the evidence. Illustrative aids are used in virtually every trial, but the Federal Rules of Evidence do not address them. Nor do the other rules of practice and procedure. The new rule would fill this gap.

The rule as published would do five things. First, it would define illustrative aids, and it would give judges and litigants a common vocabulary and at least a touchstone in trying to distinguish illustrative aids from admissible evidence.

Second, it would provide a standard for the judge and the parties to apply in deciding whether an illustrative aid may be used: the utility of the aid in assisting comprehension must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. The advisory committee specifically asked commentators to address whether it should be just an "outweighed" standard or a "substantially outweighed" standard.

Third, the new rule as published provided a notice requirement. Before showing the jury an illustrative aid, a litigant would first need to show it to the other side and give the other side a chance to object.

Fourth, the rule bars illustrative aids from going to the jury room unless the parties consent to it or the court makes an exception for good cause.

Finally, the rule would require that, where practicable, illustrative aids be made part of the record so that, if an issue about an illustrative aid comes up on appeal, the appellate court has it in the record.

Professor Capra listed several changes to the proposed rule's committee note made since its publication for public comment but not noted in the agenda book. (These changes are among those listed at the end of this section.) He then discussed the public comments on the proposed new rule. There were many comments and much opposition to the notice requirement. Commenters gave various arguments against the notice requirement, including that it would make litigation more expensive, that it was unnecessary, and that it would steal attorneys' thunder. The advisory committee decided to delete the notice requirement from the proposed rule and instead discuss the issue of notice in the committee note.

Professor Capra also discussed the advisory committee's decision to use the "substantially outweighed" standard. This standard tracks that in Rule 403, and it is geared toward admitting illustrative aids. Based on the public comment, the advisory committee decided that it did not make sense for different tests to apply to evidence and illustrative aids.

Public comment also led the advisory committee to choose the new rule's location within the Federal Rules of Evidence. The rule was published for public comment as Rule 611(d) because Rule 611(a) is frequently used by courts to regulate illustrative aids. But Rule 611, which is in Article Six, is about witnesses, and illustrative aids are not really about witnesses. The new rule fits better in Article One, which is about rules of general applicability. Therefore the proposed rule was designated as new Rule 107.

Last, Professor Capra noted that a new subdivision (d) was added to new Rule 107 to direct courts and litigants to Rule 1006 for summaries of voluminous evidence because there is a lot of confusion in the courts about the difference between summaries and illustrative aids.

A practitioner member observed that he, like other members of the trial bar, had been very concerned about the proposed rule as published. He supported the deletion of the notice requirement and the use of "substantially outweighed" as the standard; he hoped that the latter would encourage the use of illustrative aids. The member stressed that some illustrative aids equate to a written version of the lawyer's actual presentation, such that providing advance notice of the aid would equate to a preview of that presentation. Such disclosures, he argued, would impair truth-seeking and increase the number of objections. So this member had concerns about the seventh paragraph of the committee note (shown on page 923 of the agenda book), which addressed the question of notice in a way that this member thought put too much of a thumb on the scale in favor of advance notice. The member suggested adding the following as the penultimate sentence of the paragraph: "In addition, in some cases, advance disclosure may

improperly preview witness examination or attorney argument or encourage excessive objections." Asked to explain what number of objections would be optimal, the member modified his suggested sentence by deleting "or encourage excessive objections." The member also suggested revising the last sentence of the paragraph to reflect the fact that often the parties will resolve issues concerning advance notice by agreement; Professor Capra expressed reluctance to make that change because the potential for the parties to resolve an issue by agreement exists for many types of disputes.

A judge member suggested cutting the entire paragraph discussing notice. The member thought that the paragraph reflected an increasingly outdated view, and it was heavily leaning in a direction objected to by so many commenters. At the least, this member argued, the sentence beginning with the word "ample" should be replaced with the sentence suggested by the practitioner member.

Another judge member likened issues surrounding the definition of "illustrative aid" to issues prevalent in disputes about summary witnesses. The member suggested refining the definition of illustrative aid so that it cannot be used as a vehicle to bring in extra-record information. Professor Capra thought that such a situation would be prevented by Rule 403: if an aid contained additional evidence not yet in the record, that additional evidence would be evaluated under Rule 403. The practitioner member suggested that the "substantially outweighed" standard would address this problem; a purported aid that contained evidence not in the record would be subject to multiple objections, including that it would create unfair prejudice. Professor Capra noted that the Rule 403 and Rule 107(a) balancing tests would work the same way.

Judge Bates asked what would happen if someone used some type of illustrative aid containing certain terms and added a definition not in evidence—supplying additional information beyond what had been admitted into evidence in the case. Professor Capra thought that Rule 403 would prevent that from happening because of the added information's prejudicial effect.

Judge Schiltz remarked that it is difficult to define illustrative aids to exclude those sorts of situations. The rule gives a negative definition of illustrative aids—that they are not evidence. The rule has to state the idea fairly generally and let trial judges apply it. For instance, the rule cannot say illustrative aids are limited to summaries or compilations because they are much broader than that.

The judge member who had raised the concern about the inclusion of extra-record information again suggested stating explicitly that an illustrative aid cannot include information not already in the record. Professor Capra asked if putting "admissible" on line 4—"understand *admissible* evidence or argument"—would be satisfactory. The judge member responded that, no, someone could help the trier of fact understand admissible evidence by introducing extra-record evidence, as in Judge Bates' earlier illustration. The judge member also thought that whether the aid's utility in assisting comprehension is substantially outweighed by the danger of unfair prejudice is not the correct test for introducing unadmitted evidence through illustrative aids; rather, the presence of that unadmitted evidence should disqualify the aid from being used altogether. But the rule currently does not have anything that prevents that.

The judge member further commented that it might be worth adding a requirement in (b) to tell the jury that illustrative aids are not evidence. Professor Capra responded that it was in the committee note instead because most rules of evidence do not address jury instructions in the text.

A practitioner member commented that it was important to keep in mind that the rule as it now stood encompassed illustrative aids used throughout a trial, including during opening and closing arguments. An illustrative aid during a closing argument will typically include argument; it may for example include headings that characterize evidence a certain way.

Professor Bartell suggested taking the fourth sentence of the first paragraph of the committee note and placing it in the rule text to define "illustrative aid." A judge member expressed support for that suggestion. Professor Capra said that the advisory committee, after repeated consideration, felt that the definition did not work as well in the rule text as in the committee note.

A judge member expressed appreciation for the proposed new rule, and predicted that it would clear up confusion concerning when an exhibit goes back to the jury. The rule does a good job of balancing the interests on that issue. The member also thought that attorneys would generally use common sense to know not to add unadmitted evidence to an illustrative aid. One textual addition that might help reinforce that behavior could be to add the word "the" before the word "evidence" in line 4 of Rule 107(a) as shown on page 920 of the agenda book—"understand *the* evidence or argument." The member further noted that it would probably be necessary to give limiting instructions to ensure that the jury uses illustrative aids properly. Professor Capra accepted the proposed edit of adding the word "the" before "evidence."

Judge Bates wondered if the concern about adding extra-record information evidence could be addressed by adding to the first paragraph of the committee note: "An illustrative aid may not be used to bring in additional information that is not in evidence." Judge Schiltz responded that that would limit argument too much—a lot of argument brings in information not technically in evidence. Judge Bates amended the suggested addition to refer to "additional factual information." Professor Capra reiterated his belief that if there is other evidence offered in the guise of an illustrative aid, it would be analyzed under Rule 403, not 107.

A judge member understood the concern raised about adding unadmitted evidence to an illustrative aid but thought it was not worth worrying about. It is like closing arguments—there is not a rule saying that something not in evidence cannot be mentioned in closing argument, yet any attempt to do so is met with an objection.

An academic member worried about the possibility that confusion about exactly what an illustrative aid is—how it is different, what it captures, what it does not capture, and how it is implemented—would create a flurry of objections and litigation. The answer might be to monitor the caselaw and anecdotal reports so as to learn how the rule is implemented.

Ms. Shapiro commented that the DOJ trial attorneys with whom she had spoken were thrilled to have a rule like this because the courts' treatment of illustrative aids—even their vocabulary—has been inconsistent.

Judge Bates asked whether the last sentence of the third paragraph of the committee note should be revised by adding "or argument" after "evidence" on page 922. Professor Capra accepted this change.

As to the seventh paragraph of the committee note (on page 923), Judge Bates also pointed out that a decision had to be made concerning the suggestions to delete or amend that paragraph's discussion of advance notice. Judge Schiltz recalled that a majority of the advisory committee members had favored a notice requirement; the committee understood the opposition to such a requirement, and had meant to accomplish a compromise by deleting the requirement from the rule text but including the notice discussion in the committee note. He was concerned about changing the committee note too much after achieving that compromise. He thought that adding the sentence about the possible downsides of advance notice and maybe other modest changes would be acceptable, but cutting the paragraph altogether would go too far.

A judge member suggested cutting the sentence that was the penultimate sentence of the seventh paragraph as shown on page 923 (the sentence that began "Ample advance notice"). Judge Schiltz agreed to that change. A judge member expressed support for retaining that sentence because it helpfully illustrated different scenarios for the use of illustrative aids; Professor Capra added that the sentence presented a balanced viewpoint. Another practitioner member, though, supported deleting the sentence because it focused on whether requiring advance notice *can* be done rather than whether it *should* be done—the latter being, in this member's view, the more important question. Judge Schiltz agreed that he would rather take out the sentence than possibly lose the support of those concerned about the notice issue.

A judge member questioned the use of the term "infinite variety" in the fourth sentence of the note paragraph concerning advance notice. Professor Garner suggested "wide variety," which Professor Capra accepted.

Professor Capra summarized the amendments to the proposal. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 107 with one change to the proposed rule to add "the" before "evidence" on line 4 on page 920 of the agenda book, and the following changes to the committee note as printed on pages 921–24 of the agenda book:**

- In the first paragraph, fifth line, in the phrase "as that latter term is vague and has been subject," the language "is vague and" was struck.

- In the second paragraph, third line, the word "factfinder" was changed to "trier of fact."

- In the second paragraph, last line, the language "to study it, and to use it to help determine the disputed facts" was changed to "and use it to help determine the disputed facts." The comma preceding this line was also struck.

- In the third paragraph, third line, the word "factfinder" was changed to "trier of fact." In the third paragraph, second-to-last line, the phrase "finder of fact" was changed to "trier of fact," and the phrase "or argument" was added after "understand evidence."

- In the fourth paragraph, second line, the word "information" was changed to "evidence."

- In the seventh paragraph (which commences "Many courts require"), the sentence "That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used," was changed to "That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used."

- In the seventh paragraph, the sentence beginning "Ample advance notice" was struck and replaced with the sentence: "In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument."

Amendment to Rule 1006 (Summaries to Prove Content). Judge Schiltz reported on this item. The advisory committee sought final approval for an amendment to Rule 1006, which appeared on page 965 of the agenda book.

Rule 1006 allows a summary of voluminous admissible evidence to be admitted into evidence itself. Unlike an illustrative aid, these summaries are evidence and may go to the jury room and be used like any other evidence. The summary may be used in lieu of the voluminous underlying evidence or in addition to some or all of that voluminous underlying evidence.

Courts have had a great deal of difficulty with Rule 1006. Some incorrectly say that a Rule 1006 summary is not evidence; some incorrectly say that a Rule 1006 summary cannot be admitted unless all the underlying voluminous evidence is first admitted; and some incorrectly say that a Rule 1006 summary cannot be admitted if any of the underlying evidence has been admitted.

The proposed amendment would not change the substance of Rule 1006. It would instead clarify the rule in order to reduce the likelihood of errors.

Professor Richter reported that the advisory committee received seven public comments on the proposed amendment. Those comments were largely supportive. There was one note of criticism. A longstanding part of the foundation for a Rule 1006 summary is that the underlying voluminous materials must be admissible in evidence, even though they need not actually be admitted. Courts were not having a problem with that foundational requirement, so the advisory committee did not include it in the version published for public comment. The advisory committee recognized this omission and, at its Fall 2022 meeting, unanimously agreed to add the requirement of admissibility to the rule text. This addition was shown on page 965, line 5. That was the only change to the proposed amendment since the public-comment period.

Judge Bates asked whether, in line 4, the word "offered" should be added, so that the text reads, "The court may admit as evidence a summary, chart, or calculation *offered* to prove . . . ."

Turning to the fourth paragraph of the committee note, a judge member asked whether the verb "meet" in the phrase "meet the evidence" was sufficiently clear. After some discussion among the committee members and the advisory committee's representatives, the advisory committee's representatives agreed to replace the word "meet" with "evaluate."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 1006 with the following changes: in**

the rule text, adding the word "offered" after "calculation" as shown on page 965, line 4, of the agenda book; and in the fourth paragraph of the committee note, replacing the word "meet" with "evaluate."

Amendment to Rule 613(b) (Extrinsic Evidence of a Prior Inconsistent Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 613(b), which appeared on page 952 of the agenda book.

Rule 613(b) addresses the situation in which a witness takes the stand and testifies, and a party wants to impeach that witness by introducing extrinsic evidence—for example, the testimony of another witness, or a document— that the witness made an inconsistent statement in the past. Under the common law, before that party is allowed to bring in that extrinsic evidence to show that the witness made an inconsistent statement in the past, the witness had to be given a chance to explain or deny making the statement. This is called the requirement of prior presentation.

Rule 613(b) took the opposite approach: as long as sometime during the trial the witness had a chance to explain or deny the prior inconsistent statement, the extrinsic evidence could come in. But most judges ignore this rule—Judge Schiltz admitted ignoring it himself—and follow the common law. The common-law rule makes sense because the vast majority of the time, the witness will admit making the inconsistent statement, obviating the need to unnecessarily lengthen the trial by admitting the extrinsic evidence. Further, if the extrinsic evidence is admitted after the witness testifies, then someone has to bring the witness back for the chance to explain or deny it—and the witness may have flown across the country.

The proposed amendment therefore restores the common-law requirement of prior presentation. But it gives the court discretion to waive it—for example, if a party was not aware of the inconsistent statement until the witness finished testifying.

Professor Richter reported that the advisory committee received four public comments on Rule 613(b), all in support of restoring the prior-presentation requirement. The comments noted that it would make for orderly and efficient impeachment and impose no impediment to fairness. The proposal would also align the rule's text with the practice followed in most federal courts. There was no change to the rule text from the version that was published for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 613(b).**

Amendment to Rule 801(d)(2) (An Opposing Party's Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 801(d)(2), which appeared starting on page 956 of the agenda book.

Rule 801(d)(2) provides an exception to the hearsay rule for statements of a party-opponent. Courts are split about how to apply this rule when the party at trial is not the declarant but rather the declarant's successor in interest. For example, suppose the declarant is injured in an accident, makes an out-of-court statement about the incident that caused the declarant's injuries, then dies. If the declarant's estate sues, may the defendant use the deceased declarant's out-of-court statement against the estate? Some courts say yes because the estate just stands in the shoes of the declarant and should be treated the same. Some courts say no because it was technically the

human-being declarant who made the out-of-court statement, not the legal entity (the estate) that is the actual party.

The proposed amendment would adopt the former position: if the statement would be admissible against the declarant as a party, then it's also admissible against the party that stands in the shoes of the declarant. The advisory committee thought that the fairest outcome, and it also eliminates an incentive to use assignments or other devices to manipulate litigation.

Professor Capra reported that there was sparse public comment. Some comments suggested that the term "successor in interest" be used, but that was problematic because the term is used in another evidence rule, where it is applied expansively. Because it is not supposed to be applied expansively here, the committee did not adopt that change.

Judge Bates highlighted the statement in the committee note's last paragraph, that if the declarant makes the statement after the rights or obligations have been transferred, then the statement would not be admissible. He asked whether that was a substantive provision and whether there was an easy way to express it in the rule's text. Professor Capra responded that there was not an easy way to express it in the text, and this issue would arise very rarely. Furthermore, the rationale for attribution would not apply if the interest has already been transferred. The advisory committee decided in two separate votes not to include that issue in the rule text and instead to keep it in the committee note.

Turning back to the proposed rule text on line 29 of page 957 ("If a party's claim, defense, or potential liability is directly derived …"), Professor Hartnett asked whether "directly" was the appropriate term to use. For example, if a right passes through two assignments or successors in interest, would "directly derived" capture that scenario? Professor Capra responded that the term comes from the case law, and "derived" on its own seemed too diffuse.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 801(d)(2).**

Amendment to Rule 804(b)(3) (Statement Against Interest). Judge Schiltz reported on this item. The advisory committee sought final approval of a proposed amendment to Rule 804(b)(3), which appeared starting on page 960 of the agenda book.

Rule 804(b)(3) provides an exception to the hearsay rule for declarations against interest. The proposed amendment addresses a particular application of that rule.

In a criminal case in which the out-of-court statement is a declaration against penal interest—typically, a statement by somebody outside of court that the declarant was the one who actually committed the crime for which the defendant is now on trial—then the proponent of that statement must provide corroborating circumstances that clearly indicate the trustworthiness of the statement.

There's a dispute in the courts about how to decide if such corroborating circumstances exist. Some courts say that the judge may only look at the inherent guarantees of trustworthiness underlying the statement itself, not at any independent evidence (such as security-camera footage

or DNA evidence) that would support or refute the out-of-court confession. But most courts say the judge can look at independent evidence.

The proposed amendment resolves the split. It takes the side of the courts that say that the judges *can* look at independent evidence.

Professor Richter noted that the advisory committee received five public comments on this proposal, all of them in support. But several expressed confusion because, as originally drafted, the proposed rule used the term "corroborating" twice in the same sentence. The distinction was not clear between the finding of "corroborating circumstances" that a court had to make and the corroborating "evidence" that a court could use to make that finding.

The advisory committee modified the text slightly to avoid using the term "corroborating" twice and to clarify the distinction between the finding and the evidence. The revised rule text directs the court to consider "the totality of circumstances under which [the out-of-court statement] was made and any evidence that supports or contradicts it." Conforming changes were made to the committee note. The committee note also explains that a 2019 amendment to the residual hearsay exception (Rule 807) that does the same thing—expanding the evidence a court may use to find trustworthiness under that exception—should be interpreted similarly, even though amended Rules 804(b)(3) and 807 use slightly different wording.

A judge member observed that the criterion in the rule—that the statement tends to expose the declarant to criminal liability—was broader than Judge Schiltz's explanation that the statement exposes the declarant to criminal liability for the crime for which the defendant is being tried; the member asked which was the intended test. Judge Schiltz responded that his explanation was just the most common example, and the rule still reaches all statements exposing the declarant to criminal liability.

Judge Bates asked whether it is correct to say in the committee note that the language used in Rule 807, speaking only of "corroborating" evidence, is consistent with the "evidence that supports or contradicts" language in the proposed amendment to Rule 804. "Supporting or contradicting evidence" includes evidence that is not "corroborating." Professor Capra responded that, because Rule 807's committee note also discusses an absence of evidence, courts applying the post-2019 Rule 807 have considered evidence contradicting the account. Thus, the two rules, though not identical, are consistent. Judge Schiltz noted that the current proposal gets to the same point in a cleaner way. Professor Capra also remarked that the phrase "corroborating circumstances" was not changed because it has been in the rule for 50 years and there is a lot of law about it.

A judge member asked why the proposed rule uses a narrow term like "contradicts" instead of a broader term like "undermines," given that "supports" is a broad statement and the opposing term ought to have similarly broad scope. After some discussion, the advisory committee representatives agreed to replace "contradicts" with "undermines" (in line 27 on page 961 of the agenda book) and to make a corresponding change to the committee note.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 804(b)(3) with the following changes:**

in the text of Rule 804(b)(3)(B), replacing "contradicts" with "undermines," and making the same change in the committee note.

Information Item

Juror Questions. Judge Schiltz reported on this item. The advisory committee proposed an amendment that would have established minimum procedural protections if a court decided to let jurors pose questions for witnesses. The proposed rule was clear that the advisory committee did not take any position on whether that practice should be allowed.

The advisory committee presented this proposal at a previous meeting of the Standing Committee. Some members of the Standing Committee expressed concern that putting safeguards in the rules would encourage the practice.

The matter was returned to the advisory committee for further study. It held a symposium on the topic at its Fall 2022 meeting. The advisory committee then discussed the issue at its Spring 2023 meeting and decided to table the proposal. There was significant opposition to it even within the advisory committee.

Professor Capra noted that the advisory committee has sent its work to the committee updating the Benchbook for U.S. District Court Judges. Judge Schiltz explained that the advisory committee suggested that the proposed procedural safeguards may be appropriate for inclusion in the revision of the Benchbook that is currently being worked on.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

Rule 41(a)(1)(A) (Voluntary Dismissal by the Plaintiff Without a Court Order). Professor Bradt reported on this item.

The question under this rule is: what and when may a plaintiff voluntarily dismiss without a court order and without prejudice? The rule refers to the plaintiff's ability to voluntarily dismiss an "action." What does that word mean? Does it mean the entire case, all claims against all defendants? Or can it mean something less? The circuits are split on whether a plaintiff could dismiss all claims against one defendant in a multidefendant case. There's also a district-court split about whether a plaintiff may voluntarily dismiss even less without a court order, such as an individual claim.

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, is trying to figure out whether and to what extent this is a real-world problem rather than one that courts effectively muddle through. That is, can judges effectively narrow cases, despite the fact that Rule 41(a)(1)(A) speaks only of an "action"? Since the January 2023 Standing Committee meeting, the Rule 41 Subcommittee has conducted outreach with Lawyers for Civil Justice and the American Association for Justice, and it has an upcoming meeting with the National Employment Lawyers Association.

If this is a real problem, the next step would be to ask whether it can be solved by consensus. The subcommittee may need to consider the deeper question of how much flexibility a plaintiff ought to have. And if a plaintiff does have that flexibility, by when must it be exercised? The rule currently says that a plaintiff has until the answer or a motion for summary judgment is filed. But there might be a good reason to move that deadline up to the filing of a Rule 12 motion to dismiss. Further, an amendment to Rule 41 might have downstream effects on other rules designed to facilitate flexibility during litigation, such as Rule 15.

Judge Bates observed that the Eleventh Circuit in Rosell v. VMSB, LLC, 67 F.4th 1141, 1143 (11th Cir. 2023), recently held that an "action" means the whole case and therefore dismissed an appeal for lack of jurisdiction. It seems to be an issue that is live in the courts and could be causing problems for litigants.

Professor Bradt noted that the word "action" also appears in, and the interpretive questions thus extend to, Rule 41(a)(2) (concerning dismissals by court order).

Rule 7.1 (Disclosure Statement). Professor Bradt reported on this item.

The advisory committee has formed a subcommittee to examine Rule 7.1, which requires corporate litigants to disclose certain financial interests. The rule helps inform judges whether they must recuse themselves because of a financial interest in a party or the subject matter. It requires a party to disclose its ownership by a parent corporation. The problem is that the rule may not accurately reflect all of the different kinds of ownership interests that may exist in a party. One topic under discussion is when a "grandparent" corporation owns the parent corporation.

This issue has gotten a great deal of attention from the public and from Congress. At the last advisory-committee meeting, a subcommittee to investigate the issue was appointed, and it will be chaired by Justice Jane Bland of the Texas Supreme Court. The subcommittee will have its first meeting soon. It will initially research the relevant case law and local rules in the federal courts, and it will also look to state courts for insight into how best to resolve the issue.

Professor Beale wondered whether the Administrative Office or some other entity could create a database in which one could query a corporation and find all ownership interests in the corporation, in the corporation's owners, and so on, rather than depending on parties' disclosures. Professor Bradt responded that the subcommittee is going to look at this possibility, but a technological solution may be challenging because of the proliferation of many kinds of corporate structures.

Professor Bradt noted that it might make sense for the subcommittee to work with the Appellate Rules Committee on this issue because many of the questions addressed during the report about amicus disclosures parallel the questions the subcommittee will be addressing in this project.

A practitioner member commented that law firms have to investigate corporate ownership for conflict purposes. Services already exist with this information. The wheel does not necessarily need to be reinvented. Professor Bradt agreed, but also noted that the subcommittee wants to be mindful of whether those services would be sufficiently accessible to parties with fewer resources.

Additional Items. Professor Marcus briefly reported on several additional items.

Rule 23, dealing with class actions, is before the advisory committee again, this time with respect to two different issues. First, in a recent First Circuit opinion, Judge Kayatta addressed the question of incentive awards for class representatives. Because the Supreme Court has so far declined to grant certiorari on this issue, it remains before the advisory committee. Second, the Lawyers for Civil Justice suggested a change to Rule 23(b)(3) on the "superiority" prong to let a court conclude that some nonadjudicative alternative might be superior to a class action.

The advisory committee also continues to look at methods to sensibly handle applications for in forma pauperis ("IFP") status. Perhaps it should even be called something different so that people who are eligible will understand what IFP means.

Finally, three suggestions have been removed from the advisory committee's agenda. The first, suggested in 2016 by Judge Graber and then-Judge Gorsuch, would have amended Rule 38, dealing with jury-trial demands, in response to the declining frequency of civil jury trials. But studies suggest that Rule 38 is not the source of the problem, so an amendment to the rule did not seem the appropriate solution.

Second, Senators Tillis and Leahy wrote to the Chief Justice about a district judge who was extremely active in patent-infringement cases. This judge purportedly held several *Markman* hearings a week, using deputized masters or judicial assistants to assist him with that caseload. The senators did not believe that Rule 53 authorized that kind of use of special masters. But the senators did not suggest that Rule 53 should be changed. Also, the relevant court has revised its assignment of patent-infringement cases in a way that can reduce this problem. This item is therefore no longer on the advisory committee's agenda.

Third, an attorney proposed amending Rule 11 to forbid state bar authorities to impose any discipline on anyone who is accused of misconduct in federal court unless a federal court has already imposed Rule 11 sanctions. Because this proposal misconstrues the function of Rule 11, the advisory committee removed this proposal from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge James Dever and Professors Sara Sun Beale and Nancy King presented the report of the Advisory Committee on Criminal Rules, which last met in Washington, D.C., on April 20, 2023. The advisory committee presented three information items and no action items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 875.

Information Items

Rule 17 and Pretrial Subpoena Authority. Judge Dever reported on this item. Judge Jacqueline Nguyen chairs the Rule 17 Subcommittee. Rule 17, which deals with subpoenas in criminal trials, has not been updated in about 60 years. The New York City Bar Association's White Collar Crime Committee submitted a proposal to amend it.

The advisory committee responded to the proposal by first asking whether there is a problem with how Rule 17 currently works. It began gathering information in its October 2022 meeting, and it has continued that information-gathering by asking how companies that deal with big data respond to subpoenas.

About a third of the states have criminal-subpoena rules that are structured differently than the federal rules. The Rule 17 Subcommittee reported on the topic at the advisory committee's April 2023 meeting.

The advisory committee is considering how to appropriately distinguish procedurally between protected information, such as medical records, personnel records, or privileged information, and other information, such as a video of events occurring outside a store.

Professor Beale added that the subpoena issue is an important question. Defense attorneys have very little means to get information from third parties because Rule 17 has been so narrowly interpreted.

Rule 23 and Jury-Trial Waiver Without Government Consent. Judge Dever reported on this item.

The American College of Trial Lawyers' Federal Criminal Procedure Committee submitted a proposal to amend Rule 23(a) to eliminate the requirement that the government consent to a defendant's request for a bench trial.

Currently, a defendant must waive a jury trial in writing, the government must consent, and the court must also approve the waiver. About a third of the states do not require the prosecution's consent to waive a jury trial. The federal rules have always required it.

The advisory committee has not yet appointed a subcommittee to review the proposal. It has asked the Federal Defenders and Criminal Justice Act lawyers on the advisory committee to gather more information. One premise of the proposal was that there is a backlog of trials because of COVID, but none of the district judges on the advisory committee had had that experience. So the advisory committee wanted to gather more information. That process is ongoing.

The advisory committee is also trying to gather information on what rationales, if any, the DOJ gives for not consenting to a jury trial. Part of what animates the discussion is that, although the Sixth Amendment talks about the accused's right to a jury trial, Article III, Section 2's directive that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" does not mention the defendant. So the United States actually has its own, independent interest in having a jury trial.

Professor Beale predicted that the Rule 23 proposal would generate interesting discussion about whether it is appropriate for parties to be adversarial about demands or waivers of juries or whether there is something different about the jury as an institution that makes it inappropriate for parties to try to demand it or waive it for strategic advantage. There are also apparently differences in the government's practices among the 94 judicial districts. She thought that the advisory committee's attention to the issue might spur the DOJ to change its process on its own.

Judge Bates asked to clarify whether the Rule 23 investigation would only focus on the government's consent to bench trials, not court approval. Professor Beale confirmed that the proposal focused only on government consent.

Professor Marcus remarked that the proposal seems to expand the court's power by letting it decide whether to grant the defendant's request for a bench trial even though the government does not consent.

Judge Dever reiterated that only a minority of the states' practices currently align with the proposal. The federal rule had always required the government's consent, and the Supreme Court has rejected a constitutional challenge to it.

Judge Bates concluded by noting that the DOJ, whose practices vary from district to district, had volunteered to provide information about what they do and have done with respect to requests for bench trials.

Rule 49.1 (Privacy Protections for Filings Made with the Court). As to this item, Judge Dever deferred to Professor Bartell's previous report on Senator Wyden's suggestion concerning privacy protections and court filings.

OTHER COMMITTEE BUSINESS

Information Item

Legislative Update. Judge Bates and Mr. Pryby stated that there was no significant legislative activity to report since the last meeting of the Standing Committee.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to provide input to the Judicial Conference's Executive Committee about the strategic plan for the federal judiciary. Judge Bates requested comment, either then or after the meeting, on the draft report that began on page 1005 of the agenda book.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff and Professor Struve to move forward with the report. Without objection: **The Standing Committee so authorized Judge Bates.**

New Business

No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the committee members for their contributions and patience. The Standing Committee will next convene on January 4, 2024.

TAB 3C

Agenda E-19 (Summary)
Rules
September 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law

   b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

   c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 5-9

3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 12-13

4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 17-19

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Christopher Ian Pryby, Law Clerk to the Standing Committee;

John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc

and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rule 6 (Appeal in a Bankruptcy Case) and Rule 39 (Costs on Appeal) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Appellate Rule 6 would clarify the treatment of appeals in bankruptcy cases. A proposed amendment to Appellate Rule 6(a) would account for the fact that the time limits for certain post-judgment motions that reset the time to take an appeal from a district court to a court of appeals are different when the district court was exercising bankruptcy jurisdiction under 28 U.S.C. § 1334 than when it was exercising original jurisdiction under other statutory grants. The proposed committee note provides a table showing which Bankruptcy Rule governs each relevant type of post-judgment motion and the time allowed under the current version of the applicable Bankruptcy Rule. Proposed amendments to Appellate Rule 6(c) would address direct appeals in bankruptcy cases, which are governed by 28 U.S.C. § 158(d)(2). The Advisory Committee determined that Rule 6(c)'s current reliance on Rule 5 (Appeal by Permission) was misplaced and that there is considerable confusion in applying the Appellate

Rules to direct appeals. For that reason, the proposed amendments to Rule 6(c) would address direct appeals in a largely self-contained way. Finally, the proposed amendments also provide more detailed guidance for litigants about initial procedural steps once authorization is granted for a direct appeal to the court of appeals.

Rule 39 (Costs)

The proposed amendments to Rule 39 would clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals or the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments would codify the holding in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021)— that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court— and would provide a clearer procedure to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments would make Rule 39's structure more parallel by adding a list of the costs taxable in the court of appeals to the current rule, which lists only the costs taxable in the district court.

Information Items

The Advisory Committee met on March 29, 2023. In addition to the proposals noted above, the Advisory Committee discussed several other matters. The Advisory Committee has been considering potential amendments to Rule 29 (Brief of an Amicus Curiae) for several years and considered possible amendments requiring the disclosure by amici curiae of information about contributions by parties and nonparties. In addition, the Advisory Committee completed a draft of amended Form 4 to create a more streamlined and less intrusive form to use when seeking to proceed in forma pauperis. Because the Rules of the Supreme Court require litigants to use the same form, the draft has been provided to the Clerk of the Supreme Court for review.

Finally, the Advisory Committee discussed new suggestions, including a suggestion regarding the redaction of Social Security numbers in court filings, a suggestion for a possible new rule regarding intervention on appeal, a suggestion regarding third-party litigation funding, and a suggestion to follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: the proposed Restyled Bankruptcy Rules;[1] proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006; new Rule 8023.1;[2] the abrogation of Official Form 423; and a proposed amendment to Bankruptcy Official Form 410A. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Restyled Rules Parts I–IX (the 1000–9000 series of Bankruptcy Rules)

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. The Restyled Bankruptcy Rules were published for comment over several years in three sets: the 1000–2000 series of rules were published in August 2020, the 3000–6000 series in August 2021, and the final set, the 7000–9000 series, in August 2022. After each publication period, the Advisory Committee on Bankruptcy Rules carefully considered the comments received and made recommendations for final approval based on the same general drafting

[1]The Restyled Bankruptcy Rules are at Appendix B, pages 1-454. They are in side-by-side format with the existing unstyled version of each rule on the left and the proposed restyled version shown on the right. The unstyled left-side versions of the following rules reflect pending rule changes currently on track to take effect December 1, 2023, absent contrary action by Congress: Amended Rules 3011, 8003, 9006, and new Rule 9038.

[2]The proposed substantive changes to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1 are set out separately and begin at Appendix B, page 455. The changes, underlining and strikeout, are shown against the proposed restyled versions of those rules.

guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules, as outlined below. The Restyled Bankruptcy Rules as a whole, including the revisions based on public comments and a final, comprehensive review, are now being recommended for final approval.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996), and Bryan A. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). S*ee also* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Mich. Bar J., Sept. 2005, at 56 and Mich. Bar J., Oct. 2005, at 52; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using consistent formatting to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules clearer and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words, as well as redundant "intensifiers"—expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the

restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Advisory Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Advisory Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. One example is "meeting of creditors," a term that is widely used and well understood in bankruptcy practice.

Rules Enacted by Congress. Where Congress has enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 361), and Rule 7004(b) and (h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4118), the Advisory Committee has not restyled the rule.

<u>Amendments to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), related amendments to Rules 4004 (Grant or Denial of Discharge), 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied), and 9006 (Computing and Extending Time; Time for Motion Papers), and abrogation of Official Form 423 (Certification About a Financial Management Course)</u>

The amendments to Rule 1007(b)(7) delete the directive to file a statement on Official Form 423 (Certification About a Financial Management Course) and make filing the course certificate itself the exclusive means showing that the debtor has taken a postpetition course in

personal financial management. References in other parts of Rule 1007 and in Rules 4004, 5009, and 9006 to the "statement" required by Rule 1007(b)(7) are changed to refer to a "certificate." Because Official Form 423 is no longer necessary, the Advisory Committee recommends that it be abrogated.

Rule 7001 (Scope of Rules of Part VII)

The amendment to Rule 7001(a) creates an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need an order requiring the prompt return by a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of exempt property. As noted by Justice Sonia Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585, 592–95 (2021), the procedures applicable to adversary proceedings can be unnecessarily time-consuming in such a situation. Instead, the proposed amendment allows the debtor to seek turnover of such property by motion under § 542(a), and the procedures of Rule 9014 would apply. [3]

Rule 8023.1 (Substitution of Parties)

New Rule 8023.1 is modeled on Appellate Rule 43. Neither Appellate Rule 43 nor Civil Rule 25 applies to parties in bankruptcy appeals to the district court or bankruptcy appellate panel. This new rule is intended to fill that gap by providing consistent rules (in connection with such appeals) for the substitution of parties upon death or for any other reason.

Official Form 410A (Proof of Claim, Attachment A)

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under Bankruptcy Code § 1322(e) the amount necessary to cure a default

[3]As noted by Justice Sotomayor, "Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days [citation omitted]. One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments." *Fulton*, 141 S. Ct. at 594.

is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Recommendation: That the Judicial Conference:

a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1 and 8006 and proposed six new Official Forms related to the Rule 3002.1 amendments, Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation with one change, discussed below, to Rule 3002.1.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

In response to suggestions submitted by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy, the Advisory Committee proposed amendments to Rule 3002.1 that were published for comment

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule's provisions—included a new midcase assessment of the mortgage claim's status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit ("HELOC"). Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

There were 27 comments submitted in response to the proposed amendments. Many of them identified concerns about the midcase review and end-of-case procedures. The comments led the Advisory Committee to recommend several changes to the rule as published. Among those changes, the provision for giving only annual notices of HELOC changes is made optional. The proposed midcase review procedure is also made optional, can be sought at any time during the case, is done by motion rather than by notice, and can be initiated either by the debtor or the trustee, not just the trustee as initially proposed. Changes are also made to the end-of-case procedures in response to the comments, including initiating the process by notice rather than by motion from the case trustee.

In addition to the changes discussed above, the Advisory Committee also recommended changes to current Rule 3002.1(i) (which would become Rule 3002.1(h)) to clarify the scope of relief that a court may grant if a claimholder fails to provide any information required under the rule. Following concerns raised during the Standing Committee meeting, the Advisory Committee chair withdrew one aspect of those proposed changes to allow for further consideration and possible resubmission at a later time.

Because the changes to the originally published amendments are substantial, and further public input would be beneficial, the Advisory Committee sought republication of the new proposed amendments to Rule 3002.1. After the Advisory Committee chair withdrew the portion of the proposed amendments noted in the preceding paragraph concerning current Rule 3002.1(i), the Standing Committee unanimously approved for publication the remainder of the proposed amendments to Rule 3002.1.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.

Official Forms Related to Proposed Amendments to Rule 3002.1

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-N (Trustee's Notice of Payments Made),
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made),
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim),
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

The proposed amendments to Rule 3002.1 that were published for comment in 2021 called for five Official Forms to implement the proposed procedures. As a result of its recommendation to republish proposed Rule 3002.1, and the substantial changes to the proposed

procedures, the Advisory Committee now seeks publication of six proposed implementing Official Forms.

Information Items

The Advisory Committee met on March 30, 2023. In addition to the recommendations discussed above, the Advisory Committee gave preliminary consideration to a suggestion to require redaction of the entire Social Security number from filings in bankruptcy, a new suggestion to adopt national rules addressing electronic debtor signatures, changes to the timing of clerk notices of a debtor's failure to file the certificate showing completion of a personal financial management course, and a rule amendment that would require the debtor to disclose certain assets obtained after the petition date.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rule 12(a). The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language could be read to suggest unintended preemption of statutory time directives. While it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. The current rule fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Thus, the current language could be mistakenly interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) are intended to supersede inconsistent statutory provisions, especially because paragraph (1) includes specific language deferring to different periods established by statute.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1)---namely, that a different response time set by statute supersedes the response times set by those rules. After public comment, the Advisory Committee recommended final approval of the rule as published.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b)(3) would provide that the court may address the timing and method of such compliance in its scheduling order. During the January 2023 Standing Committee meeting, members expressed differing views concerning the length of, and level of detail in, the committee notes that would accompany the proposed amendments. The Advisory Committee subsequently reexamined the notes in light of that discussion, and at the June 2023 Standing Committee meeting, the Advisory Committee presented shortened notes to accompany the proposed amendments.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings, which the Civil Rules do not expressly address. After several years of work by its MDL Subcommittee, extensive discussions with interested bar groups, and consideration of multiple drafts, the Advisory Committee unanimously recommended that new Rule 16.1 be published for public comment.

Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after transfer. An initial MDL management conference allows for early attention to matters identified in Rule 16.1(c), which may be of great value to the transferee judge and the parties. Because not all MDL proceedings present the same type of management challenges, there may be some MDL proceedings in which no initial management conference is

needed, so proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b) recognizes that the transferee judge may designate coordinating counsel---before the appointment of leadership counsel—for the initial MDL conference. The court may appoint coordinating counsel to ensure effective and coordinated discussion and to provide an informative report.

Rule 16.1(c) encourages the court to order the parties to submit a report prior to the initial MDL conference. The court may order that the report address, inter alia, any matter under Rules 16.1(c)(1)–(12) or Rule 16. The rule provides a series of prompts for the court to consider, identifying matters that are often important to the management of MDL proceedings, including (1) whether to appoint leadership counsel; (2) previously entered scheduling or other orders; (3) principal factual and legal issues; (4) exchange of information about factual bases for claims and defenses; (5) consolidated pleadings; (6) a discovery plan; (7) pretrial motions; (8) additional management conferences; (9) settlement; (10) new actions in the MDL proceeding; (11) related actions in other courts; and (12) referral of matters to a magistrate judge or master.

Rule 16.1(d) provides for an initial MDL management order, which the court should enter after the initial MDL management conference. The order should address matters the court designates under Rule 16.1(c) and may address other matters in the court's discretion. This order controls the MDL proceedings until modified.

Information Items

The Advisory Committee met on March 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 23 (Class Actions) regarding awards to class representatives in class actions and

the superiority requirement for class certification, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, and Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena. The Advisory Committee also discussed issues related to sealed filings, the standards for in forma pauperis status, and the mandatory initial discovery pilot project.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 20, 2023. The Advisory Committee considered several information items.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17 (Subpoena). On issues related to third-party subpoenas, the Advisory Committee has heard from a number of experienced attorneys, including defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. Through its Rule 17 Subcommittee, the Advisory Committee has collected information from experts regarding the Stored Communications Act and other issues relating to materials held online, as well as issues affecting banks and other financial service entities.

A new proposal from the American College of Trial Lawyers would allow the defendant to waive trial by jury without the government's consent. The Advisory Committee discussed this proposal and its previous consideration of this issue in connection with deliberations over new Criminal Rule 62 (part of the set of proposed rules—currently on track to take effect December 1, 2023, absent contrary action by Congress—that resulted from the CARES Act directive that rules be considered to address future emergencies).

Finally, the Advisory Committee voted to remove two items from its study agenda: a suggestion to clarify Rule 11(a)(2), which governs conditional pleas, and a suggestion to amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening

and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also

any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

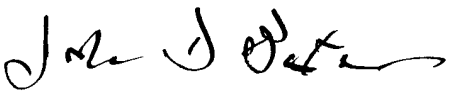
The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit questions for witnesses. Proposed amendments setting forth the minimum safeguards that should be applied if a trial court decided to allow jurors to submit questions for witnesses were under consideration for some time, but doubts about the practice of allowing jurors to submit questions for witnesses led the Advisory Committee to table any possible proposed amendments. The Advisory Committee referred the issue to the committee

updating the Benchbook for U.S. District Court Judges, and it is being considered for inclusion in the Benchbook.

JUDICIARY STRATEGIC PLANNING

The Standing Committee approved a brief report on the strategic initiatives that the Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler (N.D. Ala.), judiciary planning coordinator.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
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William J. Kayatta, Jr.	D. Brooks Smith
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Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

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TAB 3D

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." The amendments would put the burden on the claim holder to identify the elements of its claim.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within … 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

TAB 3E

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
To designate Indigenous Peoples' Day as a legal public holiday and replace the term "Columbus Day" with the term "Indigenous Peoples' Day", and for other purposes.	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 55 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** Not yet available **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee
National Defense Authorization Act for Fiscal Year 2024	**H.R. 2670** *Sponsor:* Rogers (R-AL) *Cosponsor:* Smith (D-WA) **S. 2226** *Sponsor:* Reed (D-RI)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670eas.pdf https://www.congress.gov/118/bills/s2226/BILLS-118s2226es.pdf **Summary:** Section 9011(a)(2)(B) of H.R. 2670, as amended and passed by the Senate but disagreed to by the House, and of S. 2226, as passed by the Senate, would deem that a "request for disclosure of unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence materials . . . constitute[s] a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure."	• 09/20/2023: House appointed conferees and requested a conference to resolve differences • 09/19/2023: House disagreed to the Senate amendment to H.R. 2670 • 07/27/2023: Senate passed S. 2226 with an amendment (86–11); Senate amended H.R. 2670 by striking all after the Enacting Clause and substituting the language of S. 2226, as amended; Senate passed H.R. 2670, as amended, by unanimous consent • 07/26/2023: H.R. 2670 received in Senate • 07/14/2023: H.R. 2670 passed House (219–210) • 07/11/2023: S. 2226 introduced in Senate • 06/21/2023: H.R. 2670 ordered to be reported as amended (58–1). • 04/18/2023: H.R. 2670 introduced in House; referred to Armed Services Committee

Last updated October 4, 2023

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2023	**H.R. 5488** *Sponsor:* Johnson (R-LA) *Cosponsors:* Tiffany (R-WI) Van Drew (R-NJ) **S. 2805** *Sponsor:* Kennedy (R-LA) *Cosponsor:* Manchin (D-WV)	CV 26(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5488/BILLS-118hr5488ih.pdf https://www.congress.gov/118/bills/s2805/BILLS-118s2805is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party "foreign person, foreign state, or sovereign wealth fund . . . that has a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise. . . ." Would require disclosure of the source of funding and, by default, a copy of any agreement creating the contingent right. Would prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 09/14/2023: H.R. 5488 introduced in House; referred to Judiciary Committee • S. 2805 introduced in Senate; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 90 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 34 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Would require expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	• 09/05/2023: Placed on Senate Legislative Calendar under General Orders. Calendar No. 199. • 07/20/2023: S. 359 ordered to be reported favorably, with an amendment • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would require promulgation of Rules to put any criminal surveillance order, including search warrants, on the public docket and/or create a case number and caption.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			There would be exceptions to address personal information and where the surveillance applicant asks the court to seal the order. Would amend Criminal Rule 41(f)(1)(B) by adding that an inventory shall disclose information about any electronic information.	
Protecting Girls with Turner Syndrome Act of 2023	**H.R. 5167** *Sponsor:* Feenstra (R-IA) *Cosponsors:* Banks (R-IN) Miller (R-IL)	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5167/BILLS-118hr5167ih.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed. Would create a private cause of action and criminal penalties and impose a duty on courts "to expedite to the greatest possible extent" such matters.	• 08/08/2023: H.R. 5167 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 127 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would amend existing rules and direct the Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President; and • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Would require the new rules to be transmitted within 6 months of the effective date of the bill.	• 07/27/2023: H.R. 5048 introduced in House; referred to several House Committees–Oversight and Accountability; Judiciary; House Administration; Budget; Transportation and Infrastructure; Rules; Foreign Affairs; Ways and Means; Intelligence
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4250** *Sponsor:* Kiley (R-CA) *Cosponsors:* 19 bipartisan cosponsors **S. 2074** *Sponsor:* Wyden (D-OR)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4250/BILLS-118hr4250ih.pdf https://www.congress.gov/118/bills/s2074/BILLS-118s2074is.pdf **Summary:** Would require federal entities to obtain court authorization to compel testimony or certain documents from covered journalists or covered providers; court must find by preponderance of evidence that "there is a	• 07/19/2023: H.R. 4250 ordered reported (23–0) • 06/21/2023: H.R. 4250 introduced in House; referred to Judiciary Committee • S. 2074 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsors: Lee (R-UT) Durbin (D-IL) Graham (R-SC)		reasonable threat of imminent violence unless the testimony or document is provided."	
Bring Our Heroes Home Act	**H.R. 3110** *Sponsor:* Pappas (D-NH) *Cosponsors:* Fulcher (R-ID) Houlahan (D-PA) Simpson (R-ID) **S. 2315** *Sponsor:* Crapo (D-ID) *Cosponsors:* 9 bipartisan cosponsors	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3110/BILLS-118hr3110ih.pdf https://www.congress.gov/118/bills/s2315/BILLS-118s2315is.pdf **Summary:** Would deem that a "request for disclosure of [H.R. 3110: Missing Armed Forces Personnel; S. 2315: missing Armed Forces and civilian personnel] materials . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure."	• 07/13/2023: S. 2315 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 05/05/2023: H.R. 3110 introduced in House; referred to Oversight & Accountability Committee
LGBTQ+ Panic Defense Prohibition Act of 2023	**H.R. 4432** *Sponsor:* Pappas (D-NH) *Cosponsor:* Davids (D-KS) **S. 2279** *Sponsor:* Markey (D-MA) *Cosponsors:* 17 Democratic or Democratic-caucusing cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4432/BILLS-118hr4432ih.pdf https://www.congress.gov/118/bills/s2279/BILLS-118s2279is.pdf **Summary:** Would preclude the use of evidence of a "nonviolent sexual advance or perception of belief, even if inaccurate, of the gender, gender identity, or sexual orientation of an individual . . . to excuse or justify the conduct of an individual or mitigate the severity of an offense," except that a court may admit evidence "of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense."	• 07/12/2023: S. 2279 introduced in Senate; referred to Judiciary Committee • 06/30/2023: H.R. 4432 introduced in House; referred to Judiciary Committee
Judicial Ethics and Anti-Corruption Act of 2023	**H.R. 3973** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 40 Democratic cosponsors **S. 1908** *Sponsor:* Warren (D-MA) *Cosponsors:*	CV 26(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3973/BILLS-118hr3973ih.pdf https://www.congress.gov/118/bills/s1908/BILLS-118s1908is.pdf **Summary:** Would prohibit a court from entering an order otherwise authorized under Civil Rule 26(c) to restrict disclosure of information obtained through discovery unless the court makes certain findings regarding the protection of public health and safety and the tailoring of the order; would also	• 06/09/2023: H.R. 3973 introduced in House; referred to Judiciary, Oversight & Accountability, Rules, Financial Services, Agriculture, and House Administration Committees • 06/08/2023: S. 1908 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	8 Democratic or Democratic-caucusing cosponsors		prevent order from continuing in effect after entry of final judgment unless court makes similar findings.	
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN)	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315ih.pdf **Summary:** Would extend the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.	• 05/15/2023: Introduced in House; referred to Judiciary Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 14 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would establish Diwali (a/k/a Deepavali) as a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023	**S. 1199** *Sponsor:* Durbin (D-IL) *Cosponsors:* Hawley (R-MO) Cruz (R-TX) Grassley (R-IA) Klobuchar (D-MN)	CR 32(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1199/BILLS-118s1199rs.pdf **Summary:** Would require probation officer, in preparing PSR, to request information from multidisciplinary child-abuse team or other appropriate sources "to determine the impact of the offense on a child victim and any other children who may have been affected by the offense."	• 05/15/2023: Reported favorably with an amendment; placed on Senate Legislative Calendar under General Orders • 04/19/2023: Introduced in Senate; referred to Judiciary Committee
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **S. 1569** *Sponsor:*	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors			
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 5 Democratic cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Federal Extreme Risk Protection Order Act of 2023	**H.R. 3018** *Sponsor:* McBath (D-GA) *Cosponsor:* 95 Democratic cosponsors	CV? CR?	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3018/BILLS-118hr3018ih.pdf **Summary:** Would authorize a new kind of ex parte and permanent injunctive relief, albeit one sounding in criminal law, not civil law. The injunctive relief could also result in property forfeiture. May need new rulemaking to account for this kind of hybrid procedure.	• 04/28/2023: Introduced in House; referred to Judiciary Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Clean Slate Act of 2023	**H.R. 2930** *Sponsor:* Blunt (D-DE) *Cosponsors:* 7 bipartisan cosponsors	CR 49.1	**Bill Text:** https://www.congress.gov/118/bills/hr2930/BILLS-118hr2930ih.pdf **Summary:** Would mandate sealing of nonviolent federal marijuana offenses 1 year after sentence completed and sealing of federal criminal records relating to judgment of acquittal or dismissal. Mandatory sealing rules would have retroactive effect. Would allow certain nonviolent offenders convicted of no more than two felonies to	• 04/27/2023: Introduced in House; referred to Judiciary

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			petition for sealing of federal criminal records.	
Women in Criminal Justice Reform Act	**H.R. 2954** *Sponsor:* Kamlager-Dove (D-CA) *Cosponsors:* 9 Democratic & 1 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2954/BILLS-118hr2954ih.pdf **Summary:** Would create a pretrial diversion program for federal criminal cases; may need new rulemaking for criminal procedure (e.g., to allow for withdrawal of guilty plea under diversion program).	• 04/27/2023: Introduced in House; referred to Judiciary, Ways & Means, and Energy & Commerce Committees
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 22 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would create new Fed. Rule of Evidence to exclude "evidence of a defendant's creative or artistic expression, whether original or derivative" as evidence against that defendant (not restricted to criminal cases); would permit it on certain showings by the government by clear and convincing evidence (but not clear what would happen in a civil case if the government is not a party).	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 2782** *Sponsor:* Porter (D-CA) *Cosponsor:* Nadler (D-NY) Cicilline (D-RI) Jayapal (D-WA)	CV 8, 12	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2782/BILLS-118hr2782ih.pdf **Summary:** Would abrogate *Twombly*'s pleading standard, at least in antitrust cases.	• 04/20/2023: Introduced in House; referred to Judiciary Committee
First Step Implementation Act of 2023	**S. 1251** *Sponsor:* Durbin (D-IL) *Cosponsors:* 10 bipartisan cosponsors	AP 4(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1251/BILLS-118s1251is.pdf **Summary:** Would provide that Appellate Rule 4(a) governs the time limit for an appeal of a final order on a motion to modify a term of imprisonment imposed for crimes committed before age 18 .	• 04/20/2023: Introduced in Senate; referred to Judiciary Committee
Securing and Enabling Commerce Using Remote and Electronic (SECURE)	**H.R. 1059** *Sponsor:* Kelly (R-ND) *Cosponsors:*	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1059/BILLS-118hr1059rfs.pdf https://www.congress.gov/118/bills/s1212/BILLS-118s1212is.pdf	• 04/19/2023: S. 1212 introduced in Senate; referred to Judiciary Committee • 02/28/2023: H.R. 1059 received in Senate;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Notarization Act of 2023	30 bipartisan cosponsors **S. 1212** *Sponsor:* Cramer (R-ND) *Cosponsor:* 9 bipartisan cosponsors		**Summary:** Would establish national standards for remote electronic notarization; would make signature and title of notary prima facie or conclusive evidence in determining genuineness or authority to perform notarization.	referred to Judiciary Committee • 02/27/2023: H.R. 1059 passed House by voice vote • 02/17/2023: H.R. 1059 introduced in House; referred to Judiciary Committee
Online Privacy Act of 2023	**H.R. 2701** *Sponsor:* Eshoo (D-CA) *Cosponsor:* Lofgren (D-CA)	CV 4, CV 23	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2701/BILLS-118hr2701ih.pdf **Summary:** Would permit service of "petition for enforcement" for civil investigative demand under § 401 to be served by mail, and proof of service would be permitted by "verified return" including, if applicable, any "return post office receipt of delivery." Would require a class action to be prosecuted by a nonprofit organization, not an individual, and mandates equal division of total damages among entire class.	• 04/19/2023: Introduced in House; referred to Energy & Commerce, House Administration, Judiciary, and Science, Space & Technology Committees
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Would terminate the national emergency declared March 13, 2020, by President Trump. Ends authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 04/10/2023: Signed into law • 03/29/2023: Passed Senate (68–23) • 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit, after JCUS promulgates guidelines, district court cases to be photographed, electronically recorded,	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Markey (D-MA) Cornyn (R-TX)		broadcast, or televised, notwithstanding any other provision of law (e.g., CR 53).	
Everyone can Notice-and-Takedown Distribution of Child Sexual Abuse Material (END CSAM) Act	**S. 823** *Sponsor:* Hawley (R-MO)	CV 4(i)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s823/BILLS-118s823is.pdf **Summary:** Would allow a private person to bring a qui tam civil action against a social-media company that does not disable access to or remove an offending visual depiction within 10 days of notice; complaint must be served on the government under Civil Rule 4(i)	• 03/15/2023: Introduced in Senate; referred to Judiciary Committee
Justice for Kennedy (JFK) Act of 2023	**H.R. 637** *Sponsor:* Schweikert (R-AZ)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr637/BILLS-118hr637ih.pdf **Summary:** Would deem that a "request for disclosure of assassination records . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure."	• 03/07/2023: Introduced in House; referred to Judiciary, Oversight & Accountability, Ways & Means, Foreign Affairs, Armed Services, and Intelligence Committees
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Would bar admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself).	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Would require "an audio or audio visual recording of interviews of aliens subject to expedited removal" and would require the recording's consideration "as evidence in any further proceedings involving the alien."	• 02/24/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel."	• 02/14/2023: Introduced in House; referred to Judiciary Committee
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.	• 02/07/2023: Referred to subcommittee • 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, would bar use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; would create evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; and would bar use of federal body-cam footage from use as evidence if taken in violation of act or other law.	• 02/06/2023: Introduced in House; referred to Judiciary Committee
Save Americans from the Fentanyl Emergency (SAFE) Act	**H.R. 568** *Sponsor:* Pappas (D-NH) *Cosponsors:* 18 bipartisan cosponsors	CR 43	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr568/BILLS-118hr568ih.pdf **Summary:** Would permit reduction or vacatur of sentence for certain crimes involving controlled substances that are "removed from designation as a fentanyl-related substance"; would not require defendant to be present at any hearing on whether to vacate or reduce a sentence.	• 02/03/2023: Referred to Health Subcommittee • 01/26/2023: Introduced in House; referred to Energy & Commerce and Judiciary Committees
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/01/2023: Referred to subcommittee • 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory	• 01/31/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	
No Vaccine Passports Act	S. 181 *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure.	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee
No Vaccine Mandates Act of 2023	S. 167 *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure.	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	S. 147 *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Would prohibit disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings.	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	H.R. 461 *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:**	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	S. 18 *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors		Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed. Would create a private cause of action and criminal penalties and impose a duty on courts "to expedite to the greatest possible extent" such matters.	referred to Judiciary Committee
Lunar New Year Day Act	H.R. 430 *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	H.R. 308 *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act	H.R. 241 *Sponsor:* Calvert (R-CA) *Cosponsors:* Waltz (R-FL) Grothman (R-WI)	CV 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr241/BILLS-118hr241ih.pdf **Summary:** Would require JCUS to "under rule 16 of the Federal Rules of Civil Procedure or any other applicable law, in consultation with property owners and representatives of the disability rights community, develop a model program to promote the use of alternative dispute resolution mechanisms, including a stay of discovery during mediation, to resolve claims of architectural barriers to access for public accommodations."	• 01/10/2023: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2023	H.R. 89 *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/118/bills/hr89/BILLS-118hr89ih.pdf **Summary:** Would prohibit federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 01/09/2023: Introduced in House; referred to Judiciary Committee
Kalief's Law	H.R. 44 *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf	• 01/09/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			Summary: Would impose strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth.	

TAB 4

Advisory Committee on Evidence Rules

Fall 2023 Meeting

Agenda Book Tab IV

I. Discussion of Amendments Proposed by Evidence Scholars

A. Jeffrey Bellin ---- Rule 609

B. Edward Imwinkelried --- Rule 608(b)

C. Hillel Bavli --- Rule 404(b)

D. Erin Murphy --- Rule 412

E. Andrea Roth --- Machine-generated Evidence.

II. Discussion of Possible Amendments to Article 9 to Address the Problem of Deepfakes

A. Amendment to Rule 901(b)(9) proposed by Paul Grimm and Maura Grossman:

(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 proponent 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.

B. Amendment to Apply the Rule 104(a) Standard to Deepfakes:

Rule 901(c). Audiovisual Evidence. Notwithstanding subdivision (a), to satisfy the requirement of authenticating or identifying an item of audiovisual evidence, the proponent must produce evidence that it is more likely than not that the item is what the proponent claims it is. The court must decide any question about whether the evidence is admissible.

C. Amendment to Require Corroboration by the Proponent:

Rule 901(c). Audiovisual Evidence. Before a court admits audiovisual evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources.

TAB 5

FORDHAM

University School of Law

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Prior Statements of Testifying Witnesses and the Hearsay Rule
Date: October 1, 2023

The Chair and Reporter request the Committee's consideration of whether an amendment should be proposed to change the current treatment of prior statements of testifying witnesses under the hearsay rule. Here is the hypothetical: Assume that a witness is testifying in a murder case. If the witness says, "Joe told me that the defendant shot the victim" Joe's out-of-court statement is excluded as hearsay, because the jury is in no position to assess the credibility of Joe. But what if the witness says, "I told Joe that I saw the defendant shoot the victim"? Theoretically that prior statement should not be hearsay, because the declarant's credibility *can* be assessed by the jury --- the declarant is the witness, who can be cross-examined. Yet, under the Federal Rules, that statement *is* hearsay. And while, of course, there are many exceptions to the hearsay rule, the exceptions for prior statements of testifying witnesses (especially prior inconsistent statements) are very narrow.

The Chair and Reporter request that the Committee consider an amendment that would expand the admissibility of prior statements of testifying witnesses over a hearsay objection.

Before deciding on an amendment, the Committee will need to work through several important substantive questions:

1) Should prior statements of testifying witnesses be placed outside the hearsay definition – or should an exception be established --- given the fact that the declarant is subject to cross-examination about the statement?

2) Assuming that prior witness statements remain subject to the hearsay rule, should the current exemption in Rule 801(d)(1)(A) be expanded to allow for substantive admissibility of all (or more if not all) prior inconsistent statements? Currently, substantive

admissibility is extremely limited --- to only those statements that were made under oath at a formal proceeding.[1]

3) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to expand the exemption for prior consistent statements --- Rule 801(d)(1)(B) --- given the recent expansion that became effective in 2014? The 2014 amendment provides that if a prior consistent statement is properly admitted under Rule 403 to rehabilitate a witness whose credibility has been attacked,[2] it is also admissible as substantive evidence, i.e., as proof that the content in the statement is true.[3] But no other consistent statement is admissible for its truth under Rule 801(d)(1)(B).

4) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to alter the existing exemption in Rule 801(d)(1)(C) for statements of identification?[4]

This memorandum is divided into five parts. Part One discusses the arguments for and against classifying prior statements of testifying witnesses as hearsay. Part Two discusses the history behind the Federal Rules' treatment of prior inconsistent statements; and Part Two also discusses different approaches taken in some of the states. Part Three provides the history of the Federal Rules' treatment of prior consistent statements, including the 2014 amendment, and discusses the possibility of further expansion of admissibility of such statements. Part Four briefly discusses prior statements of identification and considers whether any changes to the existing exemption would be useful. Part Five provides preliminary drafting alternatives.

It must be emphasized that there is no action item before the Committee on admissibility of prior statements of testifying witnesses. The suggestion is that the Committee engage in a preliminary review and discussion. If there is interest, then further discussion, and perhaps a vote, will take place at the Spring, 2024 meeting.

[1] Fed.R. Evid. 801(d)(1)(A).

[2] See the Committee Note to the 2014 amendment to Rule 801(d)(1)(B) (noting that "to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403.").

[3] Fed.R.Evid. 801(d)(1)(B), as amended effective December 1, 2014.

[4] Fed. R. 801(d)(1)(C) provides that a declarant's statement of identification is substantively admissible if the declarant testifies at trial subject to cross-examination.

I. Should Prior Statements of Testifying Witnesses Be Treated as Hearsay?

A. Arguments in Favor of Admitting Prior Statements of Witnesses as Substantive Evidence

Federal Rule 801(c) defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing." Thus, an earlier statement of a testifying witness, when offered for its truth, is hearsay. So when the witness says, "I told my cousin that I saw the defendant texting while driving" that is inadmissible to prove that the defendant was texting when driving, unless a hearsay exception can be found.[5]

Many have argued that prior statements of testifying witnesses should not be classified as hearsay. Probably the leading proponent for placing prior statements of testifying witnesses outside the hearsay rule was Professor Edmund Morgan. Morgan's basic argument is that the rule against hearsay stems from a concern that the out-of-court declarant's credibility cannot be assessed by the traditional methods of oath, cross-examination, and view of demeanor. But when the declarant *is* the witness at trial, she *will* be under oath and subject to cross-examination and review of demeanor. Morgan makes this point in his famous article, *Hearsay Dangers and the Application of the Hearsay Concept*:[6]

> When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. * * * The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is *now* under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part."
>
> * * *

Morgan realizes, of course that when the witness made the prior statement, she was not subjected to cross-examination, oath and a view of demeanor at that time. But he argues that the existence of these protections *at the time of trial* should suffice. Morgan observes that if the prior statement is consistent with the in-court testimony, it is being affirmed by the witness "under oath

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[5] Of course, the witness could also testify to what he saw at the time of the accident, and that would not be hearsay. Under the Federal Rule, though, the witness's statement about the prior event is treated no differently, for definitional purposes, than any other declarant's statement about the event --- if it is offered for truth, it is hearsay.

One might ask why a party would want to admit a witness's prior statement about an event when the witness can simply testify about the event itself. The answer of course is that in many cases the in-court testimony of the event has a different, possibly lesser, evidentiary significance than the statement made earlier and closer in time to the event. Moreover, if the witness has now changed his story about the evident, the prior (inconsistent) statement obviously has a different effect than the in-court testimony.

[6] 62 Harv. L.Rev. 177, 192-94 (1948).

subject to all sanctions and to cross-examination in the presence of the trier who is to value it." As Morgan notes, a prior consistent statement might be excluded on the grounds that it is cumulative, "but surely the rejection should not be on the ground that the statement involves any danger inherent in hearsay."

But what if the witness denies having made any statement at all? That should not be a problem, according to Morgan, because the witness "will usually swear that he tried to tell the truth in anything that he may have said." Thus, cross-examination on that averment will be sufficient to regulate any credibility questions as of the time the statement was made. If on the other hand the witness concedes that he made the statement but now swears that it wasn't true, the factfinder, viewing the testimony of the person who made both statements, is in a good position to assess which, if either, story represents the truth in light of all the facts. Morgan concludes that "[i]n any of these situations Proponent is not asking Trier to rely upon the credibility of anyone who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no good reason for classifying the evidence as hearsay."

To this classic argument by Morgan, two further points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described, and so is less likely to be impaired by faulty memory or a litigation motive.[7] Second, treating all prior statements of testifying witnesses as outside the hearsay rule would dispense with the need to give confusing limiting instructions as to those statements that would be admissible anyway for credibility purposes --- e.g., "the prior inconsistent statement may not be considered as a proof of any fact, but only for its bearing on the credibility of the witness."[8] Indeed the interest in avoiding difficult-to-follow instructions was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B) that eliminated the distinction between substantive and rehabilitative uses for prior consistent statements.

[7] *See* Comments of Standing Committee on Rules of Practice and Procedure and Advisory Committee on Rules of Evidence, enclosed in the Letter of May 22, 1974, Judge Thomsen to Senator Eastland, Senate Hearings 53, 64–66 ("The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play.").

[8] *See,* Morgan, *supra,* at 194: "Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? * * * Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?"

See also Steven DeBraccio, *The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials,* 78 Albany L. Rev. 269, 297 (2014) ("it would be more beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion of the usefulness of limiting instructions").

B. Arguments in Favor of Treating Prior Statements of Witnesses as Hearsay

The classic argument for treating prior statements of witnesses as hearsay was set forth by Justice Stone of the Minnesota Supreme Court in *State v. Saporen,* 285 N.W. 898, 901 (Minn. 1939). He contended that delayed cross-examination of a statement at trial is simply not the same as cross-examination at the time the statement is made:

> The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

The *Saporen* court's view of cross-examination at trial as "striking while the iron is hot" is surely overstated. It is not as if an adversary's witness is speaking extemporaneously and off-the-cuff during direct testimony. Trial testimony is usually prepared in advance and elicited in a formal q and a. For the cross-examiner of a witness at trial, the iron is not really hot. Put another way, the asserted gap in effectiveness between cross-examination about a prior statement and cross-examination of trial testimony is surely not as wide as the *Saporen* court would have it. Furthermore, the court's contention that "false testimony is likely to harden" is completely inapt when it comes to a prior inconsistent statement. When a witness has made a statement that is different from trial testimony, it is pretty obvious that the prior statement never "hardened."

That said, there is certainly dispute in the profession about the effectiveness of delayed cross-examination as compared to cross-examination of trial testimony. Some have argued that delayed cross-examination is particularly ineffective when the witness denies ever having made a statement. How do you cross-examine someone about their perceptions at the time of a prior statement when they deny having made it? The counterargument is that such a denial is implausible and suspect in many circumstances, such as when the prior statement was recorded. In such cases, there is no reason to exclude the prior statement, because the witness can be cross-examined about that implausibility. And moreover, a witness should not be allowed to bar admissibility of his prior statement simply by declaring falsely than that he never made it. The witness should not have that kind of veto power.

Besides the alleged infirmity of delayed cross-examination, there are two other arguments that have been put forth in favor of treating prior statements of testifying witnesses as hearsay. The first is illustrated by *United States v. Check,*[9] a case decided in the early days of the Federal Rules, in which the prosecution and the trial judge were apparently under the misimpression that prior statements of testifying witnesses were not hearsay. A government agent testified to a conversation he had with Check's accomplice. The testimony was carefully crafted to refer only to what the agent had said, and not to what the accomplice had said --- because what the accomplice said would be hearsay. So here is an example of the agent's trial testimony:

[9] 582 F.2d 668 (2nd Cir. 1978).

> "It told William Cali that I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from a captain of detectives [i.e., Check]."

The government took the position that the agent's testimony was not hearsay because it referred only to his own prior statements. So it can be argued that, if the rule actually were that prior statements of witnesses are not hearsay, cases like *Check* would arise and parties would offer the witness's side of a conversation pretextually to prove the other side. That is, treating prior statements of witnesses as not hearsay would result in those statements serving as conduits for the hearsay parts of the conversation.

This concern is overwrought, however, as shown by the result in *Check.* The Second Circuit reversed the conviction for two reasons. First, the trial court and the prosecution were wrong in believing that the agent's own statements could not be hearsay just because the agent was testifying. But second, even if they were right, the agent's statements should not have been admitted because "notwithstanding the artful phrasing * * * [the agent] was on numerous occasions throughout his testimony in essence conveying to the jury the precise substance of out-of-court statements Cali made to him." The court concluded that "in substance, significant portions of Spinelli's testimony regarding his conversations with Cali were indeed hearsay, for that testimony was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial."[10] In other words, even if the hearsay rule is changed to allow admission of prior statements of witnesses for their truth, those statements would still be excluded if they were being used to carry in hearsay statements of other declarants.[11]

The third argument in favor of excluding prior witness statements as hearsay focuses on prior *consistent* statements. If all prior statements were admissible for their truth, there would be an incentive for parties to encourage their witnesses to generate consistent statements before trial. Then the witness, on direct examination, could be asked about all the previous statements that he made --- to his grandmother, to the church congregation, to the bus driver on the way to testify, etc. etc. The focus would then be shifted, problematically, to the prior statements as opposed to the in-court testimony. [12]

There are several counter-arguments responding to the concern about manufactured consistent statements. First, you don't need an overbroad hearsay rule to regulate that problem, because litigation-generated extrinsic statements can be excluded under Rule 403 as cumulative

[10] Id. at 679.

[11] See also, United States v. Meises*,* 645 F.3d 5, 22 (1st Cir. 2011) (hearsay rule violated even though the government did not introduce the hearsay statements directly; because the statements were effectively before the jury in the context of the trial "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication.").

[12] See State v. Saporen, 285 N.W. 898, 901 (Minn. 1939) (noting the "practical reason" for treating prior witness statements as hearsay --- that it would create temptation and opportunity to manufacture evidence).

and unduly prejudicial and time-wasting.[13] Second, the witness can be cross-examined about the context and generation of the consistent statements.[14] Third, and probably most important, this concern about overuse of consistent statements should not lead to a rule that *all* prior statements are hearsay; there is no risk of witnesses manufacturing *inconsistent* statements, and so the concern about generating evidence is localized and should be addressed to prior consistent statements only.

There is a fourth argument against admitting prior witness statements in criminal cases that can be dismissed. That argument is that admitting a prior statement of a witness against a criminal defendant violates his right to confrontation. The Supreme Court has rejected that argument in at least three cases, finding that an opportunity to cross-examine the witness about his prior statement satisfies the Confrontation Clause.[15]

In sum, there is much to be said in favor of a rule that exempts prior witness statements from the hearsay rule. At the very least, there is a strong case for broader admissibility of prior inconsistent statements. It is notable that several states admit *all* prior statements of witnesses for their truth. For example, Kansas **(**K.S.A. 60-460) states its hearsay rule and then provides an exception for all prior statements of testifying witnesses:

> **60-460. Hearsay evidence excluded; exceptions**
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> (a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness. * * *

Similarly, Puerto Rico provides substantive admissibility for *all* prior statements of witnesses, in a hearsay exception:

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[13] The corresponding response to the Rule 403 argument is that the rule is highly discretionary and only operates to exclude evidence where its probative value is *substantially* outweighed by the risk of prejudice, confusion and delay.

[14] The response here is, once again, that cross-examination must strike while the iron is hot.

[15] See California v. Green, 399 U.S. 149 (1970) (rejecting confrontation claim where the defendant had an opportunity to cross-examine a prosecution witness about the witness's prior statement); United States v. Owens, 484 U.S. 554 (1988) (no confrontation violation where witness was subject to cross-examination about his prior statement of identification, even though he had no memory about why he made the identification); Crawford v. Washington, 541 U.S. 36, 59, n.9 (2004) ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.") (citing *Green*).

> **Rule 63. Prior statement by witness**. As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.

Delaware has a similar provision. 11 Del. Code §3507 provides that any voluntary prior statement of a testifying witness "may be used as affirmative evidence with substantive independent testimonial value" and the party need not show surprise.

There is nothing to indicate that the sky has fallen or that advocacy has been impaired as a result of more liberal admissibility in these jurisdictions.

II. Prior Inconsistent Statements

A. How Did We Get Here?: The History of Federal Rule 801(d)(1)(A)

The common-law approach to prior inconsistent statements was that they were hearsay and were admissible only to impeach the declarant-witness. The original Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was "troublesome."[16] It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." And the Committee thought that it had "never been satisfactorily explained why cross-examination cannot be subsequently conducted with success." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."[17]

For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back significantly on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements

[16] Advisory Committee Note to Rule 801(d)(1)(A).

[17] Id.

"given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."[18]

There are problems with each of the rationales for Congress's tightening of the hearsay exception for prior inconsistent statements. The first Congressional concern --- that the statement may never have been made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators--the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made, and this becomes a jury question.[19] Really, Congress's argument proves too much, because admitting *any* out-of-court statement raises the question of whether it was ever made. Why do we find the in-court witness's testimony that the statement was made in all other situations sufficient, but question in-court testimony (from the declarant-witness or by someone else with knowledge) when it comes to prior inconsistent statements?[20]

It is possible, though, that the Congressional concern about the statement having been made was about cross-examining witnesses who deny making a prior inconsistent statement, as discussed above. That risk is minimized by the fact that the statement was recorded at a formal proceeding --- it's hard to deny such a statement having been made. But as stated above, impeachment of a witness who denies making a statement can be effective; and at any rate the formality requirement is overkill because there can be many ways to prove an informal prior statement even though the witness denies making it --- such as through witnesses, or if it was recorded.

Second, the requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But the fact is that the witness is now under oath at trial, subject to cross-examination. That should be a sufficient guarantee of reliability, and adding the oath and formality requirements raise the admissibility hurdle for prior inconsistent statements much higher than for most of the other hearsay exceptions.

The end result of this Congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially the major

[18] House Comm. on Judiciary, Fed. Rules of Evidence, H.R.Rep. No. 650, 93d Cong., 1st Sess. p. 13.

[19] Of course the inconsistent statement could be proven up through hearsay subject to an exception, such as a business or public record. The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

[20] Even if the concern about manufactured prior statements were legitimate, it would not need to be regulated by the requirements of oath at a formal proceeding. A less onerous requirement, such as that the statement was recorded, should surely suffice.

function for Rule 801(d)(1)(A) is to protect the proponent (usually the government) from having its substantive case sapped by turncoat witnesses, when such witnesses have testified before the grand jury and then change their testimony at trial.[21] Congress's rationales for adding the oath and formality requirements are simply not strong enough to justify gutting the exception proposed by the Advisory Committee. This is especially so because the limitation comes with significant negative consequences, including the following:

1) excluding testimony as hearsay even though the declarant can be cross-examined;

2) requiring a difficult-to-follow jury instruction, i.e., that the statement can be used only to impeach the witness but not for its truth --- even though in many cases its impeachment value is dependent on it being true;

3) raising the possibility that parties will seek to evade the rule by calling witnesses to "impeach" them with prior inconsistent statements, with the hope that the jury will use the statements as proof of the matter asserted. That will require the courts to investigate and determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible);[22] and

4) raising the possibility that prior inconsistent statements not admissible for truth under Rule 801(d)(1)(A) will still be found admissible for truth under the residual exception (Rule 807) anyway. Federal Rule 807 provides that a hearsay statement not admissible under any other exception might nonetheless be admitted if it is trustworthy, and if other stated admissibility requirements are met. As applied to Rule 801(D)(1)(A), a proponent might argue that a prior inconsistent statement is admissible for its truth because it is reliable, even if it was not made under oath at a formal proceeding --- and the reliability would be, ironically, that the declarant was subject to cross-examination about the prior statement.[23]

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[21] At an Advisory Committee Symposium in 2016, a U.S. Attorney stated that the only use of Rule 801(d)(1)(A) was to deal with "wobblers" --- who say one thing one week, and another thing the next. He stated that you catch them in the week where they are saying the defendant did it, and bring them before the grand jury, thereby boxing up the testimony so that you don't have to worry about a later wobble.

[22] *See, e.g.,* United States v. Ince, 21 F.3d 576, 579 (4th Cir. 1994) (government's impeachment of its witness with a prior inconsistent statement was improper where "the only apparent purpose" for the impeachment "was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence). *Compare* United States v. Kane, 944 F.2d 1406 (7th Cir. 1991) (impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her). *See also* People v. Fitzpatrick, 40 N.Y.2d 44, 49-50, 386 N.Y.S.2d 28 (1976) (noting the concern that "the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature"; also noting that "a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination").

[23] *See, e.g.,* United States v. Valdez-Soto, 31 F.3d 1467, 1470 (9th Cir. 1994) (finding a prior inconsistent statement not under oath to be properly admitted as substantive evidence under the residual exception, noting that "the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule.").

B. Two Expressed Concerns About Expanding Substantive Admissibility of Prior Inconsistent Statements

At least as a matter of hearsay theory, it seems hard to deny that the current Rule 801(d)(1)(A) is too narrow. Logically the rule should allow substantive admissibility of all prior inconsistent statements. At the least it should be expanded to allow substantive admissibility to all inconsistent statements that can be easily proven to have been actually made.

But there are at least two practical arguments that have been made in opposition to expanding the exception, that need to be addressed. Here they are:

1. Expanded Substantive Admissibility Only Benefits the Party with the Burden of Proof

There are two major benefits in litigation when a statement is given substantive rather than impeachment effect:

1. Most importantly, substantive evidence is all that the court may consider when resolving motions related to whether there is enough evidence to create a jury question, or sufficient evidence to support a jury verdict --- e.g., directed verdicts, Criminal Rule 29 motions, motions for summary judgment, appeals on grounds of insufficient evidence, etc.[24] On these legal questions, the judge may not consider impeachment evidence; impeachment evidence is about credibility of witnesses, and credibility is the classic jury question.[25] So it is an advantage for a proponent when a prior inconsistent statement is admissible not only to impeach but for its truth.

2. Another advantage of substantive admissibility is that the party can argue to the jury that a fact has been established by the statement (e.g., the time of the crime has been shown by the witness's prior statement); that argument is impermissible if the statement is offered only for impeachment.

An argument has been made, on the basis of the first point above, that the major beneficiary of a rule providing substantive admissibility of prior inconsistent statements is the party with the burden of proof --- and the argument really focuses on concerns about giving the government an advantage in a criminal case.

It seems clearly true that an expansion of Rule 801(d)(1)(A) will help the government in a criminal case. For example, at an Advisory Committee Symposium in 2017, a California prosecutor stated that substantive admissibility of prior inconsistent statements (under the California Rule of Evidence) is critical in gang prosecutions, where many witnesses recant their prior statements out of fear. The prosecutor stated that if the prior statements could not be used

[24] The substantive/impeachment distinction is not important for motions for a new trial under Criminal Rule 33, because in ruling on such a motion "the district court may weigh the evidence and consider the credibility of the witnesses." United States v. Moore, 76 F.4th 1355, 1363 (11th Cir. 2023).

[25] See, e.g., United States v. Green, 981 F.3d 945, 960 (11th Cir. 2020) (reviewing the denial of a Rule 29 motion: "to the extent the appellants' arguments challenge the credibility of various witnesses, credibility determinations are exclusively within the province of the jury").

substantively, the prosecution often would not be able to present sufficient substantive evidence to the jury.

It is not immediately obvious that providing this evidentiary advantage to the government is a bad thing. There are a number of rule amendments that have favored a party on one side of the v, and that fact has not precluded the amendment. To take three recent examples: 1) the amendments to Rule 702 favor defendants (in the sense that it is defendants that will more often invoke the protections); 2) the amendments to Rule 106 definitely favor criminal defendants (in the sense that criminal defendants will more likely, in practice, take advantage of the changes); and 3) the fortification of the notice requirements in Rule 404(b) operate exclusively in favor of criminal defendants. Thus, history shows that if the amendment is valid as a matter of evidence, it should not matter where the benefits fall.

When it comes down to it, most rules establishing admissibility of substantive evidence will favor the party with the burden of proof. For example, the excited utterance exception favors the prosecution, because most often such statements identify the defendant as a perpetrator (e.g., a 911 call, "my brother just shot me"), and if there were no exception the statements could not be offered as proof of a fact. The fact is that most if not all of the hearsay exceptions favor the government in a criminal case, because the government has the burden of proof, and the government is ordinarily the party that invokes a hearsay exception in a criminal case. This fact cannot be grounds for rejecting the hearsay exceptions.

So it should not be dispositive that the major beneficiary of expansion of Rule 801(d)(1)(A) is the prosecution in a criminal case. But even if the government is the primary beneficiary, it must be remembered that the defendant will benefit from an expanded Rule 801(d)(1)(A) as well. If the exemption is expanded, it will mean that the defendant, just like the government, will be able to present the inconsistent statement to the jury as proof of a fact. Moreover, if the defendant can use prior inconsistent statements of government witnesses substantively, those statements may be the substantive evidence that would in fact support the defendant's motion for a judgment of acquittal or an attack on the verdict for insufficient evidence. That is, a piece of substantive proof offered by the defendant strengthens the defense claim about the weakness of the government's case.

The beneficial effect to the defendant of more expansive substantive admissibility of prior inconsistent statements is demonstrated in the recent case of *United States v. McGirt,* 71 F.4th 755 (10th Cir. 2023). McGirt was convicted of child sex abuse in an Oklahoma state court, but that verdict was vacated because the crime occurred in Indian country and the Supreme Court found that the state did not have jurisdiction to prosecute. At that state trial, the alleged victim and her grandmother testified. The grandmother's testimony, in particular, tended to favor McGirt, who was in a relationship with her at that time. At the federal trial, that relationship was over, and both the child and the mother testified against the defendant. Their testimony at the federal trial varied in a number of significant respects from their testimony at the state trial --- that was especially true of the grandmother. The defendant raised these inconsistencies on cross-examination and argued that the witnesses' prior statements should be admitted as proof of a fact. The trial court disagreed and instructed the jury that the inconsistencies could only be used for impeachment. That ruling was error, because the inconsistent statements were made under oath at the prior state proceeding. They fell within the narrow exception of the current Rule 801(d)(1)(A). The government argued

that the error was harmless, but the Tenth Circuit disagreed and reversed the conviction. The court's analysis provides a compelling example of the importance of the defendant being able to use prior inconsistent statements of government witnesses as substantive evidence.

The court in *McGirt*, in assessing the harmfulness of the error, was required to consider the difference between substantive and impeachment evidence, as applied in this case to the defendant. It noted that if the inconsistent statements could have been used substantively, the jury could have found as a fact that the child did not act unusually after the alleged event; that the child's accusations had been concocted by the child's mother, who resented McGirt's relationship with the grandmother; and that the child and the defendant were rarely alone in the two week period in which the alleged abuse occurred. These were all important facts bearing on the defendant's innocence. Moreover, the court pointed out that "the prior [inconsistent] testimony of a witness would not only impeach the testimony of that witness; if used substantively, the prior testimony could also undermine the testimony of other witnesses" for the government. The court reversed the conviction.

In sum, while it is true that expanding substantive admissibility of prior inconsistent statements will often benefit the government, such a change will also benefit the defendant. And the fact that one side of the v might find it more beneficial is not dispositive, given that the change is based on the valid premise that such statements should be admissible because the declarant can be cross-examined about them at trial.

2. A Party Might Want to Use a Prior Inconsistent Statement Only for Impeachment Purposes.

Some have argued that if prior inconsistent statements become substantively admissible, this would disadvantage a party that wishes only to impeach a witness and does not want to use the statement as proof of a fact. Here is the hypothetical: the defendant is charged with conspiracy to distribute drugs. The drugs were found in a car. A government witness testifies at trial that he saw the defendant standing just outside the car. The witness has previously made a statement that he saw the defendant in the car. The defense counsel wants to raise the inconsistency between the two statements. But his goal is to show that the witness is not to be believed as to *either* of them. He definitely does not want the jury to use the prior statement for the truth of the assertion that the defendant was inside the car.

This is an interesting problem, but in the end it should not mean that expanding substantive admissibility for prior inconsistent statements should be rejected. For one thing, it is an unusual fact situation. In most cases, the prior inconsistent statement will provide substantive content that is useful to the defendant, as in *McGirt, supra.* Moreover, it is risky to impeach a witness in the rare situation in which the content of the statement is so incriminating. And that is true even under current law, because while the jury is instructed not to use the statement as proof that the defendant was in the car, it is probable that at least some jurors will use the statement that way.

More importantly, expanding the Rule 801(d)(1)(A) exemption does not mean that the cross-examiner *must* offer the prior statement as proof of a fact. No rule of evidence prevents a party from choosing not to take advantage of an Evidence Rule. Most often this happens when parties choose not to object even though they have a valid objection or choose not to ask for a limiting instruction even though they have a right to do so. But the principle should apply equally when an item of evidence has two permissible uses, and a proponent offers it for only one of them. Should the amendment proceed, the Committee Note could clarify that a party is free to refrain from offering a prior inconsistent statement for its truth. Language for a note provision might read as follows:

> While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement offered only for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and the prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

C. State Variations

In deciding whether to expand the admissibility of prior inconsistent statements, there are many reference points provided in the State rules of evidence. It is particularly notable that a large number of states have rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. The state deviation is far greater than that with respect to most of the other Federal Rules of Evidence.

1. Rejection of Congressional limitation in Rule 801(d)(1)(A):

Many of the states rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. In the following states, all prior inconsistent statements are admissible for their truth:

Alaska
Arizona
California
Colorado
Georgia
Montana
Nevada
Rhode Island
South Carolina
Wisconsin. [26]

[26] See Alaska R.Evid. 801(d)(1)(A); Ariz. R. Evid. 801(d)(1)(a); Cal. Ev. Code §1235; Col.R.Evid. 801(d)(1)(A); Ga. R.Evid. 801(d)(1)(A); Montana R. Evid. 801(d)(1)(A); 4 Nev. Stat. §51.035 (2)(A); R.I. R. Evid. 801(d)(1)(A); S.C. R. Evid. 801(d)(1)(A).

2. Variations short of outright rejection of the Congressional limitation.

Other states provide less onerous alternatives to the Congressional restriction on substantive admissibility of prior inconsistent statements. For example:

Arkansas requires prior oath at a formal proceeding for civil cases only. [27]

Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers:

> A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.[28]

Requirements (B) and (C) are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602). But the Connecticut version does suggest a compromise approach that might be employed --- which would expand the exception so long as there is assurance that the prior inconsistent statement was actually made. Again, whether it was made is not a hearsay problem, but a provision requiring that the statement be recorded, signed, etc., would satisfy those whose concern is about witnesses denying their prior statements.

Hawaii, similar to Connecticut, expands the exception beyond the Congressional limitation, while still addressing concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are "reduced to writing and signed or otherwise adopted by the declarant" and also when they are "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement." [29]

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that "the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition."[30] Under the Illinois rule, the statement does not need to be recorded if the declarant

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It is worth remembering that Delaware, Kansas, and Puerto Rico admit *all* prior statements of testifying witnesses over a hearsay objection.

[27] Ark. R.Evid. 801(d)(1)(A).

[28] Conn. Code of Evid. R. 8-1.

[29] Hawaii R. Evid. 801(d)(1)(A).

[30] Ill. R.Evid. 801(d)(1)(A).

acknowledges making the statement while testifying at trial. The idea is that there should be no doubt about the existence of the prior statement if the declarant actually acknowledges making it. The concern, though, is how to determine whether a witness has actually "acknowledged" the prior statement. If the witness says "yeah, I might have said something about this before" is that an acknowledgment? Previous research on the Illinois provision, conducted by Professor Richter, uncovered a few cases considering whether a witness actually acknowledged making a statement where the witness said something less precise than "I acknowledge making the statement." Illinois has instituted the requirement of an "acknowledgment proceeding" to deal with such questions.

Louisiana does not permit substantive use of prior inconsistent statements in a civil case. Prior inconsistent statements are admissible substantively in a criminal case, "where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement." [31] So Louisiana's concern is about potential unreliability, and it is solved by corroboration. Again, the concern about reliability seems misplaced because the person who made the statement can be cross-examined about it. It's unclear why corroboration should be required for prior inconsistent statements but not for, say, a state of mind statement.

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been "reduced to writing and * * * signed by the declarant" or "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement."[32]

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party. However, if the witness is called by the proponent, safeguards must be met. The proponent must show that the statement "(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition."[33] It is unclear why, assuming there are risks of reliability and questions about whether the statement was ever made, those risks are only raised when the proponent calls the witness.

North Dakota applies the Congressional limitation in Rule 801(d)(1)(A) in criminal cases only.[34]

Pennsylvania, like Connecticut, expands beyond the Congressional limitation, but with an attempt to assure that the witness actually made the prior statement:

> **(1) Prior Inconsistent Statement of Declarant-Witness.** A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

[31] La. Code Evid. 801(d)(1)(A).
[32] Md. R. Evid. 5-802.1
[33] NJRE 801(d)(1)(A).
[34] N.D.R. Ev. 801(d)(1)(A).

(B) is a writing signed and adopted by the declarant; or
(C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.[35]

Utah rejects the congressional limitation and also treats prior statements as not hearsay when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
> (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten * * *[36]

Wyoming applies the Congressional limitation only in criminal cases.[37]

III. Prior Consistent Statements

A. A Short History of Rule 801(d)(1)(B), Ending With the 2014 Amendment

The original Advisory Committee's proposed rule creating a hearsay exemption for certain prior consistent statements turned out to be far less controversial in Congress than its proposal to allow all prior inconsistent statements. Part of the reason for the different treatment is that the substantive use of prior consistent statements is simply less important a matter. Treating inconsistent statements as substantive evidence can provide proof of a fact when it is the only evidence of that fact. That is important for motions to dismiss for lack of evidence and the like. In contrast, the difference between substantive and credibility-based use of prior consistent statements is evanescent – the witness has already testified, thus providing substantive evidence, and that testimony can be argued to the jury as proof of a fact; giving substantive effect to a prior consistent statement will usually have little to no practical effect. So there was not as much to get worked up about when it came to consistent statements.

That said, the Advisory Committee did carve out certain consistent statements for substantive use, tying the rule to an attack on the witness's credibility. The Committee Note explaining the provision puts it this way: "The prior consistent statement is consistent with the testimony given on the stand and, if the opposite party wishes to open the door for its admission in evidence [by attacking the credibility of the witness-declarant] then no sound reason is apparent

[35] Pa.R. Ev. 801(d)(1).
[36] Utah R. Evid. 801(d)(1)(A).
[37] Wyo. R. Evid. 801(d)(1)(A).

why it should not be received generally."[38] So the hearsay exemption is all about witness rehabilitation, and in that light, a hearsay exemption makes a lot of sense: if the consistent statement *is* going to be admitted to rehabilitate a witness, what sense does it make to exclude it from substantive use as hearsay?

The problem with the original Rule 801(d)(1)(B) was that it provided for substantive admissibility of only some, and not all, consistent statements that are properly admitted to rehabilitate a witness. The original rule provided for substantive admissibility only when the witness was attacked for having a bad motive or for recent fabrication, and only when the statement predated the existence of the motive or the interest to fabricate.[39] But other consistent statements can rehabilitate, and the same justification for substantive admissibility can be made: the party has opened the door by attacking the witness, and the consistent statement rebuts the attack.

The Advisory Committee Note to the 2014 amendment explains the problem of the too-narrow focus of the original rule, as well as the solution that the Advisory Committee provided. The Committee Note explains as follows:

> Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.
>
> * * * The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The 2014 Advisory Committee note makes a point of emphasizing the limited scope of the amendment. It does not provide for admission of more prior consistent statements. It simply makes all prior consistent statements that are admissible to rehabilitate the witness's credibility also admissible for the truth of the matter asserted.

> The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly

[38] Advisory Committee Note to Rule 801(d)(1)(B).
[39] Tome v. United States, 513 U.S. 150 (1995).

rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

So, Rule 801(d)(1)(B), as amended in 2014, provides as follows:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
* * *
(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

* * *

The intended effect of the amendment is to do away with the need to provide an unhelpful limiting instruction for all prior consistent statements that are admissible anyway to rehabilitate the witness's credibility. No longer need an instruction be given, for example, that "the statement that the witness made can be used only insofar as it explains his inconsistent statement, and not for the truth of any assertion in the consistent statement." These limiting instructions were considered not worth the candle due to their inherent difficulty and the lack of a practical distinction between substantive and credibility use of prior consistent statements.

The relative recency of the amendment to Rule 801(d)(1)(B) has an effect on what the Advisory Committee should do, if anything, with respect to admissibility of prior consistent statements. Certainly any *limiting* of the scope of substantive admissibility under Rule 801(d)(1)(B) should not be undertaken in light of a so-recent *expansion*. But it would seem at least possible to consider further *expanding* the admissibility of prior consistent statements in ways that are different from the path chosen by the Advisory Committee in the 2014 amendment.

One possibility would be to untether substantive admissibility from admissibility to rehabilitate. That would be the upshot of an amendment that would treat all prior witness statements as exempt from the hearsay rule. But tying admissibility of prior consistent statements to rehabilitation of credibility has the virtue of avoiding the problem of parties trying to manufacture consistent statements for trial. (That would be "impermissible bolstering" in lawyer-speak.) And the current tie to rehabilitation has the further virtue of being grounded in the policy of "opening the door" --- admissibility is dependent on an attack on the witness's credibility. If substantive admissibility were untethered from rehabilitation, then the opponent would lose the control over admissibility that the original Advisory Committee found to be important.

For these reasons, prior consistent statements are probably better left where they are --- the 2014 amendment has done good work and there is no good reason to provide for greater admissibility of prior consistent statements. If a consistent statement can't be used to rehabilitate credibility, then its offer at trial may well be just an attempt to impermissibly bolster the witness. Moreover, if a prior consistent statement *does* have some weight and reliability independent from rehabilitation, it may at any rate qualify for admission under another hearsay exception. For example, if the prosecution calls a witness to testify that he saw a murder, the witness's 911 call placed immediately after the event would not be admissible under Rule 801(d)(1)(B), in the absence of an attack on credibility that the statement would rebut. But it would be independently admissible as substantive evidence as an excited utterance.[40] So an expansion of Rule 801(d)(1)(B) does not seem necessary and is likely to cause more harm than good.

IV. Prior Statements of Identification

The Advisory Committee Note to Rule 801(d)(1)(C) explains the reason for carving out an exception for prior statements of identification: the prior identification is more reliable than the in-court identification, because it was made "earlier in time under less suggestive conditions." To this explanation can be added the fact that the identifying witness must be subject to cross-examination --- and that cross-examination in this particular circumstance can be quite useful because the witness can be asked not only about the process of identification, but also about the basis that the witness had for making the identification in the first place (how far away he was from the robbery, whether he was wearing his glasses, etc.).

Interestingly, the Senate initially rejected the proposed Rule 801(d)(1)(C); the House acquiesced to that rejection in order to ensure passage of the Rules of Evidence.[41] The Senate had deleted the provision because of strenuous objection by Senator Ervin. He was concerned that a

[40] Also note that if the prior consistent statement is one of identification, then it is admissible independently under Rule 801(d)(1)(C). The point being that you don't need a problematic expansion of the exception to cover those relatively few consistent statements that are anything more than impermissible bolstering. There are already hearsay exceptions in place to cover the consistent statements that are worth covering.

[41] Statement of Rep. Hungate, Cong. Rec. H. 9653 (Oct. 6, 1975).

conviction could be based solely on an unsworn hearsay statement in which the declarant identified the defendant.[42]

But Congress then amended Rule 801(d)(1) in 1975 to add back the Advisory Committee's proposal.[43] The report from the Senate Judiciary Committee found that Senator Ervin's concerns were "misdirected." The report makes four points: 1) the rule is addressed to admissibility, not sufficiency; 2) most of the hearsay exceptions allow statements into evidence that were not made under oath; 3) the declarant is testifying subject to cross-examination, assuring that "if any discrepancy occurs between the witness's in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed"; and 4) the identification must pass constitutional muster under the Supreme Court cases regulating identifications etc., thus guaranteeing some reliability.[44]

In practice, Rule 801(d)(1)(C) has proved relatively uncontroversial. Perhaps the most contested point was resolved by the Supreme Court in *United States v. Owens,* [45] which allows admission of a prior identification even though the witness had no memory about the reasons for making that identification. The witness without memory was found "subject to cross-examination" within the meaning of the Rule. There appears to be no groundswell for reconsidering *Owens* by way of amendment to the Evidence Rules. Nor should there be, as a faulty memory can well be the target for effective cross-examination, and it would be difficult if not impossible to craft a rule that would set forth criteria for when an attack on faulty memory will or will not be productive in an individual case.

Insofar as prior statements of identification are concerned, the only possibility of amendment that would appear to be on the table would be the broad approach, discussed above, of making *all* prior statements of testifying witnesses substantively admissible. Short of that, it would appear that the existing Rule 801(d)(1)(C) is working well and should be retained.

V. Drafting Alternatives

There are essentially three ways to expand the substantive admissibility of prior statements of witnesses (assuming, of course, that the Committee agrees that some kind of expansion of admissibility is justified). The first is the broad approach that would lift the hearsay ban from all prior statements of witnesses. The second is to lift the Congressional bar on substantive use of prior inconsistent statements, set forth in Rule 801(d)(1)(A) --- this is a more targeted attack, directed to the problematic limitations imposed by Congress on the substantive admissibility of prior inconsistent statements. And the third is to narrow the ban in Rule 801(d)(1)(A) to situations

[42] Cong. Rec. H. 9654 (Oct. 6, 1975).

[43] P.L. 94-113 (1975).

[44] Report of the Committee on the Judiciary, Senate, 94th Cong., 1st Sess., No. 94-199 (1975). For treatment of the Supreme Court cases on the process of eyewitness identification, *see* S. Saltzburg, D. Capra, and D. Gray, *American Criminal Procedure* Ch. 4 (13th ed. 2023).

[45] 484 U.S. 554 (1988).

in which there is some guarantee provided (instead of oath at a formal proceeding) that the inconsistent statement was actually made. This section provides drafting alternatives for each of these approaches.

A. Lifting the Hearsay Ban on Prior Statements of Witnesses

There appear to be two possible ways to lift the hearsay ban on prior statements of witnesses. The first is to change the hearsay definition; the second is to provide an exception.

1. Changing the Hearsay Definition

Changing the hearsay definition is tricky, but something like this might work:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that is:

(1) not the witness's own statement;

(1 2) ~~the declarant does not make~~ not made by the declarant while testifying at the current trial or hearing; and

(2) ~~a party offers~~ offered in evidence by a party to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) [Now covered in Rule 801(c)(1)] ~~***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:~~

~~**(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

~~**(B)** is consistent with the declarant's testimony and is offered:~~
~~**(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~
~~**(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or~~

~~**(C)** identifies a person as someone the declarant perceived earlier.~~

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).[46]

Reporter's Notes:

1. If you agree with Morgan's arguments, then taking prior witness statements entirely out of the definition of hearsay is analytically correct. It's not hearsay because the solution to hearsay is cross-examination, and the declarant is subject to cross-examination (albeit delayed) about their own statement. But a prior statement of a testifying witness, when offered for its truth, *does* fit the classic definition of hearsay: it is a statement made out of court that is offered for its truth. So it has to be specifically excluded from the basic definition. The language that is added seems to work pretty well, although it is a little bit clunky stylistically, because there are two negatives and a positive in the definition. If this proposal goes any further, the restylists might have a better solution. Notably, the other jurisdictions that exempt all prior statements set forth an exception from the basic definition. See the Kansas and Puerto Rico exceptions, supra.

2. The other problem with changing the definition and not making an exception is that there is a hole where Rule 801(d)(1) used to be. This is not fatal, but it does look a bit odd. And it does pose a challenge for electronic searches of case law involving prior witness statements --- the case law essentially shifts midstream from Rule 801(d)(1) to Rule 801(c). Maybe ChatGPT will help smooth out those problems.

3. If Rule 801(d)(1) *is* abrogated, this does not mean that Rule 801(d)(2) should be moved up. That would create even more havoc for electronic searches and settled expectations. The protocol for evidence rulemaking is that if a rule is abrogated or moved, the former number is left open, with an instruction as to where the rule went. See the gap between Rule 804(b)(4) and

[46] There is a new hanging paragraph that will be added to Rule 801(d)(2) in 2024, that covers successors in interest. But since it is not yet 2024, and this memo is not about Rule 801(d)(2), I decided not to add it here.

804(b)(6), which was caused when Rule 804(b)(5) was sent over to Rule 807 as part of a combined residual exception.[47]

2. A Hearsay Exception for All Prior Witness Statements

A hearsay exception for prior witness statements is probably best placed in Rule 801(d) itself; that is certainly the least disruptive fix:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about ~~a~~ the prior statement.~~, and the statement:~~

~~**(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

~~**(B)** is consistent with the declarant's testimony and is offered:~~
~~**(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~
~~**(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or~~

~~**(C)** identifies a person as someone the declarant perceived earlier.~~

[47] The instruction now seen under Rule 804(b)(5) states "Transferred to Rule 807." That language won't work if prior statements of witnesses are now placed outside hearsay proscription by a change to Rule 801(c). That is because Rule 801(d)(1) would not be "transferred" lock, stock and barrel in the way that Rule 804(b)(5) was. That is why the bracketed material reads "Now covered in Rule 801(c)(1)."

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Reporter's Observation:

Some might object that amending Rule 801(d)(1) would be unsatisfactory because it would continue the pernicious category of "not hearsay" hearsay. Rule 801(d)(1) categorizes prior witness statements, confoundingly, as "not hearsay" even though they clearly fit the definition of hearsay in Rule 801(c). If you are going to allow out-of-court statements to be admissible for their truth, it is better to create an exception to the hearsay rule, rather than to call something "not hearsay" when it actually fits the definition of hearsay.[48] In 2010, the Advisory Committee considered a proposal from a law professor to move the Rule 801(d) "not hearsay" categories into real hearsay exceptions.[49] The Advisory Committee rejected the proposal, on the grounds that lawyers and courts have become familiar with "not hearsay" hearsay; that it was a question of nomenclature only, because there is no practical difference between hearsay admissible for its truth as "not hearsay" and hearsay admissible for its truth as "hearsay subject to an exception"; and that moving the categories out of Rule 801(d) would impose costs of upsetting electronic searches and settled expectations, with no corresponding practical benefit. For all these reasons, any broadened hearsay exception for prior statements of witnesses should be placed in Rule 801(d)(1), as it is the least intrusive alternative, it is where people would by this time look for it, and there is no good reason (other than a theoretical one) to change the category from "not hearsay" to a hearsay exception.

B. Lifting the Congressional Limitation on Substantive Admissibility of Prior Inconsistent Statements:

[48] See Stephen A. Saltzburg, *Restyling Choices and a Mistake,* 53 Wm. & Mary L.Rev. 1517, 1523 (2012) (referring to the categories of statements covered by Rules 801(d)(1) and (2) as "nonhearsay hearsay").

[49] See Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Back Story and a Suggested Amendment,* 5 Fed. Cts. L.Rev. 1 (2011).

That is easy drafting:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~ ;

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * *

C. Narrowing the Limitation on Prior Inconsistent Statements to Address Concerns About Whether the Statement was Ever Made:

This drafting alternative borrows from the states that already have such a provision.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and <u>the declarant clearly acknowledges under oath the making of the statement, or the statement</u> was<u>:</u>

(i) given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) written, adopted, or prepared electronically by the declarant; or

(iii) audio-visually recorded; or

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Reporter's Observations

1. It would be possible to craft language that would delete the Congressional limitation and yet address its concerns by describing all the conditions in which there would be sufficient assurance that the statement was made. The Congressional provision could then be deleted. But the Congressional language has been in place for 40 years and there is case law on it. The better approach seems to be to retain the language as *one means* of satisfying the concern over whether a statement was made, and then to provide additional grounds that justify a conclusion that the statement was made. That process is similar to the one chosen in the 2014 amendment to Rule 801(d)(1)(B): the original language was retained and new grounds for admissibility were added.

2. The draft adds a provision that the statement is substantively admissible if the witness acknowledges under oath that he made the statement. That should be enough to allay any concern that the statement was never made. Under current law, even if the witness admits making the statement, it is not substantively admissible unless it was made under oath at a formal proceeding. This example shows that the Congressional limitation is overkill in addressing the concern that a prior inconsistent statement was never made. If this acknowledgement provision goes forth, thought should be given to adding something to the Committee Note emphasizing that acknowledgement must be clear and affirmative, not begrudging and vague.[50]

3. The draft specifically addresses the argument that prior inconsistent statements are difficult to cross-examine when the witness denies making them. Under the draft, if the witness denies making the statement, it would not be substantively admissible unless there is proof that the declarant in fact made the statement. Where there is such proof, cross-examination can address why the witness is lying about not making the prior statement --- a topic that may well be

[50] The acknowledgment provision is in the lead-up to the other possible grounds of admissibility. It could be shifted to make it an additional alternative in the list provided. But "acknowledges the making of the statement" does not fit well in the list grammatically. Ultimately the location of the provision is a style question.

productive for the cross-examiner even if the witness adheres to his story. After all, the opportunity to cross-examine does not have to be perfect to satisfy the concerns of the hearsay rule; it just has to be adequate.[51] Moreover, as stated above, it is simply bad policy to allow a witness to veto the substantive admissibility of his prior inconsistent statement, simply by denying having made it when the evidence indicates to the contrary.

4. A possible argument against the provision concerning audio-visual recording is the possibility of deepfakes. But that concern should not be fatal, for the simple reason that the concern attaches to *all* audio-visual recordings offered at trial. If there is any need to amend the Evidence Rules to prevent admission of deepfakes, the solution is to change Article 9, not to reject a provision that would add more audio-visual recordings to the mix.

Conclusion

In principle, the rationales behind the hearsay rule --- a concern over the inability to cross-examine the hearsay declarant, and a preference for live testimony --- have no applicability to prior statements of testifying witnesses. It should follow that Federal Rule 801(c) should be amended so that prior witness statements would not be covered by the definition of hearsay. Yet one might be concerned about tinkering with the language of the iconic hearsay rule. If the Committee has such a concern but agrees with the fundamental proposition that prior witness statements should be more broadly admitted, then it is possible that the better solution is to expand the current hearsay exemption provided by Rule 801(d)(1).

The question, then, is the scope of the expansion. While theoretically the hearsay rule should not apply at all to prior witness statements, functionally there is a fair reason for maintaining the current limits on prior consistent statements. The current rule on consistent statements --- which ties hearsay proscription to rehabilitation--- operates to limit strategic creation of prior consistent statements. And while that goal is conceptually not a match with the hearsay rule, it is consistent with the Advisory Committee's original conception for providing substantive admissibility of consistent statements. Moreover, prior statements of identification by testifying witnesses are now fully admissible, so there is no reason to tinker with Rule 801(d)(1)(C). So any expansion should probably be focused on greater admissibility of prior inconsistent statements.

There is much to be said for allowing substantive admissibility of all prior inconsistent statements, as many of the states have done. But the concern over whether the statement was ever made, while not a hearsay concern, is one that has been invoked by lawyers and commentators for many years and thus is difficult to ignore. The Congressional limitation on substantive admissibility of prior inconsistent statements is, however, a patently overbroad and draconian solution to that concern. Narrower protections employed by a number of states --- allowing for substantive admissibility of prior inconsistent statements if admitted by the witness or if recorded --- appropriately allow for greater substantive admissibility of prior inconsistent statements, while effectively addressing concerns about whether the statement was ever made.

[51] United States v. Owens, 484 U.S. 554 (1988).

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 803(4): Hearsay Exception for Statements Made for Medical Diagnosis or Treatment
Date: October 1, 2023

Federal Rule of Evidence 803(4) provides a hearsay exception for statements made for purposes of medical diagnosis or treatment, so long as the statements describe "medical history, past or present symptoms or sensations, their inception or general cause" and are "reasonably pertinent" to treatment or diagnosis. The exception was derived from a common law hearsay exception based upon the notion that a person seeking medical treatment is likely to relate information as accurately and reliably as possible to obtain appropriate medical care.

Unlike its common law antecedent, however, Rule 803(4) admits statements made for purposes of receiving a medical diagnosis only – without any accompanying treatment. Expanding the hearsay exception to statements made for diagnostic purposes alone allows patient/plaintiff statements made to medical expert witnesses who are developing medical opinions for trial to be admitted for their truth. Critics have long noted that patient/plaintiff statements to testifying medical experts made in anticipation of litigation are inherently *unreliable*. A patient/plaintiff declarant has a strong incentive to craft her statements to a medical expert in a manner that best suits her litigation position. A recent article published in the *Boston College Law Review* resurfaced this critique of Rule 803(4), noting that the exception routinely admits unreliable hearsay statements made to testifying experts in anticipation of litigation.[1] The same article also opined that federal courts consistently exclude highly reliable statements made *by medical providers* to one another or to their patients in aid of medical treatment under Rule 803(4).

This memorandum offers some preliminary ideas for a possible amendment to Rule 803(4) that would address these anomalous admissibility outcomes. The question for the Committee is whether it wishes to pursue a possible amendment to Rule 803(4). If the Committee is inclined to explore amendment possibilities further, additional research and amendment proposals will be developed for the Spring 2024 meeting.

This memorandum proceeds in four parts. Part I offers a brief overview of the common law hearsay exception for statements made for medical treatment that preceded Rule 803(4). Part I also explains the drafting history of Rule 803(4) and the original Advisory Committee's rationale

[1] Paul W. Kaufman & Christopher J. Merken, *Toward a Presumptive Admission of Medical Records Under Federal Rule of Evidence 803(4)*, 64 B.C. L. Rev. 567, 585 (March 2023).

for expanding the exception to include statements made for medical diagnosis, including statements made to testifying experts in anticipation of litigation. Part II examines the amendment to Federal Rule of Evidence 703 enacted in 2000 and the impact of that amendment on the rationale for expanding Rule 803(4) beyond the common law hearsay exception. Part III provides a preliminary overview of the trends in federal decisions interpreting Rule 803(4) since its enactment. Finally, Part IV explores some potential costs and benefits of amending Rule 803(4) and posits some amendment alternatives for the Committee's consideration.

I. The Common Law Hearsay Exception for Statements Made for Treatment Purposes and its Expansion in Rule 803(4)

The hearsay exceptions found in the Federal Rules of Evidence are derived from common law exceptions to the traditional ban on hearsay evidence developed by the courts prior to the enactment of the Rules. At common law, courts allowed statements made for purposes of obtaining medical treatment to be admitted for their truth so long as the statements were reasonably pertinent to treatment.[2] The theory behind this exception is that a person is likely to provide a truthful and accurate report of his symptoms and their inception when his health hangs in the balance. A person who provides an inaccurate report in these circumstances risks receiving improper and potentially harmful treatment.[3]

When the Federal Rules of Evidence were enacted, the original Advisory Committee elected to include the hearsay exception for statements made for purposes of receiving medical treatment and decided to expand upon the common law exception to include statements made for the purpose of obtaining a medical diagnosis in the absence of any treatment objective. The original Advisory Committee recognized that expanding the exception in this manner would pave the way to admitting statements made by plaintiffs to medical experts to obtain a diagnosis for use at trial. Although the Committee understood that these statements made in anticipation of litigation do not possess the reliability of statements made in pursuit of medical treatment, the Committee concluded that there was no sense in excluding purely diagnostic statements.[4] The Committee reasoned as follows: A medical expert who testifies on behalf of a plaintiff will base her trial opinion, at least in part, on the statements made to her by the plaintiff. The plaintiff's statements will be routinely reported to the jury as the basis for the expert's trial opinion to help the jury evaluate the opinion. If the plaintiff's statements are not admissible for their truth, they should be accompanied by a limiting instruction cautioning the jury against their substantive use. Jurors

[2] *See* Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) (noting that common law hearsay exception permitted statements made for treatment purposes but not diagnostic purposes).
[3] *Id.* (declarant "knows his description helps determine treatment, so he has reason to speak candidly and carefully, and risks of insincerity and ambiguity are minimal.").
[4] *See* Advisory Committee's note to Fed. R. Evid. 803(4) ("Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation."); Paul W. Kaufman & Christopher J. Merken, *Toward a Presumptive Admission of Medical Records Under Federal Rule of Evidence 803(4)*, 64 B.C. L. Rev. 567, 585 (March, 2023) ("Essentially, the Advisory Committee jettisoned a century of precedent based on its questionable belief that juries are unlikely to draw appropriate distinctions even when properly instructed.").

may have difficulty understanding and following such a limiting instruction. Therefore, because jurors will routinely be exposed to a plaintiff's statements to an expert and because jurors are unlikely to comprehend and follow a limiting instruction, the plaintiff's statements might as well be admitted for their truth. In other words, Rule 803(4) ought to *allow* full use of a plaintiff's out-of-court statements to her testifying medical expert because jurors are very likely to rely on the statements for their truth once jurors are exposed to them.[5]

Based upon this assumption that experts would routinely disclose plaintiffs' out-of-court statements as part of the basis for their trial opinions, the original Advisory Committee expanded Rule 803(4) to allow substantive admission of a plaintiff's statements made to a medical expert for the purpose of seeking a medical diagnosis for litigation.[6]

II. Amendment to Federal Rule of Evidence 703 and its impact on Rule 803(4) Rationale

In 2000, Federal Rule of Evidence 702 was amended to clarify and expand upon the Supreme Court's *Daubert* trilogy of cases governing the admissibility of expert opinion testimony. As part of the amendment package that reformed Rule 702, the Advisory Committee also proposed an amendment to Rule 703 that governs the allowable bases of an expert's testimony. Rule 703 permits an expert to rely upon her own personal knowledge in developing an opinion for trial or upon "facts or data in the case that the expert has been made aware of."[7] Rule 703 permits an expert to rely upon facts or data that would otherwise be inadmissible at trial so long as other experts in the field would "reasonably rely" on the same kinds of inadmissible facts or data.[8]

Prior to 2000, federal courts and commentators differed with respect to a testifying expert's ability to disclose otherwise inadmissible basis information upon which she reasonably relied to the jury during her testimony. Some courts allowed experts to disclose such inadmissible basis information and allowed juries unrestricted use of the information, while others excluded such inadmissible basis information or required it to be accompanied by a limiting instruction in circumstances where it was disclosed to a jury.[9] Rule 703 was amended in 2000 to clarify that the proponent of an expert *may not disclose* otherwise inadmissible basis information unless the probative value of the basis information "in helping the jury evaluate the opinion substantially

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[5] The original Advisory Committee also utilized this "why not" rationale to allow full substantive use of a witness's prior consistent statements that jurors would be exposed to as witness rehabilitation in Rule 801(d)(1)(B). *See* Advisory Committee's note to Rule 801(d)(1)(B) ("The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.").

[6] *See* Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) ("The thought at the time was that if physicians can testify on the basis of statements by patients, and if such statements are going to come out to explain the basis of physician testimony, then we should let juries make general use of them.").

[7] Fed. R. Evid. 703. Rule 602 complements Rule 703 by exempting expert witnesses from the requirement of personal knowledge. *See* Fed. R. Evid. 602 ("This rule does not apply to a witness's expert testimony under Rule 703.").

[8] Fed. R. Evid. 703.

[9] *See* Advisory Committee's note to 2000 amendment to Fed. R. Evid. 703 ("Courts have reached different results on how to treat otherwise inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference.").

outweighs their prejudicial effect."[10] The amendment thus set up a stringent balancing test weighted against disclosure when it comes to inadmissible basis information. Further, the Advisory Committee's note to the 2000 amendment clarified that the risk of prejudice from the disclosure of such inadmissible basis information is the potential misuse of the information by the jury for substantive purposes.[11] The Advisory Committee's note cautioned that inadmissible basis information that overcomes this stringent balancing test and that is disclosed to the jury must be accompanied by a limiting instruction (upon request) cautioning the jury not to use the basis information for substantive purposes.

After the 2000 amendment, therefore, inadmissible basis information relied upon by an expert is presumptively off-limits and may not be disclosed to the jury in the usual case. Even in the rare circumstance in which the inadmissible basis information survives the exclusionary balancing test and may be disclosed, it may *not* be relied upon for its truth and must be accompanied by a limiting instruction.

The 2000 amendment to Rule 703 thus upended the assumption underlying the original Advisory Committee's decision to expand Rule 803(4). Under amended Rule 703, a jury is unlikely to learn of inadmissible hearsay statements made to a testifying medical expert simply because they form the basis for the expert's trial opinion. Rather, inadmissible hearsay statements that form the basis for an expert's opinion will routinely be kept from the jury (unless the opponent of the opinion seeks to disclose them).

Because Rule 803(4) now makes patient/plaintiff statements to testifying medical experts for purposes of obtaining a diagnosis admissible for their truth, these statements are not subject to Rule 703's limitation on disclosure. Inadmissible basis information may not routinely be disclosed under amended Rule 703, but statements made to a medical expert for purposes of obtaining a diagnosis for trial remain admissible for their truth.[12]

III. Interpretations of Rule 803(4) in the Federal Courts

A. Statements Made to Medical Experts in Anticipation of Litigation

The federal courts have recognized the expansion of Rule 803(4) and have approved the admission of statements made for the purposes of obtaining a medical diagnosis even when made in anticipation of litigation. Both dated and recent federal opinions affirm the admissibility of these statements:

- O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1088-89 (2d Cir. 1978) (holding that Rule 803(4) permitted admission of plaintiff's statements to medical expert concerning her condition, though expert had not treated plaintiff and was retained for

[10] Fed. R. Evid. 703.
[11] *See* Advisory Committee's note to 2000 amendment to Fed. R. Evid. 703.
[12] *See* Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) ("[I]t is odd, to say the least, to find in place a hearsay exception that was broadened on the theory that the statements are going to come out anyway, then to retain the broadened exception after FRE 702 [sic] was amended to abandon the practice that was the basis for expanding the exception in the first place!").

purposes of litigation, so long as statements were relied on by doctor in formulating his opinion; noting that this would not have been permissible prior to the enactment of the Federal Rules of Evidence).

- United States v. Iron Shell, 633 F.2d 77, 93 (8th Cir. 1980) ("the rule [803(4)] abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness.").

- Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (rejecting defense objection to the admission of assault victim's statements to expert because the expert was consulted in order to testify as a witness rather than for treatment and finding statements admissible under Rule 803 (4)).

- United States v. Whitted, 11 F.3d 782, 787 (8th Cir. 1993) ("Rule 803 (4) applies to statements made for the sole purpose of diagnosis, which includes statements made to a doctor who is consulted only to testify as an expert witness.").

- United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (finding child's statements to a testifying doctor following assault admissible through Rule 803(4) because the hearsay exception "'abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only.").

- Sanchez v. Brokop, 398 F. Supp.2d 1177, 1193 (D.N.M. 2005) ("Defendant contends this exception [Rule 803(4)] should not be available because Dr. Kliman was not L.S.'s treating physician. Dr. Kliman acted primarily as a consulting physician for purposes of diagnosing L.S. and assessing her symptoms. The Tenth Circuit has held that allowing such a witness to testify pursuant to Rule 803(4) is still proper because Rule 803(4) 'abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness.'").

- United States v. Wilson, No. CR 09-1465 JB, 2010 WL 3023035, at *12 (D.N.M. June 23, 2010) (finding statements made in anticipation of prosecution admissible through Rule 803(4) because "nothing in the language of the rule or in the case law requires that the statement be made solely for the purpose of diagnosis or treatment.").

- Longoria v. Khachatryan, No. 14-cv-70, 2016 WL 5746221, at * 6, n.3 (N.D. Okla. Sept. 30, 2016) (plaintiff's statement to testifying expert that "(he is in constant pain) would constitute a statement of 'past or present symptoms or sensations' admissible under Federal Rule of Evidence 803(4) because it is the type of statement on which a physician would reasonably rely in determining a treatment or diagnosis.").

- Jacquety v. Baptista, 538 F. Supp. 3d 325, 340 (S.D.N.Y. 2021) ("Petitioner also argues that E.J.'s statements to Dr. Goslin should not be admitted for their truth pursuant to Rule 803(4) because Dr. Goslin was retained by a party to provide a forensic opinion in litigation. The law draws no such distinction…; Fed. R. Evid. 803(4) advisory committee notes to the 1972 proposed rules (Rule 803(4) "rejects" the former rule that statements made to a forensic physician were inadmissible hearsay)").

State court opinions likewise recognize the expansion of Rule 803(4):

- Smith v. State, 845 S.E.2d 598, 603–04 (Ga. 2020) ("the federal appellate courts that have addressed the specific issue in this case have concluded that statements made for medical purposes to experts hired in anticipation of litigation generally are admissible under Rule 803 (4).").

- Garrett v. Commonwealth, 48 S.W.3d 6, 11 (Ky. 2001) ("This distinction between "treating" and "examining" physicians was eliminated in the federal courts with the 1975 adoption of the Federal Rules of Evidence (FRE). Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat.1939.").

- State v. Yamada, 57 P.3d 467 (Haw. 2002) ("by its plain language, HRE Rule 803(b)(4) permits, contrary to the circuit court's belief, the admission of statements made solely for the purpose of diagnosis, insofar as reasonably pertinent to diagnosis, even if made in anticipation of litigation.")

Occasionally, a court acknowledges the reliability concerns inherent in statements made to a medical professional in anticipation of litigation and excludes such statements:

- G.C. v. School Board of Seminole County, 639 F. Supp. 2d 1295, 1302, n.7 (M.D. Fla. 2009) ("Dr. Day clearly states that she was hired to provide a "forensic assessment" at the request of G.C.'s attorneys in order "to assist with understanding how this abuse has impacted on [G.C.]. The Court finds that under the circumstances presented here, the statements made to Dr. Day were not "statements made for purposes of medical diagnosis or treatment," but rather made in preparation of litigation. As such, the statements do not contain the assurances of reliability or

indicia of truthfulness normally associated with statements made for the purpose of receiving medical treatment or diagnosis, especially in light of Mrs. Cosco's help in answering some of the questions asked. Therefore, the Court finds that the statements made by G.C. to Dr. Day are inadmissible hearsay.").

The overwhelming majority of federal courts, therefore, follows the clear edict of Rule 803(4) and its accompanying Advisory Committee note and admits statements made to medical experts for purposes of obtaining a diagnosis even when made in anticipation of litigation.

B. Statements by Medical Treatment Providers to Other Providers or to Patients

The recent law review article regarding Rule 803(4) highlighted another line of cases ostensibly at odds with the rationale for the exception, noting that federal courts typically decline to admit statements made *by medical providers* through Rule 803(4).[13] When medical personnel speak to one another concerning patient care or directly to patients about their treatment, courts refuse to admit provider statements through Rule 803(4).

Bulthius v. Rexall Corp. is a prime example of the rejection of Rule 803(4) when applied to statements made by providers *to patients*.[14] In that case, the plaintiff sought to use a statement made by her mother's doctor to her mother informing her that she was taking the drug DES to defeat defendant drug manufacturers' motions for summary judgment. The Ninth Circuit rejected the doctor's statement as inadmissible hearsay, stating that: "Rule 803(4) applies only to statements made by the patient to the doctor, not the reverse."[15] Other federal opinions have echoed this interpretation of Rule 803(4).[16]

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[13] *See* Paul W. Kaufman & Christopher J. Merken, *Toward a Presumptive Admission of Medical Records Under Federal Rule of Evidence 803(4)*, 64 B.C. L. Rev. 567, 588-595 (March 2023).
[14] 789 F.2d 1315 (9th Cir. 1985).
[15] *Id.*
[16] *See* Grabin v. Marymount Manhattan Coll., 659 F. App'x 7, 10 (2d Cir. 2016) (to the extent that Grabin sought to testify that doctors informed her that her fall 2010 illnesses were a result of her thalassemia, this would be inadmissible hearsay not subject to any exception because Rule 803(4) does not apply to statements by doctors); Stull v. Fuqua Indus., Inc., 906 F.2d 1271, 1274 (8th Cir. 1990) ("to fall within the exception, the statement must be obtained from the person seeking treatment, or in some instances from someone with a special relationship to the person seeking treatment, such as a parent."); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 564 (7th Cir. 1996) ("the Rule excepts statements made by a person seeking medical attention to the person providing that attention. Rule 803(4) does not purport to except, nor can it reasonably be interpreted as excepting, statements by the person providing the medical attention to the patient."); Patterson v. Miller, 451 F. Supp. 3d 1125, 1144 (D. Ariz. 2020), *aff'd,* No. 20-15860, 2021 WL 3743863 (9th Cir. Aug. 24, 2021)("this exception only applies to statements made *by* a patient, and not *to* a patient.") (emphasis in original); Roness v. T-Mobile USA, Inc., No. C18-1030-RSM, 2019 WL 2918234, at *2 (W.D. Wash. July 8, 2019) ("Although Rule 803(4) excepts statements made for medical diagnosis or treatment, this rule does not except statements made *by the person providing the medical attention* to the patient.")(emphasis in original); Rangel v. Anderson, No. 2:15-CV-81, 2016 WL 6595600, at *2 (S.D. Ga. Nov. 7, 2016) (rejecting plaintiff's testimony regarding statements made to her by her treating physicians because Rule 803(4) applies "only to statements made by a patient to his or her physician or to other parties—not to statements made by a physician to his or her patient.").

In Field v. Trigg County Hospital, Inc.,[17] a treating physician sought to introduce out-of-court statements made to him by *another consulting physician* through Rule 803(4). The Sixth Circuit held that Rule 803(4) was inapplicable:

> We agree that the hearsay exception set forth in Fed.R.Evid. 803(4) applies only to statements made by the one actually seeking or receiving medical treatment. Accordingly, the Vanderbilt physicians' statements—as statements made by consulting physicians to the treating physician—are not admissible pursuant to the Fed.R.Evid. 803(4) hearsay exception.[18]

The district court similarly excluded provider-to-provider statements under Rule 803(4) in *Tucker v. Nelson*.[19] Defendants in a medical malpractice case sought to introduce a statement made by a consulting specialist regarding the origin of the plaintiff's urgent and uncontrolled bleeding. The defense argued that the consulting physician's statement satisfied all three requirements of the Rule 803(4) hearsay exception because it described the plaintiff's symptoms and their origin, it was reasonably pertinent to the course of treatment to be offered to the plaintiff, and it was made by a consulting specialist to a treating provider for purposes of aiding the ongoing treatment of the plaintiff. The district court summarily excluded the statement under Rule 803(4) without considering whether it satisfied the stated requirements of the exception based upon Sixth Circuit precedent plainly holding that "that Rule 803(4) applies only to statements by the patient, not the doctor."[20]

The theory behind these holdings appears to be that medical providers lack the incentive to be truthful in pursuit of medical care for themselves that patients possess when they communicate their symptoms and history and that, therefore, the traditional reliability rationale for Rule 803(4) does not extend to provider statements. The recent law review article regarding Rule 803(4) argues that provider statements to one another and even to patients during the course of treatment enjoy significant reliability due to a provider's duty to offer competent medical care.[21] It posits that courts should carefully apply the requirements of Rule 803(4) to admit these statements when appropriate rather than relying upon conclusory statements about the inadmissibility of provider statements generally.

When medical providers communicate with one another in an effort to provide coordinated patient care, their statements would seem to fall within the plain text of Rule 803(4). As in *Tucker*, they are likely statements about the patient's symptoms, conditions, test results, causation of symptoms that are made for the purpose of providing medical treatment or diagnosis

[17] 386 F.3d 729, 736 (6th Cir. 2004).
[18] *Id.*
[19] 390 F. Supp. 3d 858, 862 (S.D. Ohio 2019).
[20] *Id.*
[21] Paul W. Kaufman & Christopher J. Merken, *Toward Presumptive Admission of Medical Records*, *supra* n. 1, at n. 103 ("One would imagine this to be among the most reliable statements for purposes of medical diagnosis or treatment. It is an urgent diagnosis rendered by a specialist reviewing objective test results, committed to writing in a way that would be illegal if intentionally untrue, and that could, if wrong, subject the physician to malpractice liability.").

and that are reasonably pertinent to the treatment or diagnosis. Per se exclusion of these statements would seem to run afoul of the rule text. Further, the reliability rationale for admitting patient statements may extend to provider statements to one another. While a medical provider lacks the selfish, personal motivation to be accurate for the sake of obtaining appropriate care for herself, she has a strong incentive to provide accurate information to ensure that her patient receives the appropriate care (both to live up to professional ethical standards and to avoid liability). Finally, the courts have never held that Rule 803(4) applies only to *patient* statements because only the patient has an incentive to obtain appropriate care for herself. Indeed, Rule 803(4) contains no limitation regarding the identity of the declarant and courts have long allowed statements made by family members and even stranger, Good Samaritans to be admitted through Rule 803(4) even though the declarant has no individual interest in the care received.[22]

With respect to provider statements *to patients*, some similar arguments may be made. Nothing in Rule 803(4) specifies the identity of the declarant or the recipient of the statement. Doctors communicating instructions and information to their patients ostensibly do so for the purpose of providing medical treatment and diagnosis. Doctors likely communicate information that is reasonably pertinent to the patient's course of treatment as well. Drawing parallels to the conception of the attorney-client relationship, the doctor-patient relationship also requires two-way communication to function effectively, suggesting that provider statements to patients are also a necessary component of effective treatment. Additionally, it seems counterintuitive for Rule 803(4) to assume that patients are inherently trustworthy in communicating their histories and symptoms to medical professionals, but that those trained medical professionals cannot be trusted when they convey needed information to their patients.[23]

Not all provider statements necessarily fall within Rule 803(4), of course. It is questionable whether certain provider statements to patients would fall within the subject matter covered by Rule 803(4) – "A statement that: describes medical history; past or present symptoms or sensations; their inception; or their general cause."[24] Providers are likely to explain diagnoses and offer instructions and prognoses to patients. It is possible some of these statements could be characterized as descriptions of the "cause" of symptoms. But it does seem that provider statements *to patients* may be less likely to fit within Rule 803(4) than patient statements *to*

[22] *See* Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) ("[T]he exception does not require the speaker to be the patient or the listener to be the doctor. Clearly it reaches statements by family members (parent, sibling, or spouse) who bring the patient to a hospital or doctor's office, and Good Samaritans too.").

[23] There is some sense in the opinions that reject provider statements allegedly made to patients directly of distrust that the statements were actually made. *See Toward Presumptive Admission of Medical Records*, *supra* n. 1, at 621 ("Courts exclude these statements because of the substantial risk that the patient will mis-recollect, misunderstand, or prevaricate what the practitioner said."). Patients often report provider diagnoses or instructions that are self-serving and aid in their litigation position. *See Bulthius v. Rexall Corp.,* 789 F.2d 1315 (9th Cir. 1985) (seeking to admit doctor statement confirming patient's ingestion of DES). But doubt about the credibility of a witness's reporting of a hearsay statement is not a hearsay issue to be considered as a factor in applying a hearsay exception. It is an issue of witness credibility for the jury. *See* Advisory Committee's note to 2019 amendment to Fed. R. Evid. 807 ("In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.").

[24] Fed. R. Evid. 803(4).

providers or provider statements *to one another*. Even some provider-to-provider statements may fall outside Rule 803(4) if they are not made for the purpose of providing treatment or diagnosis to a patient. Still, per se exclusion of provider statements under Rule 803(4) may be unjustified.

C. Statements of Identity in Child Abuse Cases

The vast majority of federal opinions regarding Rule 803(4) since its enactment have not dealt with the issues of provider statements or statements made to obtain an expert opinion for trial. Much of the federal precedent surrounding Rule 803(4) has focused on whether statements to medical providers identifying perpetrators of child and sexual abuse are "reasonably pertinent to treatment" and thus covered by Rule 803(4). Statements of "fault" have traditionally been inadmissible under Rule 803(4) on the assumption that a medical provider needs to know the general cause of a patient's injuries but does not need to ascribe fault to any particular actor in order to provide effective treatment.[25] Many federal and state courts, however, have found victim statements to medical personnel naming an abuser to be within Rule 803(4). The theory adopted by these courts is that a medical provider needs to know the identity of an abuser to provide effective physical and emotional treatment, and to remove a child from the custody of an abuser in appropriate cases.[26]

Federal courts have found statements of identity admissible through interpretation of the existing requirements of Rule 803(4). It does not appear necessary to amend Rule 803(4) to adopt or further this interpretation of the exception. Further, an amendment on this topic risks altering the common law direction of Rule 803(4) in unanticipated ways. Should the Committee choose to proceed with an amendment to Rule 803(4), it may elect to steer clear of this issue to allow the courts to continue to define the limits of this use of Rule 803(4).

D. Statements Made for Purposes of Mental Health Diagnosis or Treatment

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[25] *See* Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) ("Blame-casting statements attributing fault or identifying assailants or tortfeasors are not reasonably pertinent.").

[26] *See, e.g.*, United States v. Griffith, 65 F.4th 1216 (10th Cir. 2023) (victim's statements to sexual assault nurse examiner identifying defendant as perpetrator of abuse admissible under medical treatment or diagnosis hearsay exception); United States v. Woody, 45 F.4th 1166, 1178 (10th Cir. 2022) (trial court did not err in allowing testifying doctor to relate victim's hearsay statements identifying defendant – her stepfather – as her abuser; identity of perpetrator of sexual abuse is reasonably pertinent to treatment when the victim and abuser have an "intimate relationship" that makes it necessary to determine whether victim is in a safe environment); United States v. Kootswatewa, 885 F.3d 1209 (9th Cir. 2018) (statements by eleven-year-old developmentally delayed victim to nurse identifying defendant as perpetrator of sexual assault properly admitted through FRE 803(4); identity was necessary to protect victim from further abuse and to treat psychological injuries); United States v. George, 960 F.2d 97, 99–100 (9th Cir. 1992) ("the exact nature and extent of" the victim's psychological injuries "often depend on the identity of the abuser"); United States v. Renville, 779 F.2d 430 (8th Cir. 1985); Schmidt v. State, 401 P.3d 868 (Wy. 2017) (statements of six-year-old child accusing defendant of sexual exploitation to school counselor in presence of school nurse fit Wyoming medical treatment exception even though child did not direct her statements to nurse, nurse conducted no physical examination, and child used role-playing game to convey accusation); Eakes v. State, 665 So. 2d 852 (Miss. 1995) (the statement can qualify if it identifies either a member of the complainant's household or a person who has regular access to the complainant under a visitation order); Flanagan v. State, 586 So. 2d 1085 (Fla. Dist. Ct. App. 1991); People v. Meeboer, 181 Mich. App. 365, 449 N.W.2d 124 (1989), *aff'd*, 439 Mich. 310 (1992).

Federal courts have also confronted the question in recent years of whether statements made to a *mental health* professional for purposes of obtaining treatment are admissible through Rule 803(4). Some commentators have argued that statements made for purposes of mental health treatment should not be covered by Rule 803(4), particularly due to the difficulty in setting practical limits on the information that is "reasonably pertinent" to treatment or diagnosis.[27] But the federal courts have largely found such statements admissible through Rule 803(4). The Third Circuit explained as follows in *United States v. Gonzalez* in finding statements to a therapist admissible under the exception:

> We have not previously decided whether Rule 803(4) covers statements made to a mental health professional, rather than to a physician. However, the plain text of the Rule does not limit its application to statements made to a physician. Rule 803(4) focuses on the purpose for which the statement is made, not on the identity of the recipient. The advisory committee note to Rule 803(4) makes clear that statements made to a broad category of individuals other than physicians are covered by the exception, such as those made to "hospital attendants, ambulance drivers, or even members of the family." Fed. R. Evid. 803 advisory committee note to paragraph (4). There is no indication from Rule 803(4) or its accompanying advisory committee notes that it should not extend to statements made to mental health professionals. The defendants have provided no persuasive authority in support of their position. If Rule 803(4) extends to cover statements made to non-medical persons such as family members, it logically also covers statements made to other medical professionals, including those who specialize in mental health. Accordingly, we hold that the exception in Rule 803(4) applies to statements made to therapists and mental health professionals. [28]

The *Gonzalez* court went on to note that "every Court of Appeals to consider this issue has determined that statements made to a mental health professional for purposes of diagnosis or treatment qualify under the hearsay exception in Rule 803(4)."[29]

Where mental health treatment is categorized as "medical treatment," this interpretation of Rule 803(4) appears sound. It may be true, however, that the limits of pertinence may be more difficult to draw in the mental health treatment context. If the Committee is inclined to explore an amendment to Rule 803(4), it may wish to leave this contemporary issue to continued common law development as well.

IV. Amending Rule 803(4)

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[27] *See, e.g.*, Mueller, Kirkpatrick & Richter, *Evidence* § 8.42 (Aspen 6th Ed. 2018) ("Given the uncertainties and tentativeness of psychiatric diagnoses, virtually any statement would be considered "reasonably pertinent.").
[28] United States v. Gonzalez, 905 F.3d 165, 199–200 (3d Cir. 2018).
[29] *Id.*(citing United States v. Kappell, 418 F.3d 550, 556 (6th Cir. 2005); Danaipour v. McLarey, 386 F.3d 289, 297 (1st Cir. 2004); United States v. Yellow, 18 F.3d 1438, 1442 (8th Cir. 1994); Morgan v. Foretich, 846 F.2d 941, 949 n.17 (4th Cir. 1988); United States v. Lechoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976), abrogated on other grounds by In re Sealed Case, 352 F.3d 409 (D.C. Cir. 2003)).

As discussed above, some of the contemporary applications of Rule 803(4) are at odds with the original reliability rationale underlying the exception. Statements made by plaintiffs to medical experts seeking a "medical diagnosis" solely for purposes of litigation *are* covered by Rule 803(4) even though such statements may be particularly unreliable due to plaintiffs' incentives to procure favorable litigation opinions. Conversely, reliable statements made by one medical provider to another to facilitate the diagnosis and treatment of patients under their care are typically *excluded* by the federal courts applying Rule 803(4). Provider statements to patients that may also enjoy substantial reliability are also routinely excluded under the exception.

The Advisory Committee could explore the possibility of amending Rule 803(4) to alter these admissibility outcomes in keeping with the original reliability rationale for the hearsay exception.

A. Advisory Committee's 2002 Examination of Rule 803(4)

The Advisory Committee considered the possibility of amending Rule 803(4) to exclude unreliable statements made in anticipation of litigation over twenty years ago in 2002. The minutes of the Committee's Fall 2002 meeting reflect the Committee's decision to forego an amendment for the following reasons:

> 1. It will be difficult in many cases to determine the motivation of the patient who speaks to a doctor, especially after an accident or injury. Is the patient seeking treatment, or an expert witness, or both? The current rule avoids this difficult line-drawing.
>
> 2. If the rule were amended to exclude only those statements made solely for litigation purposes, it would have very little effect. Competent counsel would make sure that consultations with doctors for litigation purposes would have some treatment motivation. Moreover, statements of the patient's current physical condition (e.g., "my neck hurts") will still be admissible under Rule 803(3) even if made to a doctor for purposes of litigation. Thus, the exception as amended would exclude only those statements where counsel has done nothing to work around the rule. The costs of an amendment do not justify a rule that will apply so infrequently.
>
> 3. There will still be some situations in which a doctor, testifying as an expert, will be able to disclose hearsay when used as the basis for an expert opinion. Rule 703 does not prohibit such disclosure; it simply makes it more difficult. Thus, the original rationale for admitting statements under Rule 803(4)that the jury would hear the statements anyway and would not differentiate between statements offered for truth and statements offered as the basis for an expert opinion has been undermined somewhat, but it is still applicable.
>
> 4. A rule change that would exclude statements made by an injured plaintiff to medical experts would encounter substantial opposition from the plaintiffs' bar.
>
> 5. To the extent the amendment would be intended to deal with statements made by victims of child abuse for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

As outlined below, there may be sound reasons for revisiting these conclusions more than twenty years later.

B. Costs and Benefits of Amending Rule 803(4)

There are some clear benefits to considering an amendment to Rule 803(4) in 2023 to exclude unreliable statements made in anticipation of litigation and to admit reliable provider statements. First, it is important to note that, apart from the restyling that updated the language of all the Rules in 2011, Rule 803(4) has not been amended since it was first adopted in 1975. This frequently utilized hearsay exception may be worthy of reexamination after almost 50 years of use in federal court.

Second, statements to testifying medical professionals made in anticipation of litigation are clearly not within the reliability rationale for the Rule 803(4) exception. A plaintiff/patient may exaggerate her symptoms or misrepresent the etiology of her medical issue in an effort to secure favorable expert testimony without any health repercussions. It undermines the credibility of the oft-attacked hearsay exceptions to admit statements universally regarded as untrustworthy.

Third, the only rationale that *did exist* for allowing statements made solely for purposes of medical diagnosis by a testifying medical expert – that jurors would be informed of all of a plaintiff's statements to her testifying medical expert as part of the basis for that expert's testimony -- was destroyed by the 2000 amendment to Rule 703. Now that inadmissible information upon which testifying experts rely may not routinely be disclosed to the jury, Rule 803(4) permits substantive admission of unreliable hearsay statements that would not necessarily be heard by the jury otherwise. Even in circumstances in which a plaintiff's statements pass the stringent balancing test of Rule 703 and are revealed to jurors as basis for an expert's testimony, those basis statements should be considered only for their effect on the expert's opinion and *not for their truth*.[30] Jurors routinely receive limiting instructions cautioning them against full use of evidence, and should be capable of following similar limiting instructions in connection with an expert's inadmissible basis.[31]

Fourth, Sixth Amendment jurisprudence has changed dramatically since the Committee rejected a potential amendment to Rule 803(4) in 2002. The Supreme Court decided *Crawford v. Washington* in 2004, requiring the exclusion of un-cross-examined "testimonial" hearsay statements offered against a criminal defendant.[32] The Supreme Court has defined "testimonial" statements as those made for the "primary purpose" of establishing past events potentially relevant to later criminal prosecution.[33] A statement made by a victim to a medical professional for purposes of allowing that professional to offer a "diagnosis" of the victim at a criminal trial could be admissible through Rule 803(4) *and* a testimonial hearsay statement prohibited by the Sixth Amendment. An amendment could prevent Rule 803(4) from being applied in a manner that violates the Constitution.

Finally, an amendment that paves the way to admit reliable statements by medical providers made for purposes of diagnosing and treating patients could also be beneficial. An

[30] *See* Advisory Committee's note to Fed. R. Evid. 703 (requiring a limiting instruction upon request).
[31] Fed. R. Evid. 105 (requiring instructions limiting evidence to its proper scope upon request).
[32] Crawford v. Washington, 541 U.S. 36 (2004).
[33] Michigan v. Bryant, 562 U.S. 344 (2011).

unduly cramped reading of Rule 803(4) that excludes reliable provider statements within the core rationale for the exception deprives the factfinder of helpful information.

The Committee should also consider the potential costs or negative consequences of amending Rule 803(4) to exclude statements made in anticipation of litigation and to admit reliable provider hearsay.

From a more general perspective, there are many detractors of the current hearsay regime and the Rule 803 hearsay exceptions in particular. A common academic and judicial refrain has been that the Rule 803 hearsay exceptions lack empirical grounding establishing that the statements they admit enjoy inherent reliability.[34] Indeed, some research suggests that patients *do lie* to medical providers, whether out of embarrassment or concerns over privacy.[35] The Rule 803 hearsay exceptions reflect a judgment that the statements they cover are more likely to be reliable than other statements outside their purview and are, therefore, worthy of consideration by the factfinder, rather than empirically derived facts. That said, an amendment to reaffirm and refine Rule 803(4) could attract renewed criticism of the exception or the Rule 803 hearsay exceptions generally and a call for empirical validation of the reliability judgments they reflect. As noted by the 2002 Advisory Committee that rejected an amendment to Rule 803(4), an amendment that cuts back on plaintiff/patient statements to testifying medical experts in civil cases could also encounter opposition from the plaintiffs' Bar.

Even if the Committee were inclined to revisit Rule 803(4), it may be challenging to craft amendment language that eliminates unreliable statements made in anticipation of litigation from coverage while simultaneously retaining coverage of all statements that are likely to enjoy some inherent reliability. Further, it may be difficult -- or even impossible -- to draft amendment language that directs courts to admit reliable provider statements that should already be admissible under existing rule text.

Finally, as discussed above, there have been two significant developments surrounding Rule 803(4) since its original enactment that the Committee may *not* wish to address in any amendment process. As discussed above, most federal courts have found patient statements to medical providers that identify the perpetrator of child sexual abuse to be "reasonably pertinent" to treatment and diagnosis of the abused child. In addition, several federal courts have held that statements made for purposes of receiving mental health treatment are also covered by the exception. Because the federal courts remain actively engaged in interpreting Rule 803(4) to address these contemporary applications of the exception, the Committee may prefer to avoid these issues entirely and leave them to common law development. Indeed, the question of which patient statements are "reasonably pertinent" to medical diagnosis and treatment would seem to be one for the medical community rather than for rulemakers. It may be challenging, however, to amend Rule 803(4) without weighing in on the most pressing contemporary issues surrounding

[34] United States v. Boyce, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J. concurring) (suggesting that the present sense impression and excited utterance exceptions represent nothing more than baseless "folk psychology").
[35] *See Toward Presumptive Admission of Medical Records*, *supra* n. 1, at 584 ("Studies show patients consistently lie about certain topics, including diet, exercise, sexual activity, and adherence to prescribed treatment regimens, whether because of embarrassment or a desire for their doctor to think well of them.").

the exception. The Committee might expect some public comment regarding these contemporary issues as a response to publication of a proposed amendment to Rule 803(4). Of course, if the Committee were so inclined, it could address these issues as part of an amendment or in Committee Note language.

C. Amendment Alternatives

The amendment alternatives below offer some preliminary ideas for redrafting Rule 803(4) to exclude patient statements to testifying medical experts made in anticipation of litigation and to admit provider statements made for the purpose of medical diagnosis or treatment.

1. Eliminating the Word "Diagnosis" from Rule 803(4)

Rule 803(4) admits statements made to testifying doctors in anticipation of litigation because it permits statements made for purposes of medical "diagnosis" only and does not require that the statements be made in pursuit of any actual medical treatment. An amendment could not simply remove the "diagnostic" purpose from Rule 803(4) to eliminate statements made in anticipation of litigation, however, because such an amendment would not eliminate statements made to testifying experts who offer some "treatment." Plaintiffs' lawyers may hire testifying "treating" physicians, whose task is to treat with an eye toward litigation and expert testimony. A plaintiff's statements to such an expert could be motivated in part by a desire for treatment but lack reliability due to the inherent litigation purpose. Thus, eliminating a purely diagnostic purpose from the exception and requiring some connection to "treatment" would still pose the risk of admitting unreliable statements made in anticipation of litigation.

Eliminating a diagnostic purpose from the Rule would also risk exclusion of reliable statements squarely within the rationale for the hearsay exception. A plaintiff may make statements to a Mayo Clinic physician, for example, from whom she is seeking a "diagnosis" only, intending to find treatment based on that diagnosis closer to home. Those statements would fall within the traditional reliability rationale for Rule 803(4) because a patient who travels to a specialty institution to help resolve a medical mystery would have all the motivations to be accurate to ensure successful medical care. Removing the diagnostic purpose from the Rule altogether could, therefore, exclude statements within the reliability rationale for the exception.

Some state evidence rules account for this concern by requiring statements made for purposes of medical treatment or diagnosis *in contemplation of treatment*:

> Maryland Rule 5-803(4)
> (4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as

reasonably pertinent to treatment or diagnosis in contemplation of treatment.

An amendment to Rule 803(4) along the lines of the Maryland Rule would continue to admit reliable statements made to the Mayo Clinic physician in the above example. But it would not successfully exclude statements to testifying experts who are asked to offer some "treatment" along with a litigation opinion. Indeed, the Committee rejected the possibility of amending Rule 803(4) along the lines of the Maryland Rule in 2002 due, in part, to this problem. The minutes from the Fall 2002 meeting of the Advisory Committee meeting show that Committee members were concerned that a testifying expert could simply give a patient/plaintiff an aspirin to bring the patient's statement within a "treatment" or "diagnosis in contemplation of treatment" purpose. Therefore, the Committee reasonably rejected an amendment along the lines of Maryland Rule 5-803(4).

2. Adding a "But not" clause to Rule 803(4)

Rule 803(3), the state of mind hearsay exception, utilizes a "but not" clause to ensure exclusion of unreliable statements outside the rationale for the exception.[36] An amendment to Rule 803(4) could utilize a similar convention to exclude unreliable statements made in anticipation of litigation from the exception, as follows:

Rule 803(4) Statement Made for Medical Diagnosis or Treatment.

A statement that:

(A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause;
(C) <u>but not including a statement made in anticipation of litigation.</u>

An amendment along these lines would exclude statements made to testifying medical experts, even when those experts are asked to provide some treatment along with a litigation opinion. Even if the medical professional offers some treatment, a patient/plaintiff's statements to such a professional would be considered to be made "in anticipation of litigation" if the professional is also being consulted to provide an expert opinion. An Advisory Committee note could emphasize the intent of such an amendment to exclude statements made to a testifying expert who provides some form of treatment in the course of developing a litigation opinion. An amendment like this one would not exclude statements made to the Mayo provider in search of a diagnosis to aid in later treatment because those statements would not be made "in anticipation of litigation."

[36] *See* Fed. R. Evid. 803(3) (admitting "A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), *but not including a statement of memory or belief to prove the fact remembered or believed*…") (emphasis added).

One drawback of an amendment like this is that it may be overbroad and may exclude otherwise reliable statements to medical professionals that should be admitted through the exception. For example, a patient injured in an accident may seek treatment from her regular physician shortly after the accident. Any statements she makes to that doctor at that time would fall squarely within the reliability rationale for Rule 803(4) because the patient would have a strong interest in providing accurate information to obtain appropriate treatment. The same treating physician may thereafter be asked to testify and may be qualified to offer an expert opinion about the severity of the plaintiff's injuries and her long-term prognosis. Under an amendment to Rule 803(4) that employs a "but not" clause, a defense attorney could argue that litigation was certainly "anticipated" when the plaintiff first consulted her doctor because she had been in an accident and could foresee a lawsuit. And because the plaintiff ultimately called upon her physician to offer an expert opinion at trial, the defense could argue that all statements she made to that physician were made "in anticipation of litigation" and must be excluded.

As described above, statements made to physicians by child victims of sexual abuse are often admitted pursuant to Rule 803(4) through the testimony of the examining physicians. These include statements identifying the abuser, which can be instrumental in securing a conviction. Courts find such statements covered by Rule 803(4) because the identity of the abuser is "reasonably pertinent" to developing a treatment plan for the abused child.[37] When a medical provider examines and treats a victim of abuse, future litigation is certainly contemplated and highly likely to ensue. Therefore, courts could exclude statements made to medical providers by victims of abuse in the course of treatment under an amendment that includes a "but not" clause because those statements are deemed to be made "in anticipation of litigation." Such an overly broad reading of an amendment that reverses the existing admissibility of victim statements would be an unintended and undesirable consequence of amending Rule 803(4).

The Committee could utilize Committee note language to mitigate the possibility of an overly broad application of the "but not" clause. Note language could emphasize that statements are *not* made in "anticipation of litigation" simply because litigation is possible or even likely at the time the patient makes the statements. The note could clarify that statements are considered to be made "in anticipation of litigation" under the amendment only when the "primary purpose" of the statements is to aid in litigation. This test would allow courts to exclude statements made to a testifying expert who offers some minimal "treatment" by finding that the *primary* purpose of the statements was to aid in litigation. A "primary purpose" test would dovetail nicely with current Sixth Amendment jurisprudence under *Crawford v. Washington* because it would exclude the very "testimonial" hearsay foreclosed by the Constitution in criminal cases.[38] Statements made to a physician for the "primary purpose" of aiding in future litigation would be testimonial and, thus, excluded under the Sixth Amendment in a criminal case. Therefore, Rule 803(4) and the Confrontation clause would be aligned to exclude testimonial hearsay statements.

[37] *See, e.g.*, United States v. Griffith, 65 F.4th 1216 (10th Cir. 2023) (victim's statements to sexual assault nurse examiner identifying defendant as perpetrator of abuse admissible under medical treatment or diagnosis hearsay exception).

[38] *See* Michigan v. Bryant, 562 U.S. 344 (2011) (holding that hearsay statements are "testimonial" for purposes of the Confrontation Clause when they are made with the "primary purpose" of aiding in a future prosecution).

3. Adding a "Primary Purpose" Test to Rule 803(4)

If the Committee wishes to exclude statements made to a medical provider that are made with the primary purpose of aiding in future litigation, it may wish to include the "primary purpose" language directly in the text of Rule 803(4) and not leave that important qualification to a Committee note. One possibility for including the primary purpose language in rule text is as follows:

Rule 803(4) Statement Made for Medical Diagnosis or Treatment.

A statement that:

(A) is made for ~~—and is reasonably pertinent to —~~ the primary purpose of obtaining medical ~~diagnosis or~~ treatment or medical diagnosis in contemplation of treatment; ~~and~~

(B) is reasonably pertinent to medical treatment or diagnosis;[39] and

(C) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

An amendment along these lines would exclude statements made to a testifying expert in anticipation of litigation. Even if the expert offered the patient/plaintiff the proverbial aspirin or some treatment ancillary to his or her work developing an opinion for trial, any statements made to that expert in the course of that relationship would be excluded from coverage. While one purpose for the patient/plaintiff's statements might be medical treatment, the "primary purpose" would be to obtain an expert opinion. In addition, an amendment like this one would not suffer from overbreadth. If a patient sought care from a treating physician shortly after an accident and thereafter offered both fact and opinion testimony from that physician, the patient's statements to the doctor would remain admissible so long as her "primary purpose" in making them at the time she sought care was to obtain treatment (or diagnosis in contemplation of treatment).

Another benefit of an amendment like this one is that the text of Rule 803(4) would track Confrontation Clause jurisprudence post-*Crawford*. Because statements made for any "primary purpose" other than establishing facts to aid in a criminal investigation are nontestimonial, requiring statements made for the "primary purpose" of obtaining medical treatment or diagnosis in contemplation of treatment would make statements admissible through Rule 803(4) nontestimonial by definition. This would advance the important goal of ensuring that the

[39] At first blush, it would seem that subsection 803(4)(B) would need to track the exact language of subsection (A), which would mean repeating "in contemplation of treatment" again. That adds verbosity to the Rule and may not be necessary so long as the primary *purpose* of making the statement is to obtain treatment or diagnosis in contemplation of treatment, it may only be necessary to ascertain that the statement is pertinent to treatment or diagnosis. It may not be necessary to limit the pertinence requirement (with in contemplation of treatment language) so long as the primary purpose in subsection (A) is so limited. If the Committee is inclined to pursue a possible amendment to Rule 803(4) along these lines, this question could be explored further.

Evidence Rules do not admit evidence that violates the Constitution. In 2002, the Committee rejected the possibility of an amendment requiring a medical treatment purpose, as follows:

> It will be difficult in many cases to determine the motivation of the patient who speaks to a doctor, especially after an accident or injury. Is the patient seeking treatment, or an expert witness, or both? The current rule avoids this difficult line-drawing.[40]

Crawford v. Washington was decided in 2004 and now *require*s federal judges to determine the "primary purpose" of hearsay statements offered against a criminal defendant. Federal judges have proven quite capable of making this determination in the Sixth Amendment context. Adding "primary purpose" language to Rule 803(4) that dovetails with the constitutional analysis has significant benefits that were not present in 2002.[41]

The only drawback to a "primary purpose" test may be that it has the potential to continue admitting some unreliable hearsay. For example, parents might bring a young child to the emergency room with grievous injuries and make statements to medical personnel about the "cause" or origin of the injuries in an effort to obtain medical care. In an emergency room context, the *primary* purpose of such statements would likely be to obtain urgently needed care for the injured child. Thus, the statements of the parents to the medical personnel would likely remain admissible under an amended Rule 803(4). The parents' motivation to misrepresent the cause or origins of the child's injuries while in their care is obvious if the parents were responsible for causing the injuries. Another example might be when a medical provider offering a second opinion or follow-up care speaks to a doctor who performed earlier medical treatment of the patient in question. The first doctor may have a strong motivation to defend his course of treatment, particularly if there is some question about the competency of that care. Still, if one provider calls an earlier provider to seek information needed to provide medical treatment to an existing patient, statements made by the earlier doctor about medical history are likely made for the *primary* purpose of offering medical treatment to the patient. Despite their suspect reliability, such statements would likely remain admissible under an amended Rule 803(4).

While a "primary purpose" amendment would exclude unreliable statements made to testifying experts as part of an effort to develop a litigation opinion, it has the potential to admit other unreliable hearsay.

4. A Trustworthiness Escape Clause

[40] Minutes of Fall 2002 Evidence Advisory Committee meeting.

[41] *See* Smith v. State, 309 Ga. 240, 248, 845 S.E.2d 598, 605 (2020)("Secondly, and more critically, all of the federal criminal cases discussed above were decided prior to the United States Supreme Court's landmark decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which the Court held that the admission at trial of the defendant's wife's pretrial statement to police implicating her husband in the charged crime violated the Sixth Amendment's Confrontation Clause because that statement was testimonial and the defendant's wife did not testify at trial and thus was not subject to cross-examination. *Therefore, none of the courts deciding the cases cited above had occasion to consider whether admitting the non-testifying declarants' statements to medical professionals consulted solely to testify at trial violated the defendants' Sixth Amendment right to confront their accusers*.") (emphasis added).

Another potential amendment alternative would be to add a trustworthiness escape clause to Rule 803(4) akin to the clauses within Rules 803(6)(E), 803(7)(C), and 803(8)(B). The business records exception, for example, authorizes exclusion of a business record that meets all of the requirements of the hearsay exception if the *opponent* of the record shows "that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[42] This allows a court to exclude a business record that is otherwise admissible, but places the burden on the opponent of the record to demonstrate a reliability problem. A similar provision could be added to Rule 803(4) to deal with unreliable statements made to testifying experts in anticipation of litigation:

> Rule 803(4) Statement Made for Medical Diagnosis or Treatment.
>
> A statement that:
>
> (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; ~~and~~
> (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and
> (C) the opponent does not show to lack trustworthiness due to the source of information or circumstances surrounding its making.[43]

An amendment along these lines has some distinct advantages. First, it utilizes a trustworthiness clause that exists in current rules. The federal courts have experience applying this trustworthiness clause and are familiar with the burden-shifting approach it adopts. There is existing precedent surrounding these clauses that could aid courts in adapting it to Rule 803(4).[44] Most importantly, an amendment along these lines would have the potential to exclude any and all unreliable statements made for medical treatment or diagnosis and would not narrowly target statements "made in anticipation of litigation." For example, it would allow an opponent to challenge the unreliable statements of the emergency room parents in the hypothetical situation above, regardless of whether the statements were made "for the primary purpose of obtaining medical treatment or diagnosis in contemplation of treatment." Given the flexibility of such a provision and federal courts' familiarity with it, a trustworthiness escape clause could be an optimal amendment solution.

There are two potential downsides to this approach, however. First, several of the Rule 803 hearsay exceptions might benefit from the addition of a similar trustworthiness escape. Critics have frequently decried the potential for unreliability in excited utterances and state of mind statements admissible through Rule 803(2) and (3) respectively. Adding a trustworthiness

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[42] Fed. R. Evid. 803(6)(E).

[43] Rule 803(4) cannot employ the exact language used in Rules 803(6), (7), and (8) because those Rules lead in with the word "if." Rule 803(4) leads in with different language: "A statement that…." Perhaps, the stylists could help identify superior verbiage for a trustworthiness escape clause in Rule 803(4) if the Committee is interested in pursuing such an alternative.

[44] *See e.g.*, Jordan v. Binns, 712 F.3d 1123, 1136 (7th Cir. 2013) (excluding adjuster's report under Rule 803(6) where plaintiffs carried their burden of showing that it was an untrustworthy document prepared in anticipation of litigation).

clause to Rule 803 hearsay exceptions one at a time could be deemed inefficient and cumbersome. Second, a trustworthiness clause in Rule 803(4) would not track the Confrontation Clause precedent. Courts would have to perform a "trustworthiness" inquiry under Rule 803(4) and a distinct "primary purpose" inquiry under *Crawford*. Of course, Rule 803(4) currently demands statements "made for medical diagnosis or treatment," thus incorporating a purpose requirement that often aids in the constitutional analysis. The existing Rule thus already reflects some symmetry with the testimonial inquiry that would not be lost with the use of a trustworthiness escape clause.

5. Admitting Reliable Provider Statements

Amending Rule 803(4) to clarify that reliable provider statements may be admitted through the exception poses a drafting challenge where such statements are arguably admissible through the existing requirements of the exception. Two possibilities seem most promising.

First, a "primary purpose" amendment like the one set forth above might add language clarifying that the exception admits statements made for purposes of "providing" medical treatment or diagnosis, in addition to statements made for purposes of "obtaining" treatment or diagnosis:

Rule 803(4) Statement Made for Medical Diagnosis or Treatment.

A statement that:

(A) is made for ~~—and is reasonably pertinent to —~~ the primary purpose of obtaining or providing medical ~~diagnosis or~~ treatment or medical diagnosis in contemplation of treatment; ~~and~~

(B) is reasonably pertinent to medical treatment or diagnosis; and

(C) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

This added textual language could be accompanied by an Advisory Committee note explaining that statements made *by medical providers* may also be admitted when they satisfy the other requirements of the exception.

Alternatively, an amendment adding a trustworthiness escape clause to Rule 803(4) like the one set forth above might simply include a Committee note discussing the admissibility of qualifying provider statements without adding any language to the text of Rule 803(4) to address this issue.

V. Conclusion

The drafters of Rule 803(4) chose to permit unreliable statements made to testifying medical experts to be admitted through the exception due to an assumption about the routine disclosure of those statements to the jury. Federal courts have accordingly allowed such statements made in anticipation of litigation to be admitted through Rule 803(4). Conversely, federal courts have per

se excluded statements made by medical providers to one another or to patients directly without considering whether those statements satisfy the specific requirements of Rule 803(4). The Advisory Committee may wish to explore the possibility of amending Rule 803(4) to address these admissibility issues.

EVIDENCE OF ALLEGED PRIOR FALSE ACCUSATIONS OF SEXUAL ASSAULT

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FRE 412 Sex-Offense Cases: The Victim

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) ***Criminal Cases*****.** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) ***Civil Cases*****.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) ***Motion*****.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) ***Hearing*****.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

FRE 608 A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(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; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

FRE 404 Character Evidence; Other Crimes, Wrongs, or Act

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

…

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

…

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) ***Prohibited Uses.*** 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.

(2) ***Permitted Uses.*** 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.

(3) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

…

CONSTITUTIONAL RIGHTS

- **Davis v. Alaska, 415 U.S. 308 (1974) (“**A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.”)
- **Delaware v. Van Arsdall, 475 U.S. 673 (1986) (**[w]e have recognized that the exposure of a witness' motivation in testifying isa 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' safety, or interrogation that is repetitive or only marginally relevant.)
- **Olden v. Kentucky, 488 U.S. 227 (1988)** (constitutional rights violated by application of rape shield rule to preclude cross-examination for bias).
- **Nevada v. Jackson, 133 S. Ct. 1990 (2013)** (citing Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam) for the principle that “this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes.”).

FRE 608

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609 **or as provided in subsection (c),** 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 ....

(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.

Rule 412. Sex-Offense Cases: The Victim

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) ***Criminal Cases*****.** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;

(C) evidence of a witness's allegedly false prior accusation of sexual misconduct; or

(D) ~~**(C)**~~ evidence whose exclusion would violate the defendant's constitutional rights.

(2) ***Civil Cases*****.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition, **or an alleged prior false accusation of sexual misconduct,** if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

ADVANTAGES

- **Make clear, textually,** that PFAs are **admissible** under Rule 412.
- **Subject PFAs to Rule 412s** notice & procedural requirements (filing motion 14 days in advance; victim notice and right to participate; etc.)
  → This means that even if sought to be used for **608(b)** purposes, will need to give notice etc.
- Provide for the admission of **extrinsic evidence** for 608 purposes when a PFA is **especially probative** (with guidance on standard); but disallow extrinsic evidence if W concedes (for efficiency)
  → Relieve pressure from 404(b) and constitutional frameworks
- Provides for **notice etc**. for non-412/sex PFAs.
- Ameliorates constitutional **uncertainty** and variety

ADDED CONSIDERATIONS

- Consider addressing/raising the good faith threshold of 608(b)?
  - Note: Coplan says that state's standard of "demonstrably false' by C&C evidence violated Constitution
- Could provide more descriptive guidance to courts on how to assess probative value for untruthfulnesss for 608(b), so that courts don't erroneous preclude XX even if not allowing/meeting threshold for extrinsic in (c).
  - Advisory committee note?
- Limit extrinsic evidence to criminal cases? To complainant's PFAs?
- Relationship to 404(b)?

Suggested FRE Amendments Related to Machine Conveyances of Information

FRE Advisory Committee Meeting
October 27, 2023 – Minneapolis

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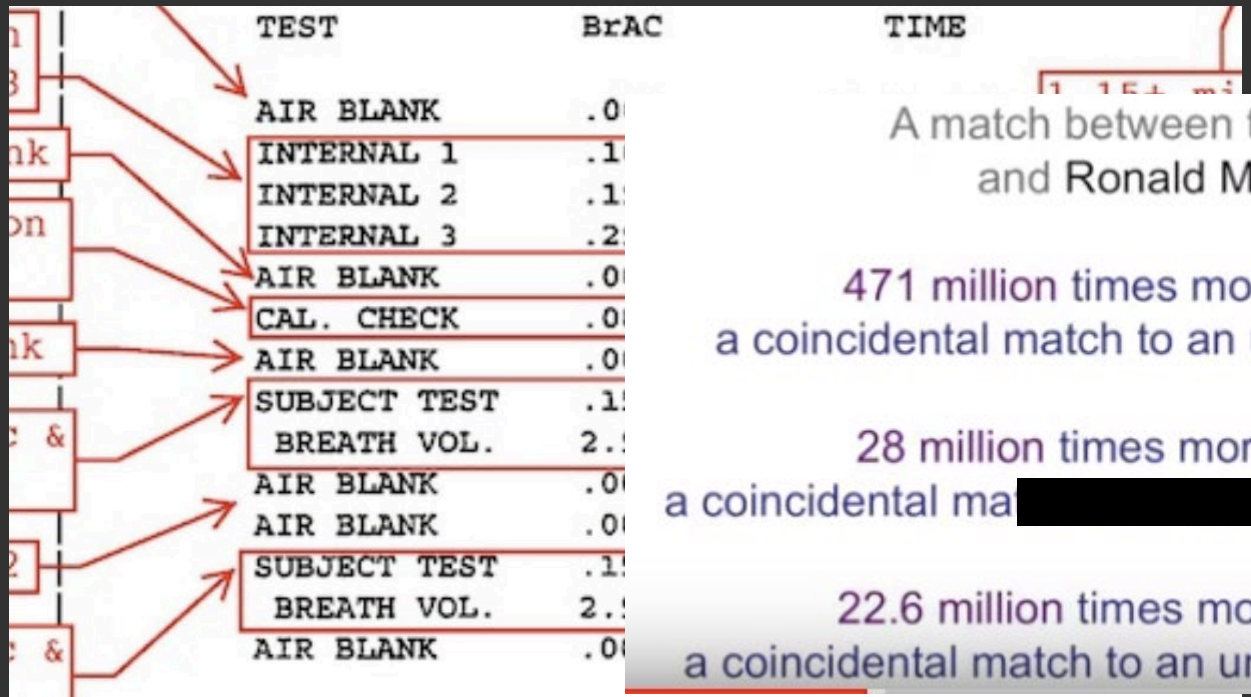

A match between the beer bottle
and Ronald Meadow is:

471 million times more probable than
a coincidental match to an unrelated Black person

28 million times more probable than
a coincidental ma[redacted]d Caucasian person

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

Authorship Attribution of Micro Messages

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TEST RESULT: 0.15 grams of Alcohol per 210L of breath.

DNA Mixture Interpretation:
A NIST Scientific Foundation Review

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This publication is available free of charge from:
https://doi.org/10.6028/NIST.IR.8351-draft

Machine “Testimony”: The Problem

- Machine-generated conveyances of information (akin to human assertions) are *ubiquitous*, *potentially unreliable*, *often proprietary and difficult to access*, and *difficult for jurors to assess on their own without more information*.
- Current FRE address human assertions in numerous ways (both through enforcement of CX/confrontation and impeachment) but…
- They only address machine conveyances indirectly through (1) FRE 702 when relied on by an expert and (2) live CX of the user and/or proprietor
- Human safeguards (hearsay rule + CX at trial) aren’t a good fit
- Verdict accuracy, legitimacy, and fairness are at stake, as AI becomes more sophisticated

Possible changes to 702

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

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

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

(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.

Possible changes to 806

(1) When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

(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.

Possible changes to 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 instruments, all of the following:

(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.

Grimm & Grossman's 901(b)(9)

For an item generated by a process or system:

(A) evidence describing it and showing that it produces a reliable result, including:

(1) that the opponent had fair pretrial access to the process or system;

…

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.

Possible changes to 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.

Changes to Notes

- 702: Make clear that *Daubert* hearings are appropriate to determine reliability of machine output and the importance of "factor space"
- 806: Make clear that this should apply to machine output too
- 901/902: Make clear what an "accurate result" showing will include for more complex algorithms

Contextual Information Jurors and Opponents Often Need:

(1) **Pretrial access to the software**

Jennifer L. Mnookin, *Repeat Play Evidence: Jack Weinstein, "Pedagogical Devices," Technology, and Evidence*, 64 DePaul L. Rev. (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."

Contextual Information Jurors and Opponents Often Need:

(2) **Studies and underlying performance data showing how well the software works under circumstances substantially similar to this case.**

2021 NIST PGS Study, at 83, 89:

"LR results cannot be externally and independently demonstrated to be reliable without access to underlying performance data…. On the question 'Are currently used PGS systems reliable?' the answer is 'It depends.' It depends on the region of the factor space for the case sample of interest and coverage with available ground truth data for assessing reliability."

- **[Alternatively, source code access]**

Contextual Information Jurors and Opponents Often Need:

(3) **Prior relevant output of the software.**

[e.g. COBRA data, other matching candidates from a biometric database, other statements from an AI related to the same subject matter]