Keeping Evidence Real

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ABSTRACT: Commentators largely agree that the Federal Rules of Evidence have problems. Expert testimony standards admit junk science. Impeachment rules chill defendant testimony. The hearsay regime defies consistent application and obstructs self-representation. The list goes on: Many rules fail to assist, or affirmatively thwart, jurors trying to make good decisions. Such shortcomings disproportionately harm those with the least power in the system, raising profound questions about whether the evidence code serves its statutory mandate—to promote truth and justice in court proceedings. In the face of widely recognized problems, the government body charged with managing the evidence code—the Advisory Committee on Evidence Rules—has been passive. Rather than exercising its authority to ensure that evidence rules fulfill their statutory purposes by rulemaking, it has focused on what we term rule-tending—treating the existing code as a fixed edifice needing only light maintenance.

The evidence committee is not the only government organ charged with managing regulations through authorities delegated by statute. Administrative agencies do that, too. This Article places evidence rule management within this larger government landscape, showing that the evidence committee's statutorily delegated authority is comparable to that of agencies. Rule-tending, we argue, has left the evidence regime empirically untested, normatively adrift, and unaccountable both to the public it governs and to the statutes it implements. We suggest that practices historically developed in the administrative agency context would help. Increasing public participation, diversifying decision-makers, pursuing empirical evaluations, and articulating reasons grounded in statutory purposes would enhance both efficacy and accountability. And it would better align the rules with their statutory purposes of promoting truth and justice. The very fact of delegated authority, we argue, demands

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more than rule-tending—it requires rulemaking that is empirical, accountable, and purpose driven.

INTRODUCTION

The Federal Rules of Evidence recently turned fifty.[1] Their tenure thus far has been characterized by a degree of stability not seen in other rule-based areas. The code has been tweaked through amendments, but there have been almost no fundamental alterations to the rules. Anyone perusing the Federal Rules of Evidence would have no idea of the breadth and depth of the criticism they have engendered. Yet, the half century since the evidence code's enactment has seen something close to consensus that the rules embody numerous alarming failures. Scholars have persuasively identified fundamental problems with a broad range of evidence rules—from rules on experts that reward the highest bidder and admit junk science, to a credibility impeachment scheme known to silence defendants in criminal cases, to a hearsay regime whose

1. *See* FED. R. EVID. REFS & ANNOS (describing congressional enactment of the Federal Rules of Evidence ("FRE") on January 2, 1975).

intricacies elude even trained legal professionals, and more.[2] A growing literature has exposed how such failures systematically disadvantage those with little power in the system, often people also marginalized in other ways.[3]

Focusing on the rulemaking process as key to the rules' current state, this Article argues that tools and approaches developed by other federal rulemakers—administrative agencies—could help make the evidence regime both more accountable and more effective.[4] The Advisory Committee to the Federal Rules of Evidence, or "Rules Committee," manages the federal evidence rules through a congressional delegation of authority to the judiciary.[5] As a government institution making rules binding on the public, we argue, the Rules Committee is positioned much like many other rulemaking bodies in the federal government. It owes accountability to both the people it governs and the law it administers—the Federal Rules of Evidence itself. Other rulemaking bodies using delegated congressional authority, such as administrative agencies, have developed extensive channels for information gathering and accountability in service of purpose-driven rulemaking. By contrast, the Rules Committee has favored what we call rule-*tending*: treating the rules as a fixed edifice and keeping alterations to the minimum required to correct mistakes in the application of already existing rules.

There are potential benefits to rule-tending. Proponents cite predictability and efficiency in trial practice, plea bargaining, and settlement, and avoiding the costs and inefficiencies of reform.[6] Yet any claims about the success of

2. *See infra* Section III.D (explaining issues with Rule 702 and expert qualifications); Section III.A (discussing literature critiquing impeachment with prior convictions); Section III.C (discussing problems with the modern hearsay rules and exceptions).

3. *See generally* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017) (describing the racial differentiation in admissibility of certain evidence); Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) (describing how impeachment rules prioritize evidence based on culturally recognized moral integrity and not untruthfulness); Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018) (describing evidence that jurors rely on that are not subject to any rules of evidence).

4. We also join recent scholars focusing on the role of the Rules Committee in contributing to evidentiary stasis and other problems. *See generally* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937 (2022) (identifying rulemaking process as source of stagnation in evidence and arguing that judges should have more interpretive leeway for the law to evolve); Ngozi Okidegbe, *Democratic Evidence*, *in* CRITICAL EVIDENCE (I. Bennett Capers, Jasmine E. Harris & Julia Simon-Kerr eds., forthcoming 2026) (on file with authors) (arguing for a more inclusive rulemaking process with reference to administrative procedure); *see also* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1190 (2012) (noting, with respect to civil procedure, that "[l]ike an administrative agency, the Court's role in civil procedure is to set policy—not simply to resolve particular disputes").

5. Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1902 (2019) (describing congressional delegation to the judiciary).

6. Daniel J. Capra & Liesa L. Richter, *Long Live the Federal Rules of Evidence!*, 31 GEO. MASON L. REV. 1, 42–47 (2024) (describing benefits of an incremental evidence regime).

evidence rulemaking necessarily depend on the goals of the enterprise. What are evidence rules supposed to do? The answer is not obvious. The rules provide a framework through which we endeavor to "lead the jury to the truth,"[7] but are equally important when no jury is present.[8] Theorists have additionally posited that evidence law serves a legitimizing function;[9] offers a web of choices for allocating the risk of error;[10] and even "regulates and reflects the construction of courtroom 'truth,'"[11] shaping the narrative of the trial[12]—all while still being categorized as procedural and not substantive law, as a system that enables "factual rather than normative conclusions."[13]

The field has largely focused on accuracy and avoided sustained deliberation about other goals and effects of the rules.[14] Yet, the rules themselves are explicit in adopting a broader conception of their purpose.[15] Rule 102 specifies that the rules should support fairness and efficiency, and help develop evidence law, with the ultimate goal of "ascertaining the truth and securing a just determination."[16] Evidence law thus has a complex mandate with primary purposes that may sometimes be in tension with one another.

This multiplicity of purpose has led some to question how one legal regime can ever serve so many masters.[17] Our take is different. *Most* federal legal regimes involve multiple, contested, and at times competing aims; we see no inherent problem in an evidence regime that follows this predominant

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7. *See, e.g.*, David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 416 (2013); *see also* Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 408, 443 (2022) (noting that "[t]he goal [of the evidence process] is to reach an accurate conclusion").

8. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 202 (2006).

9. *See, e.g.*, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368–69 (1985).

10. *See, e.g.*, ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 208–13, 243–44 (2005).

11. Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 162 (1997).

12. *See, e.g.*, Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 374.

13. Schauer, *supra* note 8, at 183.

14. A notable exception to this was a 1997 Hastings Law Review Symposium, *Truth & Its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J. 289 (1997), although even in this setting, contributors focused on accuracy, considering "truth—and its interplay with the rules of evidence." Professor Nunn recently restarted a conversation about the purpose of evidence law. G. Alexander Nunn, *The Incoherence of Evidence Law*, 99 NOTRE DAME L. REV. 1255, 1258–59 (2024). Law and economics accounts present an important exception to this, though they tend to assume efficiency and error minimization as the overriding goals of the system.

15. FED. R. EVID. 102.

16. *Id.*

17. Nunn, *supra* note 14, at 1267 (describing "[a]n [i]ncoherence of [p]urpose" in evidence law).

pattern.[18] This is one reason government exists: to manage essential systems with manifold values, providing a forum for fleshing out, and arbitrating among, their disparate goals. The problem, in our view, lies in the way the rules are managed. Without a robust process for debating and refining the rules' purposes, much less evaluating how well the rules serve those purposes, both the rules and those tasked with overseeing them can come adrift from empirical realities and normative commitments.[19] In other words, they become untethered from anything beyond the task of shoring up existing rules. We see the effects in evidence class, as professors wait out student chuckling at the rules' assumption the jurors won't think about insurance as long as lawyers don't talk about it; admit that one after another of the rules' underlying empirical assumptions have been shown to be false; and can offer no comfort when it becomes clear that the rules do not protect the litigation system from junk science.[20] The rule-tending tradition has made these and other such fallacies, documented amply by many scholars,[21] a seemingly indelible part of the evidence landscape.

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18. *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640–42 (2002) (describing legislative incentives for creating statutory ambiguity); Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. 921, 938–39 (2025) (explaining that "[r]egulatory statutes often do not require one particular response to a given issue; they allow for multiple possible solutions to any one problem," and quoting an agency administrator who had previously assisted with writing legislation as a congressional staffer as saying that "[t]he words end up on the page *because* they are unclear," so "everybody can see their own outcomes . . . [and] goals in them" (third alteration in original) (quoting an anonymous interview from an administrative official)).

19. With credit to Mirjan R. Damaška for the metaphor. *See generally* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997).

20. *Compare, e.g.*, FED. R. EVID. 804(b)(2) advisory committee's note on proposed rules (citing Rex v. Woodcock (1789) 168 Eng. Rep. 352, 353; 1 Leach 500, 502 ("[W]hen the party is at the point of death, . . . every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth . . . .")), *and* Shepard v. United States, 290 U.S. 96, 100 (1933) (explaining that a dying declaration "must have been spoken in the hush of [death's] impending presence"), *with* Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 237–43 (1998) (discussing the science surrounding why dying declarations may not be reliable), *and* Nunn, *supra* note 14, at 1283 (explaining that hypoxia actually "*distort*[s] the perception" of those closest to death), *and* Michael J. Polelle, *The Death of Dying Declarations in a Post-*Crawford *World*, 71 MO. L. REV. 285, 301–02 (2006) (suggesting that there are a variety of psychological pressures that one could experience at death). *But see* Timothy T. Lau, *Reliability of Dying Declaration Hearsay Evidence*, 55 AM. CRIM. L. REV. 373, 377 (2018) (arguing that there is "a modern justification for the exception").

21. *See, e.g.*, Liang, *supra* note 20, at 240 (discussing how modern medicine undermines the premise of dying declarations); James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 613 (1985) ("Neither prevailing psychological theories nor existing empirical data supports the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction."); Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 723 (1992) (finding that modern empirical studies show "juries are fully capable of evaluating the strengths and weaknesses of hearsay evidence");

It does not need to be this way. The federal government itself offers ideas for how to do things differently. Administrative agencies, like the Rules Committee, implement federal statutes and policies through authority delegated to unelected government employees.[22] The strictures and practices that have been developed for agency rulemaking, we argue, offer a foundation for reforming evidence rulemaking. As government institutions laying down rules for a broad public, both agencies and the Rules Committee have the obligation to act accountably to the people they govern and to the laws they implement. Such accountability involves getting input from a diverse public in an inclusive way. Along with expert research, such input helps rulemakers credibly assess the field they regulate and evaluate their regulations' effects. Rulemakers' decisions should show that they took into account both available information about on-the-ground realities and the pluralistic views and interests of the publics affected. And their outcomes should relate clearly to their legal mandate. In short, we argue that, like other government rulemaking, evidence rulemaking should be inclusive, realistic, responsive, and tied to clear standards.

This Article argues that, as with other federal rulemaking, it is the evidence rules' overarching purposes that set the baseline against which to assess them. To determine whether a rule presents a problem worth solving, we need to have a sense of what the rules are *for*. Articulating what purposes the rules should serve and figuring out whether and how they serve them, we suggest, lies at the heart of proper rulemaking. This would require a departure from the tradition of rule-tending to a more active, inquisitive rulemaking orientation. The Rules Committee has operated as the guardian of the existing code, rather than a custodian of the values the code serves. A purpose-driven rulemaking approach would instead require that it assess whether federal evidence rules help fact finders find truth or reach just adjudications. The Rules Committee could make this move from rule-tending to rulemaking by adopting practices developed by administrative agencies. Congress and the Chief Justice could help by making the Rules Committee itself bigger, more epistemically diverse, and more experientially balanced.[23]

Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 830–31 (2013) (determining that the fact finder's ability to predict future misconduct based on uncharged misconduct under Rules 413 and 414 is low).

22. *See, e.g.*, Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 828 (2002) (noting that, "[b]ecause Congress has delegated these procedural matters to the Judicial Conference, members of Congress have generally washed their hands of responsibility for maintaining the various Codes," a situation quite like most legislation, where Congress enacts broad statutes and lets implementers figure out implementation and updating).

23. Although this Article focuses on evidence rulemaking and highlights features unique to evidence, other judicial rulemaking undoubtedly suffers from some, or many, of the same aspects

This Article proceeds in four parts. Part I considers how evidence rulemaking might, like other forms of rulemaking, try to promote the goals of its statutory mandate. It identifies two central goals of the evidence regime—truth and justice—and suggests the kinds of empirical and normative inquiries that would be necessary to foster them. Part II introduces administrative agency rulemaking as a salutary comparator to evidence rulemaking. We explain how evidence rulemaking lacks the accountability mechanisms developed by agencies, which allow agencies to consider expertise, hear from affected communities, provide reasons for action or inaction, and justify their conclusions with reference to statutory mandates. Further, the composition of the Rules Committee, particularly its homogeneity and pro-prosecutorial slant, differs from agency rulemaking, where input from many different voices and institutional locations is the norm. Part III then considers a number of evidence rules and doctrines to show that evidence rulemakers have focused on rule-tending—upholding, rather than changing, the existing code even in the face of overwhelming, long-standing critiques. Whether the rules achieve their purposes, or are empirically efficacious or normatively coherent, has often seemed immaterial. Although we use particular examples to demonstrate the rulemaking deficiencies we point to, our argument is generally not that the Rules Committee must change some specific rules in some specific way. Rather, we argue that the Committee's approach to rulemaking suffers from a lack of accountability both to affected parties and to the statutory mandate that gives the Committee power. In Part IV, we suggest how changing the process and personnel could help make evidence rulemaking both more accountable and more realistic.

I. THE PURPOSE OF EVIDENCE RULEMAKING

Evidence rulemaking shares fundamental similarities with other delegations of congressional authority. Although rules of evidence are often thought of as sui generis or a product of logical rationality divorced from the messiness of other lawmaking,[24] in a very mundane way the Federal Rules of Evidence establish both law and policy. The body of rules first passed in 1975 created a system that governs the admissibility of evidence in federal courtrooms.[25] This system, like most laws, is not wholly self-actualizing. The rules themselves have legal force, but they also embody complex policy prescriptions. The system's success, therefore, depends both on judges correctly applying the rules and the rules' capacity to achieve their policy objectives. As is usually the case in

of rule-tending. We hope our analysis of the structures of evidence rulemaking will facilitate future work on this issue.

24. *See, e.g.*, Donald Nicolson, *Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory*, *in* FEMINIST PERSPECTIVES ON EVIDENCE 14–25 (Mary Childs & Louise Ellison eds., 2000) (critiquing Rationalist conception of evidence law as "knowledge which corresponds to . . . objective reality . . . best discovered through reason").

25. FED. R. EVID. REFS & ANNOS (describing congressional enactment of the FRE on January 2, 1975).

modern statutory schemes, the rules require maintenance and additional rulemaking to achieve their objectives.[26]

To ensure that laws remain relevant and updated over time, Congress often delegates rulemaking to other bodies. Evidence admissibility is the province of the courts, so it is no surprise that Congress assigned control over evidence rulemaking to the judicial branch.[27] Specifically, the Chief Justice of the Supreme Court must ensure that the rules' mandate is carried out. For the past thirty years, two Chief Justices have used this delegated authority to staff an Advisory Committee to manage the rules.[28] As with other rulemaking endeavors that result from congressional delegation, evidence rulemaking should in theory be tied to the objectives articulated in the governing statute.

Evaluating the success of evidence rulemaking thus depends on the goals of the enterprise. What are the rules meant to accomplish? This question has received less attention than one might expect. Although evidence scholars have interrogated nearly every rule in the book, most accounts do not spend much time considering what the rules are *for*. Instead, they often assume an end goal—accuracy,[29] efficiency,[30] or sometimes legitimacy[31]—and move on. The field has not yet engaged in sustained interrogation of the rules' purposes.[32] From a rulemaking perspective, this is a serious omission. The purpose of individual rules and—perhaps more importantly—the purpose of the rules as a body are key to measuring their successes. As such, it should be a central question for scholars as well as rulemakers.

Like many other statutes, the Federal Rules of Evidence contain a statement of purpose.[33] Rule 102, entitled "Purpose," catalogs a list of priorities: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence

26. The evidence rules are a somewhat unusual hybrid: Initially drafted by judges working under statutory authorization, the rules were then revamped by Congress and enacted as a statute. *See infra* Section IV.B. The rules enacted in that statute are themselves subject to revision through a process involving judicial committees managed by the Chief Justice; proposed revisions presumptively go into effect unless Congress legislates otherwise. *See infra* Section IV.B. Although this system does not entirely mirror the typical structure of administrative agency authorization, it bears its key hallmarks: Statutes authorize unelected government actors to make rules with the force of law. It is on this aspect of the regime that we focus here. We discuss the complications, and potential constitutional problems, with the evidence regime further in Part IV.

27. Capra & Richter, *supra* note 5, at 1902 (describing congressional delegation of rulemaking authority to the judiciary).

28. *See* Dawn M. Chutkow & Michael Heise, *The Rulemakers: An Empirical Analysis of Chief Justice Appointments to the Judicial Conference Rules Committee*, 74 CASE W. RSRV. L. REV. 991, 999–1000 (2024).

29. *See, e.g.*, Sklansky, *supra* note 7, at 416.

30. *See, e.g.*, STEIN, *supra* note 10, at 141.

31. *See, e.g.*, Nesson, *supra* note 9, at 1368–69.

32. Professor Nunn begins a conversation about the purpose of evidence law in his recent work. Nunn, *supra* note 14, at 1258–59.

33. FED. R. EVID. 102.

law, to the end of ascertaining the truth and securing a just determination."[34] Embodied in this provision are a set of values judges should support when applying the rules. Rule 102 also implies that the rules themselves should promote these values. It would be difficult for a judge to apply a rule to the end of ascertaining the truth when the rule itself contravenes that end. This is, presumably, why Congress provided procedures for amending the rules.[35] Both the rules and their application, therefore, should be interpreted and assessed through the lens of Rule 102's enacted statutory purpose.[36]

In codifying Rule 102, Congress did not offer any formal commentary on how the values it articulates should be reconciled; in fact, they will doubtless sometimes conflict.[37] Truth and justice are not always aligned. Efficiency is often in tension with the thoroughness that fairness requires. The development of evidence law may involve experimental application that ultimately does not serve efficiency, truth, or justice in a given case. While this complicates the job of those tasked with administering or maintaining the rules, this state of affairs is by no means unusual. Congressional delegations of rulemaking authority will often come with a mandate to balance a multiplicity of aims that may be in tension with one another. Any regulation of economic activity, for instance, requires agencies to balance the needs of industry with the needs of the publics industry affects. Indeed, the kind of systemic, accountable rulemaking we describe in Part II developed in response to the need to accomplish complex, multifaceted mandates. Nonetheless, Rule 102 has been largely ignored: Courts rarely cite it. As Professor Alex Nunn recently put it, Rule 102 is seen as both self-explanatory "to the point of [being] banal[]" and "merely an accoutrement."[38]

What would it mean for evidence rulemaking to try to promote the goals of its statutory mandate, like much other rulemaking does? We focus particularly on the instruction that the rules should promote "ascertaining the truth and securing a just determination."[39] Taking even this subset of

34. *Id.*

35. *See infra* Section II.B.

36. *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 671 (2019) ("Congress frequently includes legislative findings and purposes in enacted bills . . . .").

37. *See* Nunn, *supra* note 14 at 1258–66.

38. *Id.* at 1266, 1269. Almost all of the federal procedural rules share similar statements, which may, ironically, contribute to their lack of salience. For example, the Federal Rules of Civil Procedure state that they "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1; *see also* FED. R. BANKR. P. 1001(a) ("[These rules] must be construed, administered, and employed by both the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."); FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.").

39. FED. R. EVID. 102.

articulated purposes seriously raises difficult questions. How do we know whether something helps or hinders our ascertainment of the truth? How do we recognize a just determination when we see it? Determining what these goals might look like on the ground takes more than just naming them. The rules point us in the direction of purposes, but—like most foundational legal texts—require further interpretation.

Deciding whether a given rule helps ascertain the truth or promote justice has both empirical and normative, or policy-based, aspects. We have to ask whether a rule admits evidence that will help reach the truth, based on what we know about how the world works and the social realities of truth-seeking. We also must recognize that, while rules that keep out reliable evidence may be unjust, justice might also be implicated by rules that systemically disadvantage certain groups or advantage others. Answering the questions raised here would not be easy. It would involve research and discussion. Scholars and practitioners might disagree on the answers. In fact, disagreement seems likely. Still, considering the complex empirical questions that undergird our evidence rules is as important as considering the shape that justice should take. The failure to ask these questions does not avoid answering them. Instead, it entrenches implicit, undertheorized, and obsolete conceptions of empirical realities and normative commitments.[40]

A. ASSESSING RULES EMPIRICALLY

The evidence rules are supposed to help fact finders ascertain the truth.[41] The truth of a litigation dispute—what actually happened out in the world—is itself an empirical matter. But lawyers do not present "the truth" to fact finders; they present bits and pieces of evidence favorable to their side.[42] Many evidentiary provisions concern whether the potential evidence provides a reliable basis for a reasonable inference about factual events. The hearsay regime, authentication rules, rules about qualifying experts, and rules permitting evidence of prior convictions to impeach credibility, to name a few, all rest on

40. Julia Simon-Kerr, *A New Baseline for Character Evidence*, 76 VAND. L. REV. 1827, 1850 (2023) ("The rules . . . are a site of legal decisionmaking that is particularly inflected by normative social judgment. And evidence law has too often treated the people, and in particular the cultural assumptions that undergird the rules, as monolithic.").

41. FED. R. EVID. 102; *see also* Schauer, *supra* note 8, at 168 (suggesting that exclusionary evidence rules are designed to "increas[e] the accuracy and efficiency of fact finding"); JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 20–21 (2008) (explaining that evidence rules are "moral comfort procedures" shaped by "pursuit of the truth").

42. *See* Bruce A. Green, *"The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 699–708 (1991) (arguing that the rules of evidence "undermin[e] the search for truth at trial" by promoting omissions and deceit by lawyers); Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 914–17 (2012) (arguing that the justice system is "not designed to maximize truth finding" due its adversarial nature and rules of evidence).

assumptions about what kind of evidence is sufficiently reliable for a fact finder to draw proper inferences. These assumptions, in turn, express empirical understanding of how people—and sometimes things—actually work. It is no leap therefore to argue that evidence rules designed to assist the fact finder in constructing the truth about what happened should be grounded in empirical understandings of how both fact finders and things work. One way of evaluating evidence rules, then, is to compare their explicit or implicit empirical claims with current understandings of the cognitive, psychological, and practical realities underlying those claims.[43]

Of course, this is a difficult enterprise that may require many different forms of knowledge. Consider a simple question: Do jurors assume that people have insurance? Rule 411 of the Federal Rules of Evidence suggests the answer is "no"; it excludes evidence of insurance to prevent jurors from considering it.[44] But if people generally assume that others have insurance, excluding evidence about it may not be the best way to de-bias them.[45] An empirical assessment would be challenging, but possible. It would likely implicate psychological and social scientific insights about group dynamics, priming, geographical and class influences, and broader behavioral patterns. If we want jurors to make more truth-oriented judgments, in short, we need to have at least some understanding of whether barring evidence about insurance helps; and that requires empirical information.[46]

Other rules similarly raise empirical questions. Are people less able to make up lies when they have little time to think, as assumed by the present sense impression hearsay exception?[47] Are people similarly less deceptive when feeling stressed by a startling event, as the excited utterance exception

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43. *See, e.g.*, Capra & Richter, *supra* note 5, at 1894 ("In some instances . . . a rule that operated very well for the era in which it was enacted may be undermined by technological or other societal developments in the trial process.").

44. FED. R. EVID. 411 advisory committee's note on proposed rules (noting the courts' perspective "that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds" (first citing EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 168 (2d ed. 1972); and then citing J.B. Glen, Annotation, *Admissibility of Evidence, and Propriety and Effect of Questions, Statements, Comments, Etc., Tending to Show that Defendant in Personal Injury or Death Action Carries Liability Insurance*, 4 A.L.R.2d 761 (1949))).

45. *See* Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 855 (1998) (suggesting that uninsured defendants are harmed when reference to insurance is excluded from trial because modern jurors "no doubt assume" that defendants are insured); Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW & CONTEMP. PROBS. 225, 243 (1989) (noting that over half of jurors in one study admitted to considering whether the defendant had insurance).

46. *See* Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1190 (1991) (explaining that Rule 411 would be "undermine[d]" if studies were to show that modern jurors assume the existence of insurance).

47. FED. R. EVID. 803(1) advisory committee's note on proposed rules ("The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.").

suggests?[48] Do businesses' incentives to keep accurate records override other incentives to the contrary, as assumed by the business records exception?[49] Are people who have been convicted of felonies more likely to lie than others, a foundational assumption of Rule 609?[50] To the extent that these rules aim to facilitate a jury's determination of the truth—to channel more useful information to jurors while shielding them from less useful information—they reflect assumptions about what kind of information is likely to be more or less reliable.[51] Those assumptions, in turn, are susceptible to empirical investigation.

These examples also hint at another set of problems: Our understanding of what constitutes a reliable way to answer empirical questions can change. A public initially unaware of the prevalence of insurance may develop to assume that everyone has it.[52] New research can debunk what once passed as a reliable method, as the forensic "sciences" illustrate.[53] Although many courts still permit self-proclaimed expert witnesses to testify about the implications of bite marks or fire patterns, for example, there is now scientific consensus that there is no scientific basis for such inferences.[54] All of this is to say that taking

48. FED. R. EVID. 803(2) advisory committee's note on proposed rules ("The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); *see also* Orenstein, *supra* note 11, at 168–73 (describing accepted rationale).

49. FED. R. EVID. 803(6) advisory committee's note on proposed rules (discussing employers' inherent interest in accurate recordkeeping).

50. *See, e.g.*, Hume v. Scott, 10 Ky. (3 A.K. Marsh.) 260, 262 (1821) (noting that a jury would be "warranted in disbelieving" a witness with a "vile reputation," even if they do not have a reputation as a liar); State v. Parker, 7 La. Ann. 83, 87 (1852) (ruling "that the court should have admitted evidence that the witness was a man of infamous character . . . and not to be believed on oath"); Zanone v. State, 36 S.W. 711, 715 (Tenn. 1896) (stating that a witness's credibility may be tarnished due to their "violation and disregard . . . of the rules of decent society").

51. Of course, if these assumptions were to be proved empirically false, that would be the beginning rather than the end of reconsidering the rule. There may be reasons beyond accuracy for continuing to allow admission of business records, dying declarations, or other hearsay statements. *See infra* Section I.B (discussing situations in which concerns about justice may outweigh the striving for truth).

52. Gross, *supra* note 45, at 855.

53. *See, e.g.*, Paul C. Giannelli, *Forensic Science:* Daubert*'s Failure*, 68 CASE W. RSRV. L. REV. 869, 876–909 (2018) (describing how bite mark comparisons, microscopic hair analysis, arson investigations, and comparative bullet lead analysis have been discredited); Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879, 880–81 & n.2 (2022) (noting scientifically invalid techniques such as shoe-print comparison and fire analysis).

54. *See* Valena E. Beety & Jennifer D. Oliva, *Evidence on Fire*, 97 N.C. L. REV. 483, 486–87 (2019); COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 173–75 (2009) [hereinafter NAS REPORT], https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf [https://perma.cc/DR88-B74K] ("More research is needed to confirm the fundamental basis for the science of bite mark comparison."); PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 85–87 (2016) [hereinafter PCAST REPORT], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/J2JZ-TU

seriously the truth-seeking function of evidence rules is an unavoidably empirical undertaking. And therefore the rules' assumptions about empirical realities should be well founded.[55]

B. POLICY CONSIDERATIONS

Of course, truth seeking is just one of the goals articulated in the Purpose section of the Federal Rules.[56] Significantly, the rules are also intended to promote justice.[57] These two goals are in a sense inextricable; an empirically unjustifiable outcome is by many definitions unjust. But the goals can also be in tension: Truth seeking does not necessarily promote justice. What justice looks like is a complex normative and policy-based question that is in many ways broader than the question of accuracy. The realities of what happened in some particular event may not be all that leads people to end up in court; the social distribution of power may be at play, too. Justice speaks not just to individual incidents but to structures and patterns; to power relations and opportunity access; to privilege and burden. These factors, which characterize not just individual cases but entire spheres of society, are bound up with questions of truth, but also analytically distinct. Yet the normative assessments demanded by both goals are equally baked into the rules.

We see the tension between truth and justice within existing rules and practices already. Judges sometimes exclude evidence to pursue a "socially desirable objective unrelated to the goal of accurate dispute resolution."[58] For example, Rule 403 allows judges to exclude evidence if the risk of unfair

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PX] ("Few empirical studies have been undertaken to study the ability of examiners to accurately identify the source of a bitemark. Among those studies that have been undertaken, the observed false positive rates were so high that the method is clearly scientifically unreliable at present.").

55. Of course, rulemakers are not the only actors who should take account of the empirical knowledge base when seeking to promote truth-seeking. Judges are admonished to construe the rules in ways that promote truth-seeking; they have a responsibility to check the rules' empirical claims against reality, as when judges act as gatekeepers for expert testimony. *See, e.g.*, FED. R. EVID. 702 advisory committee's note to the 2000 amendment (citing Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)). Yet, judges are also constrained by the rules. If the excited utterance exception says that a statement is not hearsay, a judge lacks authority to rule such an utterance inadmissible just because people do not, in fact, speak with more candor when excited. FED. R. EVID. 803(1). Even though Rule 403 permits judges to generally exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, FED. R. EVID. 403, a judge is not free to simply ignore a hearsay exception that explicitly makes certain statements admissible on the theory that they are particularly reliable. Thus, a judge could not find that an excited utterance carries a high risk of unfair prejudice precisely because it fits the definition of being an excited utterance. Such a finding would constitute error. Whether the error would be reversible is another question. *See, e.g.*, Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 504 (1992).

56. FED. R. EVID. 102.

57. *Id.*

58. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 891 (1988).

prejudice substantially outweighs its probative value.[59] Courts and commentators have noted that this expresses a commitment to goals other than truth seeking: Since before the passage of the federal rules, such judicial discretion has been said to further "extrinsic social policy."[60] A judge might exclude evidence that would chill the exercise of First Amendment rights;[61] or exclude evidence about plaintiffs' government-funded compensation to promote the benefit statute's policy goals.[62] Justice, in other words, might require attention to constitutional rights or statutory goals that have little to do with accuracy.[63]

Similarly, evidentiary privileges actively undermine truth seeking.[64] Shielding private conversations between spouses, attorneys and their clients, or religious figures and their flock can undermine accuracy. But evidence law prioritizes such confidences over truth seeking. The attorney–client privilege, in particular, has been explained as justice promoting: Defendants who have a meritorious, but not obvious, defense might never discover it if they cannot speak openly with a lawyer without risking disclosure.[65] Rules like 407 and 408, which exclude evidence of subsequent remedial measures and certain offers to compromise, also promote policy goals—in this case remedying

59. FED. R. EVID. 403.

60. Imwinkelried, *supra* note 58, at 888.

61. *Id.* at 890.

62. *Id.* at 891.

63. Professor Macleod has recently argued for a "broad view" that allows injustice outside the courtroom to inform a court's understanding of unfair prejudice, suggesting that the rules' striving for a "just determination" entails "systemic justice" rather than being limited only on the case at hand. James A. Macleod, *Evidence Law's Blind Spots*, 109 IOWA L. REV. 189, 233, 229–30 (2023); *see id.* at 230–31 (describing the narrow view "under which the broader implications of a given accuracy-undermining consideration . . . are beside the point"); *see also* Jonathan R. Siegel, *The Article III Mask v. the Article III Reality*, 59 WAKE FOREST L. REV. 501, 508 (2024) (critiquing the "private rights" perspective as obscuring the courts' broader role in interpreting and enforcing the Constitution).

64. *See, e.g.*, PAUL F. ROTHSTEIN & SYDNEY A. BECKMAN, FEDERAL TESTIMONIAL PRIVILEGES § 1:1 (2024) (stating that "privileges are . . . in derogation of the search for truth" but are enforced for policy reasons). Bentham critiqued evidentiary privileges, describing them as "a contract which . . . enabl[es] the delinquent to escape the punishment which is his due," and asking, "[w]ith what consistency, to what end, would the law seek to enforce a contract to such an effect?" 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM: RATIONALE OF JUDICIAL EVIDENCE 474 (John Bowring ed., London, Simpkin, Marshall & Co. 1843). These privileges have never been enshrined in the federal evidence code. In fact, the original Rules Committee's proposal to include them was apparently so offensive to Congress that it wound up disbanding the Committee for thirty years. Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, 68 UCLA L. REV. 370, 380–81 (2020). As amended by congressional committees, the final version of the Federal Rules punts the question of privileges entirely to the common law, though the Committee's original proposed rules on privileges still influence how they are taught.

65. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

dangerous conditions and resolving disputes with settlements—at the expense of truth seeking.[66]

Much like these rules, Rule 404 excludes relevant and potentially probative evidence about a defendant's character propensity or prior bad acts.[67] The rule embodies a policy imperative that defendants be judged not for who they are or what they have previously done, but for acts directly related to the current accusation alone.[68] Research suggests that prior conduct can be predictive of future bad acts.[69] When England eliminated the character propensity prohibition in 2003, for example, reformers cited the loss of highly probative evidence as one reason.[70] But Rule 404 purposely excludes such probative evidence to promote a particular understanding of justice, showing how the rules sometimes separate a just process from an accurate outcome.[71]

Even rules that are not seen as explicitly policy based can implicate complex normative decisions. Think of Rule 402, which establishes that irrelevant evidence is inadmissible.[72] Relevance is a malleable concept that depends on how its interpreter views the world.[73] As such, relevance determinations are not reproducible binaries; they require judgment, applying baseline beliefs to specific facts.

The Rules implicate normative commitments in other ways, too. For example, because empirical understandings change, even a system with perfect rules based on the best available empirics would get things wrong eventually. Allocating the risk of error is unavoidable, and error allocation can systematically privilege different groups. Just as focusing evidence rules on the pursuit of truth unavoidably demands empirical investigation, it is also unavoidably normative.

This Part suggests some of the complex questions raised by taking seriously the Rules' expressed commitment to seeking both truth and justice. Of course, all of this raises a host of further questions about the nature of each and their relationship to each other, which we do not resolve here. Our point

66. FED. R. EVID. 407; FED. R. EVID. 408.

67. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).

68. Kiel Brennan-Marquez & Julia Simon-Kerr, *Judging Demeanor*, 109 MINN. L. REV. 1503, 1521 (2025).

69. Teneille R. Brown, *The Content of Our Character*, 126 PA. STATE L. REV. 1, 26 (2021) (explaining that recidivism data shows that it is not always error to use past acts to prove future conduct).

70. *See, e.g.*, Paul F. Rothstein & Edward J. Imwinkelried, *The Future Scope of the Character Evidence Prohibition: The Contextual Statutory Construction Argument that Could Finally Force the Policy Discussion*, 60 CRIM. L. BULL. 127, 137–38 (2024).

71. Erin R. Collins, *Bending Evidence Rules Towards Decarceration*, *in* CRITICAL EVIDENCE, *supra* note 4.

72. FED. R. EVID. 402.

73. Julia Simon-Kerr, *Relevance Through a Feminist Lens*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364, 368 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021); *see* William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 276 (1984) ("To what extent do contextual factors generate different criteria of relevance and of appropriateness?").

is that, from a rulemaking perspective, evidence rulemaking must engage with the Rules' purposes, which implicates both empirical and normative considerations. The Rules cannot be tailored to their expressed goals without considering what truth and justice look like and how rules can best promote them. That requires research, debate, and almost certainly disagreement—especially in particularly polarized times. Declining to consider these issues consciously and explicitly, moreover, does not make them go away; rather, it privileges unconscious, implicit conceptions and potentially antiquated or irrational commitments.[74] As we discuss in the following Part, the kind of reality-based, pluralistic, negotiated process of coming to provisional conclusions that we recommend has historically characterized a substantial swath of government rulemaking.

II. TWO RULEMAKING MODELS

Rules don't produce themselves. People must produce, revise, and manage them. Those people have to use some procedures and approaches—and which procedures and approaches they use will influence whether the rules serve their purposes in an inclusive, realistic, and responsive way. The preceding Part suggested the general purpose of evidence rules: They should help trials reach true and just outcomes in ways that support litigation efficiency and the development of the law. This Part considers the kinds of procedures and orientations that might support—or obstruct—those desirable outcomes.

Evidence is, of course, not the only area where our government makes rules. In the federal government, the most significant rulemakers are administrative agencies. Though they differ in many ways, agency rulemaking and evidence rulemaking instantiate the same activity in different institutional locations: Unelected government employees authorized to promulgate rules with binding force make rules to effectuate mandates enacted by Congress. Understanding agency rulemaking can thus give us context for evaluating evidence rulemaking in a way that considering evidence rules alone cannot. This Part first outlines some central factors in federal agency rulemaking. We highlight some useful approaches and ideas developed in the agency context to help make rules inclusive, responsive, and realistic, and to keep rulemakers accountable both to the people they govern, and to the laws they implement. With these approaches and ideas in mind, we then describe current evidence rulemaking. Considering the two kinds of rulemaking side by side highlights significant shortcomings in evidence rulemaking procedures and structures.

A. AGENCY RULEMAKING

Like evidence rulemaking, administrative agency rulemaking involves unelected government officials acting with authority delegated by Congress to implement federal law and policy. A range of features have been developed

74. *See* Simon-Kerr, *supra* note 40, at 1850.

to keep agency rulemaking accountable to both its statutory mandate and the governed public. Even as agency practices undergo tumultuous changes, these accountability practices, developed over decades, provide helpful models for government institutions. One such feature is information gathering through both independent research and public engagement. Agencies gather expert information about the world they regulate and get input on regulatory ideas from the people they govern. Such engagement helps agencies implement their statutory mandates in ways responsive to real-world conditions: Agency rulemaking is one key way our system bridges the time between a statute's enactment and its ongoing effectuation over the ensuing decades.[75]

The agency rulemaking process presents opportunities, as well as requirements, for getting input from differently situated publics, and for collecting and processing information about the realities of regulated situations. Private parties have a right to petition for a rule to be made, and agencies have a duty to respond, explaining their reasoning.[76] To promulgate a rule, agencies must generally publish a proposal explaining what the rule would do and how it relates to the agency's statutory mandate, then accept comments from the public.[77] The Administrative Procedure Act ("APA") provides that, "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[78] One might think this would allow the agency to simply publish a final rule along with "a concise general statement" of reasons and reasoning, but courts over the decades have required far more, creating a body of administrative common law that pushes agencies to actually engage with the publics and the realities they regulate.[79]

Courts have required agencies to "take[] a 'hard look' at the salient problem, and . . . engage[] in reasoned decision-making," under threat of judicial reversal.[80] In the classic formulation, an agency's rule may be invalidated if its decision process "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation . . . counter to the evidence before the

75. *See* Bernstein & Rodríguez, *supra* note 18, 938–43.

76. 5 U.S.C. § 553(e) (2018) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); Massachusetts v. EPA, 549 U.S. 497, 501 (2007) (holding that agencies must respond in a reasoned way to petitions for rulemaking). *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1603 (2018) (explaining that statutes moved the Constitution's petition right from Congress to administrative agencies in the mid-20th century).

77. 5 U.S.C. § 553 (outlining notice-and-comment rulemaking).

78. *Id.* § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

79. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 809 (2018) ("Much of our administrative law, like much of our constitutional law, is governed by judicially-created 'common law' doctrines that seem untethered to any text or history.").

80. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

agency," or if its conclusion "is so implausible that it could not be ascribed to a difference in view of . . . agency expertise."[81] The agency must therefore consider both the statute—the issues it addresses, the results it mandates, the standards it sets—and its real-world circumstances, which it learns about from interested publics and relevant research.[82] And it has to demonstrate that consideration in the administrative record, explaining where public input fit into its reasoning and showing how the rule will address relevant realities.[83] In a legal system that has, from the start, favored broad, open-ended delegations of discretionary power, such requirements provide support for ongoing accountability to the governed public.[84]

Beyond this base line process, various statutes require involving relevant groups in rulemaking through what Brian Feinstein has termed "identity-conscious" "representational mandates and consultative requirements."[85] These statutes, sprinkled "throughout the administrative state," might mandate that "specific economic sectors or other groups be represented" in agency decisions and on agency boards; list "requirements pertaining to appointees' ethnicity, gender, or geography"; require "that boards be 'fairly balanced'" among different interests; or even prohibit the appointment of "individuals from certain backgrounds."[86] Other statutes ensure that agencies "convene and respond to government-supported advisory committees" and "consider

81. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

82. Bernstein & Rodríguez, *supra* note 18, at 958–63, 962 n.190 (discussing the influence of public comments on interviewed administrators and quoting an administrator as saying, "[W]e had spreadsheets basically where we categorized the comments by issue, [with] keywords about which stakeholders it was, which provisions of the rule they addressed, which issue they were responding to, [and at] twice-weekly meetings . . . [staff would share] a synopsis of the comments . . . and they proposed recommendation[s] for my review." (alterations in original)).

83. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) (holding that a reviewing court must evaluate a final rule only with reference to the considerations reflected in the administrative rulemaking record, not with reference to arguments or views an agency raises later on); Bernstein & Rodríguez, *supra* note 18, at 976 (quoting a federal administrator as saying, "'On technical issues, the ultimate judge . . . will be a federal judge. So I would want to make sure, not only had we explained in a way that a non-technical person like me or a federal judge could understand,' but also 'that all significant comments be . . . answered in a manner that really deals with their efforts.'" (omissions in original)).

84. Nicholas R. Parrillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress's Delegation of Power to Lay Embargoes in 1794*, 172 U. PA. L. REV. 1803, 1805 (2024) (noting that "Congress in the 1790s enacted several statutes with broad delegations, to little or no constitutional objection"); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 159 (2021) ("The overall historical record of legislation passed by early Congresses is one of broad delegation to decide important questions."); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 289 (2021) (showing that early Congresses delegated broad discretion to agencies and arguing "that there was no nondelegation doctrine at the Founding").

85. Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 20 (2022); *see also* Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802, 1810 (2024) (mapping federal agencies' involvement in state legislation).

86. Feinstein, *supra* note 85, at 21–22.

the views of specific outside groups."[87] Agencies are often obligated to "take affirmative steps to solicit comments from small businesses on proposed rules" that might affect them,[88] or "to meet with small-business panels to hear their recommendations prior to issuing a proposed rule."[89] When making rules, agencies are statutorily required to offer input opportunities to the public generally, as well as to make extra efforts to get input from specific groups who might be particularly affected or who have been historically marginalized in the production of rules that affect them.[90]

Inside the executive branch, agencies have developed a host of additional ways to interact with the public. Many reach out to potentially affected groups when considering what kind of rule to make or whether to even make a rule at all.[91] Some have developed practices to "proactively seek[] early input, support[] robust participation during the public comment process, develop[] inclusive participation . . . , and demonstrat[e] the impact of participation."[92] That might include "focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, [and] various forms of web-based outreach."[93] Or it might include convening differently situated groups of people affected by a regulatory regime,[94] or

87. *Id.* at 35 ("Of the nineteen committees that counsel agencies on financial regulatory matters, eight have charters that require their memberships to be drawn from groups that are conventionally perceived as underrepresented."); *see* 2 U.S.C. § 1532(a) (requiring consultation with state, local, and tribal governments on rules that would significantly affect them).

88. Feinstein, *supra* note 80, at 37–38 (citing the Regulatory Flexibility Act, 5 U.S.C. § 605(b)).

89. *Id.* at 38 (discussing the Consumer Financial Protection Bureau, Environmental Protection Agency, and Occupational Safety and Health Administration).

90. An agency can, of course, sometimes skirt such requirements or minimize their efficacy in practice, though that might violate its statutory obligations. For our purposes, particular agency choices in specific instances are less relevant than the set of practices, developed over decades of implementing the rulemaking regime, that promote accountability, inclusiveness, and realism in the production of rules and policies across different government institutions. The approaches discussed here can be useful for those purposes even if they are undermined or abandoned by the agencies that developed them.

91. Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 801 (2021) (describing agencies' varied practices of engaging publics affected by regulation in the agenda-setting stage when rule proposals are developed); *see* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93–103 (2016); William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 576–77 (2009).

92. OFF. OF INFO. & REGUL. AFFS., WITH THE PEOPLE, FOR THE PEOPLE: STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS 23–30 (2024) [hereinafter OFF. OF INFO. & REGUL. AFFS., WITH THE PEOPLE] (on file with the *Iowa Law Review*); Memorandum from Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs. on Broadening Public Participation and Community Engagement in the Regulatory Process 15–18 (July 19, 2023) (on file with the *Iowa Law Review*).

93. Sant'Ambrogio & Staszewski, *supra* note 91, at 801.

94. *See* OFF. OF INFO. & REGUL. AFFS., WITH THE PEOPLE, *supra* note 92, at 23–25; *HHS Announces Historic Child Welfare Package to Expand Support and Equity in Child Welfare System*, ADMIN. FOR CHILD. & FAMS. (Sept. 27, 2023), https://www.acf.hhs.gov/media/press/2023/hhs-announceshistoric-child-welfare-package-expand-support-and-equity-child (on file with the *Iowa Law Review*).

working with civil society groups to reach traditionally absent stakeholders.[95] Such creative, informal methods can help agencies formulate policy with input from affected people who are not in a position to monitor Federal Register listings or pick up the phone and get attention from government officials.[96]

Statutes, judicial decisions, agency-internal programs, and executive branch initiatives all affect how agencies bring regulated publics into the rulemaking process. These developments are by no means perfect; some have consequences that can undermine rulemaking itself. For instance, scholars have argued persuasively that the multiple overlapping procedural requirements imposed by statutes and courts on agency rulemaking have bad effects, stifling the effectuation of statutory mandates under reams of red tape.[97] Presidential influence, too, can privilege the powerful as opposed to broader publics.[98] And agency efforts to engage with regulated publics don't always stick. The Biden Administration made public outreach plans mandatory and outlined

95. *See* OFF. OF INFO. & REGUL. AFFS., WITH THE PEOPLE, *supra* note 92, at 24–25 (discussing the Department of Transportation's work with "disability rights groups" to reach individuals who could speak to the experience of wheelchair-bound air travel); Ensuring Safe Accommodations for Air Travelers with Disabilities Using Wheelchairs, 89 Fed. Reg. 17766, 17768 (proposed Mar. 12, 2024) (to be codified at 14 C.F.R. pt. 382).

96. *See* Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 402–03 (2020) (explaining that congressional committees can obtain "policy concessions" from agencies through procedural maneuvers); Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467, 478 (2004) (finding that agency actors must "be sensitive to the preferences of" oversight committees in making policy); Jason A. MacDonald & Robert J. McGrath, *Retrospective Congressional Oversight and the Dynamics of Legislative Influence over the Bureaucracy*, 41 LEGIS. STUD. Q. 899, 906 (2016) ("[C]ommittees can directly address [agency discretion] using oversight, rather than through the more burdensome process of legislation."); Kenneth Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 874, 888 (2018) (finding that "congressional oversight is far more diffuse and ubiquitous than previously thought" in part because "oversight is often informal and conducted by individual legislators"); Bernstein & Rodríguez, *supra* note 18, at 969 (discussing a situation in which regulated entities "went complaining to" members of Congress about the impact of a statutory scheme, leading the members to engage in a colloquy to influence agency rulemaking).

97. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019) (arguing that procedural burdens "hobble federal agencies" in carrying out statutes); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 775 (1996); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 14 (1983) ("Far removed from the daily operation of administrative agencies, judges may fail to appreciate the complexity of the issues before them and consequently hand down sweeping but inappropriate orders.").

98. *See, e.g.*, Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T. L. REV. 325, 325–31 (2014) (arguing that the Office of Regulatory Affairs in the Office of Management and Budget exercises too much, and overly discretionary, power over the rulemaking process, in ways that privilege industry to the detriment of public welfare).

best practices;[99] President Trump rescinded the relevant executive order almost as soon as he took office; related memoranda have been deleted from the White House website.[100] The standard notice-and-comment process, moreover, is known to skew in favor of more powerful, better-resourced parties, especially regulated industries.[101] In agency rulemaking, like in other parts of American governance, the "haves" routinely "come out ahead."[102]

Still, agencies have developed ways to give people input into how they are governed as an integral part of carrying out their statutory mandates. On many accounts, agencies seek out significantly more input from significantly more types of people than many other areas of American governance.[103] They employ

99. *See* Exec. Order No. 14094, Modernizing Regulatory Review, 88 Fed. Reg. 21879, 21880 (Apr. 11, 2023). These efforts were informed by the experiences and efforts of individual agencies over the years as well as by scholarship about policy production and effects. *See* Alexander Hertel-Fernandez, *How Political Science Shaped Federal Policy in the Biden-Harris Administration: Learning from Efforts to Democratize the Administrative State*, PERSPS. ON POL. 2 (2025) ("Scholarship from political scientists . . . helped to define the problems the initiatives were trying to address, the language and framing of the proposals, and the strategies for implementation within the broad mandate created by political leadership.").

100. Exec. Order No. 14148, 90 Fed. Reg. (Jan. 28, 2025) (rescinding Exec. Order No. 14094, 88 Fed. Reg. 21879). *See generally* Memorandum from Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs. (Apr. 6, 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/04/ModernizingEOImplementation.pdf [https://perma.cc/DS4Q-55SB]; Memorandum from Richard L. Revesz, *supra* note 92; OFF. OF INFO. & REGUL. AFFS., WITH THE PEOPLE, *supra* note 92; *see also* Memorandum from Shalanda D. Young, Dir. & Dominic J. Mancini, Deputy Adm'r, Off. Info. & Regul. Affs. (Apr. 13, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf [https://perma.cc/RUZ6-R9DA] (discussing burdens of public participation in regulatory decision-making and proposing methods to alleviate them) (on file with the *Iowa Law Review*); Exec. Order No. 14036, 86 Fed. Reg. 36987, 36998 (July 14, 2021) (instructing agencies to consider regulatory effects on competition); Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (instructing agencies to take into account broad normative values like dignity, equity, and fairness).

101. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1352 (2010) (detailing regulated industries' control over the information agencies receive); Feinstein, *supra* note 85, at 5 ("[W]ell-resourced groups make better use of formally neutral public-involvement provisions."); Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 183–90 (2019) (discussing literature showing that business interests dominate policy participation); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951 (2006); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 129 (2006); Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281–88 (2004) (outlining regulators' informational dependence on those they regulate).

102. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124–25 (1974) (modeling how "repeat players" often have sufficient resources and long-term interests to shape legal development).

103. *See, e.g.*, Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 545–46 (2016) (finding that senior policy makers in congressional offices are more likely to agree to meet with

a wealth of approaches to gathering information about the diverse views and interests of the people they govern, as well as the probable effects of rulemaking decisions. And judicial doctrine, as well as long-term agency practice, requires some serious attention to public input and research. This feature of agency rulemaking offers useful ideas and approaches for making rulemaking inclusive, responsive, and realistic while working toward statutory goals.

In addition to gathering information and soliciting public input, agency rulemaking must be responsive to concerns about efficiency. Statutes, courts, and executive directives require significant analysis to ensure that final rules both comport with statutory requirements and are, on balance, worth doing.[104] These requirements, too, have faced criticism. In particular, cost-benefit analysis has been roundly criticized for overvaluing costs and undervaluing benefits, leading to a cramped view of worthwhile regulation and obstructing efforts to implement statutes in ways that further the public good.[105] We think much of this criticism is apt, but do not delve into the debate here, since our point is not to evaluate agency practices but to highlight useful approaches that might be gleaned from them. For our purposes, what matters is that administrative agencies must routinely justify their rules with reference both to their likely effects and to the statutory provisions they purport to implement.

Thus, a final key feature of agency rulemaking is accountability. Agencies have to make their justifications to a number of audiences that can clap back. Other agencies and the presidential bureaucracy may weigh in both as a rule is being proposed and as it is being finalized, in ways that can pressure an

political organizations that made campaign contributions than those who did not); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1195–98 (2016) ("The presumption that access to lawmakers is contingent on a relationship with that member, built through campaign contributions and other forms of electoral power, has become profoundly uncontroversial. . . . [and] the fact that Congress affords access and process unequally and based on political power has become settled doctrine in political science."); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 29–30 (3d ed. 1989) (showing that members of Congress tend to advance the views of favored constituents).

104. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see* Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51736 (Sept. 30, 1993) (bolstering existing requirements for regulatory cost-benefit analysis); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1599–1600 (2019) (arguing that, even though cost-benefit analysis may impede regulation, it helps keep the regulatory system stable). *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002) (outlining the development and requirements of cost-benefit analysis).

105. *See, e.g.*, Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIA. L. REV. 335, 335 (2011) (arguing that cost-benefit analysis is not appropriate for regulation of long-term, large-scale risks); W. Kip Viscusi, *Why Office of Management and Budget's (OMB) Social Welfare Function Is Not Society's Social Welfare Function*, 15 J. BENEFIT-COST ANALYSIS 252, 253 (2024) (discussing potential effects of decisions to change the weighting of various factors in cost-benefit analysis based on different normative considerations).

agency to change its rule or force it to abandon an idea altogether.[106] The agency must explain its reasoning to the public, including by responding to public comments.[107] And if someone decides to challenge the resulting rule in court, the agency must explain its reasoning to a judge, who can invalidate the rule for not conforming to the statute, lacking a rational basis, or even failing to provide a justification sufficiently responsive to the inputs the agency has received.[108] These considerable constraints push an agency to incorporate available information about how the regulated area really works and how the rule will likely affect it. It also encourages the agency to produce rules and justifications that are responsive to the views and interests of affected people, to realities on the ground, and, above all, to the statutory mandate itself.

In general, then, agency rulemaking is characterized by a high level of epistemic diversity. This is partly because agency rulemaking must consider data from many types of experts, include opinions from those affected, monitor cost and efficacy, and survive a gauntlet of accountability mechanisms. Agency work also benefits from internal epistemic diversity. Political appointees hired by the current presidential administration work with civil servants whose tenure presumptively spans more than one administration, a combination that brings different epistemological modalities, values, and timescales to bear.[109] Subject

106. One such mechanism for this interagency and presidential oversight is through the Office of Information and Regulatory Affairs ("OIRA"). *Compare* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities Commentary*, 126 HARV. L. REV. 1838, 1840–41 (2013) (praising the interagency and OIRA review process), *with* Heinzerling, *supra* note 98, at 326–27 (arguing that OIRA exercises too much, and overly discretionary, power over the rulemaking process). The real role of OIRA, its normative advisability, and even its constitutionality are a matter of some debate. *See* Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2133 (2023) ("[T]he administrative presidency began as a collaborative project of Congress and the President to enhance government efficacy and accountability. . . . [but] was eclipsed in the second half of the twentieth century, as Presidents sought grounds for unilateral action."). We do not enter this fray; we note OIRA involvement to show the layers of supervision and the varied perspectives under which a rule is scrutinized.

107. *See supra* notes 76–89 and accompanying text (describing the statement of basis and purpose in a final rule).

108. 5 U.S.C. § 704 (describing situations where an agency action is subject to judicial review); *id.* § 706 (directing courts reviewing agency actions to hold them unlawful if they are, among other factors, arbitrary and capricious or an abuse of discretion, "in excess of statutory justification," or "unwarranted by the facts"); *see* Abbott Lab'ys. v. Gardner, 387 U.S. 136, 141–42, 154–56 (1967) (allowing pre-enforcement, facial challenges to agency rules); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 825 (2024) (holding that the APA's six-year statute of limitations for challenging a rule begins to run not when the rule is promulgated, but when a party is subject to injury, effectively leaving many rules open to challenge indefinitely).

109. Bernstein & Rodríguez, *supra* note 18, at 972–73. The Trump Administration and some in the current Congress are attempting to dismantle this system, which has governed regulatory rulemaking for almost a century, to create a radically smaller government workforce with significantly less epistemic differentiation. Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce, Exec. Order No. 14,171, 90 Fed. Reg. 8625 (Jan. 20, 2025)

matter experts within the agency incorporate and respond to research and public input, evaluating the likely effects of different options.[110] Others evaluate a rule's fit with public policy principles and current congressional orientations.[111] Agency lawyers comb through statutory language to ensure that rules conform to legal provisions.[112] Other agencies influence the evolving rule to maintain coherence among different regulatory regimes,[113] while major rules pass through yet more review at the Executive Office of the President.[114] And after promulgation, a party "aggrieved by" the rule may challenge it in court.[115] Agency rulemaking thus combines agency-internal epistemic diversity, active incorporation of input from affected publics, domain-relevant research and subject matter expertise, and constraints from other branches and other parts of the executive branch. All these inputs, constraints, and competing interests make rulemaking complex. But they also help keep it accountable both to the laws it effectuates and to the society it governs.

B. EVIDENCE RULEMAKING

Like administrative rules, evidence rules are rooted in statute, but they are managed by the judiciary. "The Rules Enabling Act delegates congressional authority to make rules regulating practice and procedure in the federal courts to the U.S. Supreme Court."[116] The Supreme Court has made the Judicial

(purporting to recategorize many career civil servant positions into at-will presidential employees); Meg Kinnard, *A Comprehensive Look at DOGE's Firings and Layoffs So Far*, ASSOCIATED PRESS (Feb. 21, 2025, 6:08 PM), https://apnews.com/article/doge-firings-layoffs-federal-government-workers-musk-d33cdd7872d64d2bdd8fe70c286526 54 [https://perma.cc/H4BC-VQ4Y] (discussing massive firings of federal employees by the Trump Administration). Such changes would significantly degrade governance capacity and accountability. But the traditions of agency regulation described here still demonstrate the kind of accountability our government is capable of—even if political leaders choose to undermine it.

110. Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1633 & n.115 (2023) (discussing the role of subject matter experts).

111. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 467–76 (2017) (discussing the role of offices of legislative affairs in statutory drafting); CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 37–38 (2015) (discussing differentiated roles within these offices).

112. *See* Bernstein & Rodríguez, *supra* note 18, at 938 (quoting an agency official as saying, "[E]very single thing I worked on was always carefully analyzed at the highest level about, 'Do we have the authority to do this? Does the statute say this? Has it always been interpreted this way? Can we really say that?'" (alteration in original)).

113. *See* Galanter, *supra* note 102, at 135–39.

114. *See supra* note 106 and accompanying text.

115. *See supra* note 108 and accompanying text.

116. Capra & Richter, *supra* note 6, at 10 (citing Rules Enabling Act of 1934, 62 Stat. 961, 961 (1948) (codified as amended at 28 U.S.C. §§ 2071–2077 (2011))); 28 U.S.C. § 2072(a); PROCEDURES FOR THE JUDICIAL CONFERENCE'S COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ITS ADVISORY RULES COMMITTEES § 440.10 (2022) [hereinafter GUIDE TO JUDICIARY POLICY], https://www.uscourts.gov/sites/default/files/guide-vol01-sec440_jcs-2022-0

Conference "responsible for the process by which rules . . . are formulated."[117] And "the Judicial Conference has authorized a Standing Committee on Rules of Practice and Procedure to vet rule proposals by advisory committees" covering different areas of court activity.[118] That Standing Committee is in turn advised by "federal Evidence Advisory Committee" responsible "for proposing reforms to the Federal Rules of Evidence"[119]—what we here call the "Rules Committee." It is, of course, judges who apply the evidence rules in court cases. But judges do not make the rules. Nor do they have authority to change or ignore a rule, even in the service of truth or justice.[120] So we focus on the Rules Committee.

The Rules Committee may come up with ideas on its own, or entertain proposals from others.[121] Outsiders may propose a rule change by submitting a "suggestion" or "recommendation" to the Standing Committee.[122] These proposals are then forwarded to the Rules Committee, whose "reporter normally analyzes the suggestion and makes appropriate recommendations."[123] The Committee also seeks information on timely topics. For instance, it has recently been inviting legal scholars to discuss how the rules might account for the advent of algorithmically produced evidence.[124] These invitees are generally identified by the Reporter, who is charged with staying abreast of developments that merit attention.[125] Those who wish to express a view but have not been invited to communicate with the Committee may submit written materials at

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5-27-uscourts.pdf [https://perma.cc/TS7Q-S6GF]; 28 U.S.C. § 2073(a)(2)–(b) (authorizing the Standing Committee); GUIDE TO JUDICIARY POLICY, *supra*, § 440.20.30(b)–(c) (describing the Rules Committee's process when drafting and considering proposed rule changes).

117. Capra & Richter, *supra* note 6, at 10.

118. *Id.*

119. *Id.*

120. Edward K. Cheng, G. Alexander Nunn & Julia Simon-Kerr, *Bending the Rules of Evidence*, 118 NW. U. L. REV. 295, 330 (2023) ("The sole responsibility of a judge is to hew closely to codified rules, using only the narrow windows of discretion explicitly provided, and leaving any questions about potential changes in evidence law to committees."). Though one of us has argued that the system should formalize the possibility of rule bending, where judges intentionally misapply rules to achieve what they perceive to be more just or fair outcomes, there is no such flexibility in American evidentiary codes. *Id.* at 299–301.

121. Capra & Richter, *supra* note 6, at 11 ("Reform proposals may emanate from concerned legislators, experienced trial judges, practitioners, academics, and pro se litigants, as well as from the independent research of the reporter.").

122. *How to Suggest a Change to Federal Court Rules and Forms*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-suggest-a-change-federal-court-rules-and-forms [https://perma.cc/WYS8-XTM2].

123. *Id.*

124. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024, at 5 (2024) [hereinafter ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024], https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes [https://perma.cc/67UN-BE9R].

125. *Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/committee-membership-selection [https://perma.cc/VNF4-DRZG].

the discretion of the Chair.[126] As one former member put it, "information drifts into the committee from a variety of places."[127]

The Rules Committee meets once or twice a year, in Washington, D.C., as well as other locations, generally in public meetings at which it gathers information and considers proposals.[128] In recent years, meetings have become accessible for remote attendees as well as those who can attend in person. These meetings, while open to the public, are not open to public participation: Only invited guests can speak.[129]

If the Rules Committee proposes a rule revision, it opens a notice period during which members of the public and others are invited to comment on the proposal.[130] Once the Committee approves a rule change proposal, it reports that change to the Standing Committee,[131] which must approve it before sending it to the full Judicial Conference for review, which then submits it to the Supreme Court for approval.[132] After the Supreme Court approves a rule change, the proposed rule goes to Congress, which can reject or modify the proposal through legislation or, more often, ignore it.[133] Although Congress from time to time inserts itself by proposing a rule in response to public pressure,[134] congressional inaction on proposals from the Committee has been the norm for decades. If—or rather when—Congress does nothing, the proposed rule becomes effective the following December.[135]

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126. *How to Submit Input on a Pending Proposal*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-submit-input-a-pending-proposal [https://perma.cc/P9C2-QJ9D].

127. Symposium, *The Politics of (Evidence) Rulemaking*, 53 HASTINGS L.J. 733, 736 (2002) [hereinafter *The Politics of (Evidence) Rulemaking*].

128. *Open Meetings and Hearings of the Rules Committee*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/open-meetings-and-hearings-rules-committee [https://perma.cc/6XCJ-FTA9]; *see, e.g.*, U.S. CTS., ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOKS (Nov. 8, 2024, New York) (Apr. 19, 2024, Washington) (Oct. 27, 2023, Minneapolis) (Apr. 28, 2023, Washington) (May 6, 2022, Washington) (Nov. 5, 2021, Washington) (Oct. 25, 2019, Nashville), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books [https://perma.cc/XZ5Q-HC56].

129. Advisory Committee on Criminal Rules; Meeting of the Judicial Conference, 89 Fed. Reg. 76870 (Sept. 19, 2024).

130. *The Politics of (Evidence) Rulemaking*, *supra* note 127, at 740 ("If the [Rules] Committee doesn't draft it, a change doesn't go to anybody. Because the rulemaking power has been delegated to such a degree, the [Rules] Committee is on the bottom of the totem pole, but it has to start there to go anywhere.").

131. Rice, *supra* note 22, at 819.

132. *Id.*

133. *Id.*

134. For example, Congress enacted FREs 413 to 415 over objections from the Rules Committee (with the notable exception of the DOJ's representative) in response to public concerns about crime and recidivism by sex offenders. *See* Joëlle Anne Moreno, *"Whoever Fights Monsters Should See to It that in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart*—Kansas v. Hendricks, 49 FLA. L. REV. 505, 514–17 (1997).

135. *Id.*

This process is of relatively recent vintage. After the Rules Enabling Act was enacted in 1934, a judicial committee began drafting the Federal Rules of Civil Procedure.[136] But it resisted drafting a code of evidence.[137] The Rules Enabling Act specified that rules must be limited to "practice and procedure" and could not affect substantive rights, and committee members apparently believed many evidence rules were too substantive to fall within the ambit of that delegation.[138] By the 1970s, opinion had changed enough that a committee was formed to propose rules of evidence. But unlike other federal rulemaking, this process did not go smoothly. It resulted, instead, in an "imbroglio."[139]

Rather than accepting the Rules Committee's proposals, congressional committees significantly altered the draft rules the Committee produced. Congress finally adopted the Federal Rules of Evidence, by statute, in 1975.[140] It also decided to eliminate the Rules Committee altogether,[141] farming evidence rules out to other judicial committees—the Advisory Committee on Criminal Rules and the Civil Rules Committee—for almost twenty years.[142] This effectively left the evidence rules without oversight, as those calling for a dedicated committee pointed out.[143] It also left the rules to stagnate: While the civil procedure rules saw over one hundred amendments during this time period, the evidence rules were amended only six times before Chief Justice Rehnquist reconstituted the Rules Committee in 1993.[144]

The smallest of the judiciary's rulemaking committees, the Evidence Rules Committee currently has nine members: five judges (one of whom chairs the Committee), two attorneys in private practice, and one representative each from the Office of the Federal Defender and the Department of Justice ("DOJ").[145] Although there were two academic members on the Committee,

136. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 ("[T]he Supreme Court of the United States shall have the power to prescribe by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.").

137. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 PA. L. REV. 1015, 1138 (1982).

138. *Id.* at 1085–87.

139. *Id.* at 1020, 1138.

140. Capra & Richter, *supra* note 5, at 1876. Among other changes, Congress's code eliminated the proposed rules on privileges altogether. Paul R. Rice, *Back to the Future with Privileges Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739, 759 (2004).

141. Coleman, *supra* note 64, at 381.

142. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 861 (1992).

143. *Id.*

144. *Id.* at 859–61; A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 686 (1996) [hereinafter SELF-STUDY].

145. *Rules Committees — Chairs and Reporters*, https://www.uscourts.gov/file/78432/download [https://perma.cc/9KXT-DPTW]. The precise composition of the Rules Committee appears

those positions have gone unfilled since 1999.[146] A non-voting law professor serves as a Reporter, preparing advisory memoranda, seeking out information, and drafting rules.[147] The Reporter holds negative agency on the Committee: They can recommend inaction or withhold proposals from the Committee altogether if they deem it appropriate, but get no vote when a proposal is considered.[148]

The Chief Justice appoints the judges, attorneys, and Reporter; the DOJ and the Federal Defender Services select their representatives.[149] The judges, attorneys, and Federal Defender representative serve six-year terms.[150] The term of the DOJ representative, however, is unlimited.[151] The DOJ representative serving in 2025 had served in that capacity since 2007.[152] The Reporter also has no term limit; the current Reporter has served since 1996.[153]

The structure and process of evidence rulemaking displays some salutary accountability features. Rules Committee meetings and related materials are public.[154] Anyone can suggest a change to the rules, and the Reporter documents the Committee's consideration of such proposals in their periodic

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to be determined by the Chief Justice of the Supreme Court. *See* SELF-STUDY, *supra* note 144, at 695 (calling judicial committee membership a "consideration[] for the attention of the appointing authority, the Chief Justice").

146. *Compare* ADVISORY COMM. ON EVIDENCE RULES, AGENDA FOR SEPTEMBER 30 – OCTOBER 2 MEETING 1 (1993), https://www.uscourts.gov/sites/default/files/fr_import/EV1993-09.pdf [https://perma.cc/G9MP-EG6P] (listing two academic members), *with* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF OCTOBER 25, 1999, at 1 (1999), https://www.uscourts.gov/sites/sites/default/files/fr_import/1099mnEV.pdf [https://perma.cc/XDF4-MZ7B] (listing no academic members). Although the current Reporter has asserted that "there is no seat (or vote)" for an academic on the Rules Committee, historical practice suggests that at one time academics were voting members of the Committee. Capra & Richter, *supra* note 6, at 11.

147. *Committee Membership Selection*, *supra* note 125; Coleman, *supra* note 64, at 378.

148. *See* Capra & Richter, *supra* note 6, at 11 (asserting that there is no vote for an academic on the Committee); Rice, *supra* note 22, at 839–42 (describing Reporter's summary rejection of a lengthy series of reform proposals from academics prior to submitting it for the Rules Committee's consideration).

149. *About the Judicial Conference of the United States*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/F252-KJ43].

150. It is unclear the origin of the six-year term for the Federal Defenders representative, as their representative is not technically subject to a term limit.

151. *Committee Membership Selection*, *supra* note 125.

152. *See* ADVISORY COMM. ON EVIDENCE RULES, MEETING OF NOV. 5, 2025; ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 12–13, 2007, at 1 (2007), https://www.uscourts.gov/forms-rules/records-rules-committees/meeting-minutes/advisory-committee-rules-evidence-april-2007 [https://perma.cc/LU9Y-LWJJ] (noting Elizabeth Shapiro as a member in both meetings).

153. *Full-Time Faculty Directory: Daniel Capra*, FORDHAM SCH. L., https://www.fordham.edu/school-of-law/faculty/directory/full-time/daniel-capra [https://perma.cc/58ZA-8SZG].

154. *Open Meetings and Hearings of the Rules Committee*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/open-meetings-and-hearings-rules-committee [https://perma.cc/VP98-3C4M].

reports to the Standing Committee; these reports are available to the public, if one knows where to look.[155] The Reporter can provide the Committee with information, bring issues to its attention, or pass on academic work and suggestions from external sources.[156] The judges, private attorneys, Federal Defender, and DOJ prosecutor who make up the Committee bring their own experiences and perspectives to the table, and can press for rule changes that accord with their concerns.[157] And rule change proposals are made available for public comments. Like agencies, then, the Committee has some internal epistemic differentiation and employs some procedures to communicate with and get input from the publics it governs.

C. Relating Evidence and Agency Rulemaking

Nonetheless, compared with what we demand from many other federal policy implementers, these accountability features are strikingly skimpy. The position of Reporter, for instance, appears to provide a layer of insulation from affected publics, playing a significant role in determining what information goes to the Rules Committee.[158] Agency rulemaking has no such gatekeeper. Members of the public may submit proposals for rulemaking or use public comment opportunities to offer views of related issues, and the agency, as an institution, is obligated to respond in a reasoned fashion.

As we explore further in the following Part, some of the most robust criticisms of the evidence rules over the past half century call not for more rules but for different ones: The problem is not so much that the evidence rules fail to regulate the litigation process as that they regulate it with perverse or arbitrary effects.[159] These arguments suggest that the evidence rules are not fulfilling their statutory mandate to facilitate true and just adjudications and to develop the law of evidence. On the administrative side, agencies have developed ways to incorporate public stakeholders in decisions about where to focus regulatory attention and what kinds of rules to consider—the agenda-

155. Capra & Richter, *supra* note 6, at 11; *see* GUIDE TO JUDICIARY POLICY, *supra* note 116, § 440.20.60(c) (providing that Rules Committee records "must be posted on the judiciary's rulemaking website," but that "general public correspondence about proposed rule changes" need not be posted but "are maintained by the [Administrative Office of the U.S. Courts] and are available for public inspection").

156. *See The Politics of (Evidence) Rulemaking*, *supra* note 127, at 736–37 (comment of J. Fern Smith) ("[I]t is [the Reporter's] job to keep track of what is going on out there in law review articles, in cases, etc., and to bring problem areas to [the Committee's] attention.").

157. *See* Rice, *supra* note 22, at 819–20 (noting that the Rules Committee tends to focus on issues "that its members consider[] the most compelling problems for the courts," or that are "of personal interest to [the] members" or "to members of Congress and special interest groups that . . . advocate before the Committee").

158. *See, e.g.*, *The Politics of (Evidence) Rulemaking*, *supra* note 127, at 736 (comment of J. Fern Smith) ("The Reporter on the Committee is incredibly influential. . . . I would suggest that the Reporter is the most important person on the Committee.").

159. *See infra* Part III.

setting and proposal-development stages during which many of the most consequential decisions are made.[160] The Rules Committee appears to have developed few such avenues. Unlike their agency counterparts, these rulemakers are also not required to seriously consider proposals for rule changes. On the contrary, Professor Rice reports that the "Evidence Project"—a set of proposals growing from the work of "more than forty people over . . . two years"—was "summarily rejected by the Advisory Committee," with committee members even telling people involved that their "proposals 'would not be given serious consideration'" and would be "rejected out of hand."[161] In the agency rulemaking context, that kind of response would be subject to easy reversal in court. While the post-meeting reports the Reporter drafts to submit on behalf of the Rules Committee to the Standing Committee do cover rejected proposals, that coverage is generally cursory.[162] By contrast, agency rulemakers are required to respond in a reasoned way to a proposal for rulemaking, even if they ultimately reject it.[163]

Similarly, although proposed rule changes are made available for public comment, the Rules Committee has no obligation to incorporate such comments into its decision-making process. It need not seek out the viewpoints of people particularly affected by its rules, nor involve those traditionally excluded from the rulemaking process.[164] Unlike administrative agencies, the Rules Committee has, as far as we can tell, also developed no internal capacities or practices for doing so. Even those members of the public who might manage to attend a Rules Committee meeting are not permitted to participate, only to observe, unless they are affirmatively invited to speak.[165] According to a former

160. *See supra* note 91 (collecting sources).

161. Rice, *supra* note 22, at 824 & n.20 (first quoting Gregory Joseph, former member, Federal Rules of Evidence Advisory Committee; and then quoting Ralph Winter, J., former Chairperson, Federal Rules of Evidence Advisory Committee).

162. For example, in the May 2016 report to the Standing Committee, the Rules Committee offered a four-sentence response to a full-length law review article that proposed eliminating Rule 704(b), which covers expert testimony about a defendant's mental state. WILLIAM K. SESSIONS, REPORT TO THE STANDING COMMITTEE FROM THE ADVISORY COMMITTEE ON EVIDENCE RULES 22 (2016). Without addressing the substance of the proposal, the report explained that the Committee might consider "amendments to *improve* the Rule" but that deference to Congress "cautioned strongly against" eliminating it. *Id.* In May 2024, the Reporter offered two sentences to explain the Committee's decision to reject a proposal to eliminate Rule 609(a)(1). PATRICK J. SCHILTZ, REPORT TO THE ADVISORY COMMITTEE ON EVIDENCE RULES 5 (2024). The explanation did not address any of the empirical claims put forward in the body of the proposal, such as the fact that the main effect of the rule is to silence defendants in criminal cases or that it has an unacceptable disparate impact on Black and Brown defendants. *Id.* Instead, the report states: "There was a consensus that a number of courts have erred in admitting convictions that should not have been allowed under the more-probative-than-prejudicial balancing test. But those mistakes did not, in the view of the majority, justify elimination of the rule." *Id.*

163. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007).

164. *See* Feinstein, *supra* note 80.

165. *See, e.g.*, Advisory Committee on Evidence Rules; Meeting of the Judicial Conference, 89 Fed. Reg. 76870, 76870 (Sept. 19, 2024).

committee member, the system is "amorphous"; information makes its way in somewhat at random.[166] As this comment suggests, the Rules Committee engages with topics in a largely ad hoc way; it has no obligation to substantively engage with outside proposals or criticisms, nor provide reasons for not heeding them.[167] Evidence rulemaking thus not only fails to achieve, but appears not even to attempt, the kind of pluralistic inclusivity we have seen developed in agency rulemaking.

So much for input. What about output? The Rules Committee's limited interactions with public stakeholders in the agenda-setting and rule-development stages also means it need not justify decisions *not* to consider issues or propose changes—even though these likely constitute its most consequential decisions.[168] When the Committee does propose a revision or—much more rarely—a new rule, it appends a note explaining its "rationale and import."[169] These notes are intended to guide practitioners and judges in their use of the rule.[170] But the notes are not intended to—nor do they—provide the kind of reason-giving and justification we demand from agency counterparts. There is, thus, no forum in which the Committee responds to even those limited public views it has received. The Reporter's post-meeting report to the Standing Committee does describe the proposals the Committee has considered, but often merely notes that the Committee decided not to act, without explaining the reasoning behind the Committee's decisions or engaging with the substance of the rejected proposal or public comments.[171] Similarly, there is no forum where the Committee is required to articulate the effects it foresees a rule change having. What are the expected consequences of a rule change, such that we would know if it were successful? The Rules Committee does not say.

166. *The Politics of (Evidence) Rulemaking*, *supra* note 127, at 736 (comment of Judge Fern Smith).

167. Notably, as Alex Nunn recently brought to our attention, the Committee has seemed reluctant to embrace even the most commonly accepted form of expertise in the field, articles by evidence scholars, rarely citing scholarship in its rulemaking. Although the original advisory committee notes to the proposed rules incorporated many references to legal scholarship, the Committee has cited seven articles in the thirty-two years since then, one of which was written by the Reporter to the Committee. *See* FED. R. EVID. 404 advisory committee's note to the 2006 amendments (citing two articles); FED R. EVID. 608 advisory committee's note to the 2003 amendments (citing one article); FED R. EVID. 609 advisory committee's note to the 2006 amendments (citing one article); FED R. EVID. 702 advisory committee's note to the 2000 amendments (citing one article by the Reporter to the Committee); FED R. EVID. 703 advisory committee's note to the 2000 amendments (citing two articles).

168. *See infra* Part III (surveying key areas where abstaining from changing evidence rules has caused severe deleterious effects). *See generally* Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963) (presenting a typology of decision-making and arguing that *avoiding* decisions—creating nondecisions—is one important type of decision).

169. Capra & Richter, *supra* note 6, at 13.

170. *Id.*

171. *See, e.g.*, *supra* note 162 (describing responses to proposals).

Having no standards for success makes it difficult to evaluate a rule change and the trade-offs that inevitably go into it. Is the change likely to benefit one class of litigants, or hurt another? Does it aid judicial efficiency, but impede litigant options? Value trade-offs are an intrinsic part of governance; recognizing and justifying them allows others to agree or to argue, presenting reasons for making different trade-offs instead.[172] This is how democratic governance progresses: through incremental, provisional negotiations among differing views and interests. But the procedures of evidence rulemaking give the Rules Committee no platform to justify its reasoning or even recognize the trade-offs it makes. That structure detaches the Rules Committee from the process of democratic governance. Evidence rulemaking thus lacks the kind of responsiveness to public input, real-world circumstances, and legal mandates that we demand of agency rulemaking. This lack of standards and accountability measures supports rule-tending—preserving the existing regime through small tweaks—rather than robust, purpose-oriented rulemaking.

Perhaps most strangely, the Rules Committee does not explain how rule proposals comport with its statutory mandates to further truth and justice in ways that support efficiency and the development of evidence law. A baseline requirement of agency rulemaking is adherence to the statute a rule implements. Yet, in explaining how it proposes to implement a federal policy, the Rules Committee has no such norm.[173] As we explore further in Part III, the Rules Committee has apparently treated its brief as preserving the evidence rule regime instituted in 1975.[174] That may help explain its rather passive approach toward revising the rules as well as justifying its choices. Yet, as we have emphasized, the enacted rules issue a somewhat different mandate. Rule-tending contravenes Rule 102—the enacted statutory purpose under which the Committee operates—which anticipates change. Rule 102 does not instruct the Committee to preserve the existing rules but to ensure that they work to serve truth, justice, efficiency, and the development of evidence law. It thus requires considering how well existing rules fulfill their truth, justice, and efficiency purposes, as well as how the evidence regime should be developed to better serve these goals.

Oversight presents another big difference between the rulemaking models. As detailed above, agency rulemaking is subject to judicial review.[175] Agencies are all too aware of the possibility of challenge; judges form one of their key audiences.[176] If anything, judicial review may play *too* much of a role

172. *See, e.g.*, SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 2 (2021) ("Disparate policy views are normal in a democracy. Unanimous consent is not a realistic goal for most policy choices.").

173. *See* Nunn, *supra* note 4, at 1266.

174. *See infra* Part III.

175. *See supra* note 108 (collecting cases and statutes).

176. *See, e.g.*, Bernstein & Rodríguez, *supra* note 18, at 974–81 (discussing agencies' pervasive concern with litigation risk).

in agency rulemaking: Scholars have complained for decades that the demands placed on agency rulemaking, under threat of judicial invalidation, obstruct agencies from properly carrying out the statutory mandates Congress sets.[177] We are sympathetic to these arguments. But whether or not we like the easy availability of strict judicial oversight, it is a fact of agency rulemaking.[178] And, as Edward Stiglitz has argued, the availability of judicial review likely pushes agencies to explain and justify their decisions in ways that are comprehensible to outside readers and responsive to their concerns.[179]

Evidence rulemaking is also nominally available for review, by the Standing Committee and the Supreme Court. Although the issue has not been studied in depth, it seems that at least some of this review may have an ossifying effect, as it does in the agency context. One former Rules Committee member has noted that fear of disapproval by increasingly rarified judicial bodies has held the Committee back from proposing changes.[180] But, as long-time critic Paul Rice has observed, "if change doesn't start it doesn't go."[181] Short of congressional intervention, a rule change requires a Rules Committee proposal. Avoiding proposals the Standing Rules Committee or the Judicial Conference is likely to reject means that rules rarely reach a stage where anyone other than those connected to the Committee—or who happen to set information in the right orbit to "drift in" onto its shores—gets a voice in evidence rulemaking.

Evidence rules are also available for review by Congress, though this is usually a negligible step. We see no evidence that members of Congress pay the evidence rules much mind. And even if they did know or care, representatives can only override proposed rules as a body, through a heroic collective legislative action designed to be difficult.[182] This might explain why congressional inaction—which allows a proposed rule to go into effect—has

177. *See* Bagley, *supra* note 97; McGarity, *supra* note 97, at 1412; Peter L. Strauss, *Speech, from Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 775 (1996). *See generally* MELNICK, *supra* note 97.

178. *See, e.g.*, Bernstein & Rodríguez, *supra* note 18, at 974–81.

179. *See id.*; EDWARD H. STIGLITZ, THE REASONING STATE 237 (2022) (arguing, based on both political philosophy and experimental data, that the possibility of judicial review likely enhances agency accountability in rulemaking); *see also id.* at 215 (finding that psychological experiment subjects provide higher-quality reasoning when informed that their reasoning will be reviewed by a disinterested third party).

180. *The Politics of (Evidence) Rulemaking*, *supra* note 127, at 739 (describing the Rules Committee as at "the bottom" of a chain of review by judicial committees who become ever more "conservative" at each step and culminating at the Supreme Court).

181. *Id.* at 740.

182. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) ("[T]he framers went to great lengths to make lawmaking difficult."); *see* FED. R. EVID. 1102 (specifying that an amendment to the Federal Rules of Evidence transmitted to Congress by the Supreme Court "becomes effective unless Congress enacts legislation to reject, modify, or defer it"); *see also* 28 U.S.C. § 2072 (setting out the amendment process). The purposely difficult structure of legislation may paradoxically make evidence rulemaking easy, since it takes so much for Congress to overcome its collective action difficulties to reject a rule proposed by the judiciary.

been the norm. Professors Capra and Richter identify four instances after 1993 in which Congress enacted its own evidence rules; two "collaboration[s]" between Congress and the Rules Committee; and no instance at all in which Congress prevented a proposed rule from going into effect.[183] This process contrasts dramatically with the review of agency rules in litigation, where a court must adjudicate the conflict between a challenger and the agency defending its rule, taking evidence, hearing arguments, and paying the attention that a court must pay to do its job. We do not mean to suggest that evidence rules should necessarily be subject to challenge through litigation. Instead, this discussion highlights the relative paucity of external review as an accountability mechanism for the evidence rulemaking process.[184]

The impetus and timing of review for the two kinds of rules also differs dramatically. Agency rules are subject to challenge by the very people they affect, who can sue to challenge a rule either before or after it goes into effect.[185] The review of evidence rules, in contrast, is not connected to the rules' consequences. Most people affected by a rule will have no opportunity to challenge its negative effect on them. Indeed, review through the Standing Committee and Congress happens only *before* the change has gone into effect. That means that the Rules Committee never gets to, or has to, confront the consequences of its actions, nor justify them to either affected parties or arm's-length third parties.

Finally, the two institutions differ dramatically in the epistemic diversity they bring to the rulemaking process. The Rules Committee's members are all trained as attorneys of one sort or another. These are all experts, but they are all expert in more or less the same thing. Given the rules' complex mandate to secure empirically accurate determinations that accord with normative understandings of justice, one might hope for a rulemaking body with more wide-ranging expertise, perhaps including groundings in scientific, philosophical, and legal concepts. After all, the Committee has to consider a wide array of questions implicating different kinds of knowledge, at a range of levels of specificity. Do jury-eligible people tend to assume that others have insurance? Do expert evidence rules succeed at excluding flawed and repudiated forensic methods? Are businesses usually particularly careful or truthful in their records? Do jury-eligible people tend to evaluate some kinds of information in ways that systematically, but arbitrarily, yield different outcomes for different groups? These are the sorts of questions that demand answers to ensure that the evidence rules serve their purposes. The Rules Committee is not tailored to addressing them.

183. Capra & Richter, *supra* note 6, at 20.

184. *See* discussion *infra* Part IV (outlining some ways to address the problems this paucity raises).

185. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 140–41 (1967).

As our discussion of agency rulemaking suggests, one way to avoid these epistemic limitations would be to extensively engage non-Committee members who might have relevant knowledge, such as academics, forensic experts, and litigants. As we have noted, the Rules Committee occasionally seeks out information on topics of interest to members. But it is also clear that this information is highly limited and only employed *ad hoc*. Similarly, other avenues for getting information—proposals for rule changes and comments on proposed rule changes—remain quite limited as well. The Committee does not, as a regular matter, connect with interest groups or other representative organizations that could illuminate how rules affect litigation on the ground. While the Committee does sometimes seek out expert input, such limited consultation happens at the Committee's sole discretion, and it involves only experts selected by the Committee itself. In other words, where agencies have not only historically had epistemically diverse staff but have also come up with a range of ways to fill epistemic gaps, the Rules Committee mostly relies on itself—even though its epistemic make-up is basically homogeneous.

Within the already homogeneous group of legal professionals, the Rules Committee skews dramatically toward the viewpoint and concerns of prosecutors. Two-thirds of the current Committee has substantial experience representing the government in criminal matters[186]: All of the judges appointed to the Committee, including the Chair, are former prosecutors.[187] And the DOJ representative is the one voting member with no term limit; as of 2025, the federal prosecutor representative had served almost three times as long as any other voting member.[188] Having the same person serve over multiple committee compositions presumably gives the federal prosecutor a significant boost in procedural know-how, institutional memory, credibility, and influence.[189] Finally, the two practicing attorney seats have been given to men whose experience

186. *See generally Rules Committees — Chairs and Reporters*, *supra* note 145.

187. *Id.*

188. *Past Members of the Rules Committees*, U.S. CTS., https://www.uscourts.gov/forms-rules/records-rules-committees/past-members-rules-committees [https://perma.cc/2AGX-FCCF]; *see* ADVISORY COMM. ON EVIDENCE RULES, MEETING OF NOV. 5, 2025; ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 12–13, *supra* note 152, at 1.

189. For example, a close reading of the meeting minutes and report to the Standing Committee surrounding the recent proposal to amend Rule 609(a)(1)(b) to make the balancing test slightly more protective of defendants in criminal cases suggests that the Committee went from being deadlocked on the proposal (a 4-4 tie with one member absent) to voting 8-1 in favor of the change. In the interim, two changes to the proposal, including a revised Advisory Committee Note "as edited by the Department of Justice" meant that the DOJ announced its support for the provision. *Compare* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF NOV. 8, 2024, at 1 (2024) [hereinafter ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF NOV. 8, 2024], https://www.uscourts.gov/sites/default/files/2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf [https://perma.cc/HRA5-H43T], *with* ADVISORY COMM. ON EVIDENCE RULES, REPORT TO THE STANDING COMMITTEE, JUNE 10, 2025, at 6 (2025), https://www.uscourts.gov/sites/default/files/document/2025-06-standing-agenda-book.pdf.pdf [https://perma.cc/PH52-XUKM].

involves defending powerful corporations from civil suits (one of whom is himself a former prosecutor).[190] White collar defense is not prosecution, of course; but that kind of corporate defense often aligns with the interests of prosecutors on some important issues. For instance, these well-resourced groups can usually afford expert witnesses, and benefit when litigating against adversaries who cannot, which might naturally lead them to prefer some rules about expert witnesses over others.[191]

A simple counterfactual helps highlight the homogeneity of expertise and experience on the Rules Committee. Imagine, if you will, a committee composed ever so slightly differently. A term-limited representative from the DOJ would serve alongside a representative from the Federal Defenders who remained on the Committee as long as the Defenders liked, garnering experience and status. Former state and federal public defenders would occupy the Chair and all four other seats for judges. One of the attorneys in private practice would have made a career launching class action lawsuits challenging employment discrimination, while the other would have spent decades representing plaintiffs challenging government officer abuses. The Reporter would be a scholar with a long publication record exploring the way that evidence rules support racial and class inequity in litigation outcomes. Career trajectories do not, of course, determine one's worldview. Still, simply by dint of their legal experiences, this group of people would be exceptionally practiced at seeing things from the perspectives of particular litigants: defendants in criminal cases and plaintiffs in cases challenging corporate and governmental actions. Their litigation experiences and research trajectory would likely sensitize them to particular issues, and raise concerns about the rights of the disadvantaged, the poor, and the unrepresented, for example. Without doubting their good will or their competence, we can easily imagine that these people's backgrounds would influence their actions as Committee members. The same should surely go for the actual Committee as currently composed. It is skewed so dramatically toward the experience of prosecutors, and additionally of large corporations, that it is difficult to imagine that these viewpoints make no difference on evidence rulemaking outcomes.

Additionally, the Committee suffers from another kind of epistemic and experiential homogeneity: Evidence rulemakers have been disproportionately

190. *John S. Siffert*, LANKLER SIFFERT & WOHL (2025), https://www.lswlaw.com/lawyers/john-siffert [https://perma.cc/J7U4-HTRP].

191. Rules that allow parties to monopolize expert witnesses by employing them as consultants, for example, benefit better resourced parties. This alignment between corporate defenders and prosecutors may be facilitated by the fact that judicial attitudes toward expert witnesses seem to diverge as between civil and criminal cases. *See, e.g.*, Julie A. Seaman, *A Tale of Two* Dauberts, 47 GA. L. REV. 889, 897 (2013) (finding that courts admit evidence from prosecutors in criminal cases while excluding similar evidence from plaintiffs in civil cases). It is worth acknowledging that the alignment is not absolute. At times, the corporate bar may prefer rules that make it easier to exclude expert testimony, as in mass tort cases when excluding expert testimony may resolve the case in favor of the corporate defendant at summary judgment.

white and male.[192] The Committee did not have a non-white member until 2022,[193] making it the least ethnically diverse of the judicial rulemaking committees.[194] Historically, the Committee has been eighty-five percent men; just one of its seven appointed positions is held by a woman now.[195] And of course, a committee of white men wrote the original rules, which were then rewritten by House and Senate committees composed almost entirely of white men.[196] The evidence rules affect the entire litigation system; deliberating about the place of justice in the evidentiary regime requires reaching beyond the epistemological positions of a few privileged white men.

The multi-participant, multi-tiered nature of agency rulemaking, in contrast, means agency rulemakers are eclectic. Proposed and final rule drafts are subject to comments from many different kinds of government employees, including other agencies implementing different kinds of legislation.[197] That broader pool provides more varied expertise and experience than any one agency could offer, and helps maintain coherence among disparate rules.[198] Where agency rulemaking involves government actors with differing expertise, experience, mandates, and purviews, evidence rulemaking involves people with largely similar briefs and backgrounds. All of them are lawyers. Most of them are judges. Most of them are, or have been, prosecutors; most of the rest are corporate defense lawyers. What heterogeneity these rulemakers have inheres less in the expertise and experience they bring to the process than in the hierarchical levels they occupy—whether they are state or federal judges or law firm partners, for example, and if they are members of the Rules

192. Coleman, *supra* note 64, at 381–94.

193. *Id.* at 391 (describing the Rules Committee as "an all-white committee" in 2020); ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF MAY 6, 2022 (2022), https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf [https://perma.cc/8LQJ-F3L5] (welcoming new member Rene Valladares as the Office of the Federal Public Defender's representative).

194. *See* Coleman, *supra* note 64, at 382–94 (providing the demographics of each Standing Committee).

195. *Rules Committees — Chairs and Reporters*, *supra* note 145; Coleman, *supra* note 64, at 391; *see* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024, *supra* note 124, at 7.

196. The Rules Committee members appointed in 1965 all present outwardly as white and male: Albert E. Jenner, Jr., David Berger, Hicks Epton, Robert S. Erdahl, Judge Joe Ewing Estes, Professor Thomas F. Green, Jr., Egbert L. Haywood, Associate Dean Charles W. Joiner, Frank G. Raichle, Herman F. Selvin, Judge Simon E. Sobeloff, Craig Spangenberg, Judge Robert Van Pelt, Professor Jack B. Weinstein, Edward Bennett Williams, and Professor Edward W. Cleary (reporter). *Past Members of the Rules Committee: 1966*, U.S. CTS., https://www.uscourts.gov/file/1966pdf [https://perma.cc/N55D-JE2V]. On the various judiciary committees in the House and Senate that extensively engaged with and modified the rules before their passage in 1975, five members were not white men.

197. *See* Bernstein & Rodríguez, *supra* note 110, at 1640–41 (discussing interagency review).

198. *See* Bernstein & Rodríguez, *supra* note 18, at 930–31 (discussing rulemaking in shared regulatory space).

Committee, the Standing Committee, the Judicial Conference, or the Supreme Court.

The Rules Committee has a difficult task: It needs to ensure that evidence rules actually help fact finders figure out what happened in a particular case in a way that broadly supports just outcomes. As with most areas of regulation, the relevant questions may require different kinds of inquiries whose results will rarely be absolute or eternal. The Rules Committee, like all of us, has to make do with the best available information. But the Rules Committee, more than most of us, is also *obligated* to use the best available information. Otherwise it abdicates its responsibility to ensure that the rules actually help promote truth and justice in the litigation system. Plenty of scholarship helpfully points out the systemic effects of various rules and proposes ways to equalize results across cases and social groups.[199] And many people touched by the rules—practitioners, parties, jurors—have insights into how the rules distribute credibility and power across groups. But the people exploring or experiencing the rules' perverse effects can't change them. That responsibility falls on the Rules Committee.

In short, evidence rulemaking is structurally similar to agency rulemaking. Unelected government employees, acting under the authority of a statutory mandate, create rules governing conduct in a particular regulated area, with significant effects on varying publics with different roles in and relationships to the regulated area.[200] Of course, evidence rulemaking is, by statute, housed in the judiciary instead of the executive. But that should hardly make much difference. The judiciary is a branch of our democratic government; just like other branches, the judiciary owes those it governs, and the authorities it governs under, accountability.[201] It makes sense, then, to seek in evidence rulemaking a kind of accountability that resembles, or at least emulates, what we demand in other rulemaking arenas. But a lack of public engagement, a uniformity of expertise, and the absence of effective review by other government entities all lead evidence rulemaking to have significant accountability deficits.

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199. For a very small sampling from this rich literature, see Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 559–82, 588 (2009) (examining racial inequality inherent in prior conviction impeachment and proposing to eliminate Rule 609); Bennett Capers, *Race, Gatekeeping, Magical Words, and the Rules of Evidence*, 76 VAND. L. REV. 1855, 1872–76 (2023) (discussing expert testimony through a critical race theory lens); and Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 34–50, 53 (2007) (critiquing the racial implications of Rule 404(b) and proposing a new rule).

200. *See, e.g.*, Rice, *supra* note 22, at 828 (noting that, "[b]ecause Congress has delegated these procedural matters to the Judicial Conference, members of Congress have generally washed their hands of responsibility for maintaining the various Codes," a situation resembling most federal legislation, where Congress enacts broad statutes and lets others figure out implementation and updating).

201. Anya Bernstein, *Judicial Accountability*, 113 GEO. L.J. 651, 674–75 (2025) (explaining why courts owe both people and laws accountability).

III. RULE-TENDING

In the preceding parts, we have described evidence rulemaking as structurally analogous to other forms of rulemaking. Evidence rulemakers have been tasked with accomplishing a set of profound yet potentially conflicting goals, including promoting the pursuit of truth and justice through evidence rules. We have also shown how at present, evidence rulemaking is structurally dissimilar to forms of inclusive and accountable rulemaking developed by other bodies tasked with implementing similarly complex congressional mandates. While we think it possible that much of this analysis would apply to other rulemaking bodies administered by the judiciary, our focus here is on evidence rulemaking in its particularity.

Accordingly, this Part moves from theory to practice. We examine how the evidence rulemaking body has responded to a subset of the most longstanding and substantively meritorious critiques of evidence rules. These critiques demonstrate that certain rules are empirically problematic, normatively unjustifiable, inefficient, or perverse in terms of evidence law's development. The fruits of this examination are twofold. First, it suggests that the current rulemaking body works under a conception of rule-*tending* rather than rulemaking. In rule-tending, existing rules are revered as sacrosanct. The Committee's role is to keep changes to a minimum and act primarily to correct pervasive rule misapplication. Second, our discussion shows that rule-tending is incompatible with the principle that evidence rulemaking must serve the purposes of the rules themselves.

A. PRIOR CONVICTION IMPEACHMENT

The evidence literature is full of critiques of Rule 609, which allows for impeachment of witnesses with their prior convictions.[202] The justifications given for allowing witnesses to be impeached with their prior convictions have

202. *See, e.g.*, Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377, 384 (2023) (arguing that prior conviction impeachment "is substantially less probative than it is unfairly prejudicial," deters defendants from testifying and from trial, "compounds the racial bias of the criminal system," imposes a permanent "brand" on the defendant's character, and "compounds the risk . . . of wrongful conviction"); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1978–79 (2016) (arguing that Rule 609 relies on "shaky" justifications, causes problems in individual trials, and contributes to broader issues in the criminal justice system); James E. Beaver & Stephen L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 613 (1985) (explaining that "[n]either prevailing psychological theories nor existing empirical data supports the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction"); Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 23 N.C. CENT. L.J. 14, 16 (1998) (arguing that "the various American approaches to the admission of prior convictions are largely inconsistent with bedrock principles ingrained in American criminal law").

changed over time.[203] Previously, courts emphasized that those with certain types of prior convictions intrinsically lacked integrity and were therefore unworthy of belief—a normative claim about the witness's character. This rationale did not depend on any verifiable link between conviction and lying; it expressed a cultural view that people convicted of a crime do not deserve to be treated as credible.[204] This vision also had antecedents in witness incompetency laws, which held that people with certain identities or attributes—such as being Native American or African American, or having been convicted of an infamous crime—should be barred from the witness stand.[205] Norms have changed.[206] The idea that convictions render someone intrinsically unworthy of belief is no longer social dogma. Instead of changing the rule, however, federal courts simply embraced a new rationale to justify it.[207] Modern federal doctrine now says prior convictions have a predictive quality.[208] They supposedly offer information about a witness's *propensity* to lie on the witness stand—an empirical claim that has been subjected to near universal criticism in legal and psychology scholarship, as well as by members of the bench and bar.[209]

If we think of evidence rulemaking as tied to the purposes established by Congress, this combination—widespread criticism that Rule 609 undermines truth seeking and justice, on the one hand, and the shifting rationales offered to justify the rule, on the other—should prompt action. One might imagine that rulemakers would convene social scientists and neuroscientists to consider whether prior convictions *actually* help predict lying. This predictive claim seems worthy of scrutiny not least because of the unfair prejudice that prior conviction information may cause, making it crucial to explain how judges

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203. *See* Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS U. L. REV. 111, 131–33 (2021).

204. *Id.* at 128, 131–32.

205. Simon-Kerr, *supra* note 3, at 159–66.

206. One example of this change comes in the election of a man with felony convictions to the presidency. Peter Baker, *As a Felon, Trump Upends How Americans View the Presidency*, N.Y. TIMES (Jan. 10, 2025), https://www.nytimes.com/2025/01/10/us/politics/trump-felon-presidency.html (on file with the *Iowa Law Review*).

207. This is a form of what Reva Siegel famously terms preservation through transformation, in which a critiqued regime preserves its existing dynamic of benefits and harms by "produc[ing] changes in its formal structure until such a point as its legitimacy can be reestablished . . . as 'reasonable.'" Reva B. Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2180 (1996).

208. Simon-Kerr, *supra* note 203, at 117–22.

209. *See, e.g.*, Roberts & Simon-Kerr, *supra* note 202, at 386–89 (describing the large literature critiquing Rule 609); United States v. DeLeon, 287 F.Supp.3d 1187, 1261–62 (D.N.M. 2018) (expressing sympathy with the academic literature's criticism of Rule 609); State v. Brunson, 625 A.2d 1085, 1096 (N.J. 1993) (Handler, J., concurring in part) ("[T]he ever-growing body of empirical evidence and scholarly consensus that juries use prior-crimes evidence not to assess credibility but to infer guilt based on bad character."); United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) ("When the defendant is impeached by a prior conviction, the question of prejudice, as Congress well knew, is not *if*, but how much.").

should apply their balancing tests. And, in fact, there is empirical information on these issues. Social scientists have developed a huge literature on how to predict lying.[210] These studies suggest that far more granular information is required to usefully predict a person's likelihood of lying on the witness stand.[211] Even assuming that convictions accurately indicate a witness's past actions,[212] there is thus reason to be skeptical that they could help the fact finder predict whether that witness will lie. Moreover, it bears asking how such evidence helps a fact finder. Particularly with a defendant in a criminal case, the fact finder will already know that the accused has overwhelming incentives to shape the narrative to appear innocent.[213]

Other studies suggest that prior conviction impeachment carries a high risk of unfair prejudice. It turns out juries don't actually use prior convictions to evaluate credibility. Instead, when they hear evidence of defendants' prior convictions in criminal cases, jurors lower the burden of proof when the evidence is close, requiring less evidence of criminal conduct to reach a guilty verdict.[214] Prior conviction evidence thus acts as character propensity evidence—in a regime that nominally bans such evidence. Prior conviction impeachment has also contributed to wrongful convictions by silencing defendants who fear being impeached if they testify.[215] These tendencies disproportionately affect communities of color that are themselves disproportionately policed and prosecuted—and thus more likely to end up with previous convictions than those subject to less scrutiny.[216] Attention to such empirics would seem vital in a rulemaking endeavor centered around the twin pillars of truth and justice.[217]

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210. *See* Roberts & Simon-Kerr, *supra* note 202, at 384–89.

211. *Id.*

212. Notably, the assumption that a person committed the specific crime they were convicted of is questionable due to "the pervasiveness of bias, the under-resourcing of defense counsel, and the pressures to plead guilty, including the 'trial penalty' and pre-trial detention." *Id.* at 395–96.

213. Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 666–68 (1991) (describing effect of prior conviction impeachment on defendants' incentive to testify and juror assumptions of guilt); *see* Simon-Kerr, *supra* note 3, at 210–11.

214. 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, 1358–61 (2009) (showing that jurors use prior convictions to lower the burden of proof in close cases not to assess credibility).

215. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record–Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 488–92 (2008).

216. Roberts & Simon-Kerr, *supra* note 202, at 381. *See generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2006) (explaining how increased surveillance leads to higher conviction rates even in the absence of higher crime rates).

217. *See, e.g.*, ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024 (2024), https://www.uscourts.gov/sites/default/files/2024-04_agenda_book_for_evidence_rules_meeting_final.pdf [https://perma.cc/A9BF-YGFY] (largely not responding to a proposal by Professor Jeffrey Bellin, a report that Professor Daniel Capra prepared for the meeting, a letter

Strikingly, the Rules Committee has never responded to this data. Although rulemakers have seen seventeen proposals to modify Rule 609 since the Committee was reconstituted in 1993, at no point has the Committee actively reconsidered the rule's normative or empirical underpinnings.[218] Rather, in response to a recent attempt to persuade the Committee to eliminate the part of the rule that permits impeachment of defendants in criminal cases with their prior convictions, rulemakers cited a lack of data on how Rule 609 works.[219] Further discussion made clear that what the rulemakers meant by "data" was information on whether judges were admitting prior convictions in a way that is inconsistent with the rules' existing balancing test—not whether the rule undermined the search for truth or produced unjust results, as proponents of the change had argued.[220] In this case, the Committee's myopic focus on tending the rules did lead to action. Although it did not respond to

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from the Coalition for Prior Conviction Impeachment Reform and a prepared statement offered in person at the meeting by a representative of the Federal Defenders and instead demanding data on the how judges apply Rule 609, rather than the rule's effects).

218. The Standing Committee has considered a unified notice provision appliable to Rule 609 on multiple occasions. *See generally* U.S. CTS., ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOKS (Nov. 12, 1996, Apr. 12, 1997, Apr. 17, 2015, Oct. 9, 2015 & Apr. 29, 2016), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books [https://perma.cc/XZ5Q-HC56] (considering a unified notice provision applicable to Rule 609). The Standing Committee has proposed or approved technical amendments to Rule 609 on multiple occasions. *See generally* U.S. CTS., ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOKS (Oct. 22, 1998, Apr. 23, 2009 & Nov. 20, 2009), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books [https://perma.cc/XZ5Q-HC56].The Standing Committee has formed amendments substituting "character for truthfulness" for "credibility" and changed "if it involves dishonesty or false statement" to "that readily can be determined to have been a crime of dishonesty or false statement." *See generally* U.S. CTS., ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOKS (Apr. 19, 2002, Nov. 13, 2003 & Apr. 29, 2003), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books [https://perma.cc/XZ5Q-HC56]. The Standing Committee has rejected the addition of a probative–prejudicial balancing test to Rule 609(a)(2). *See generally* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 4, 2014 (2014), https://www.uscourts.gov/sites/default/files/fr_import/EV2014-04.pdf [https://perma.cc/R4TS-QPBM]. The Standing Committee has discussed the potential abrogation of Rule 609(a)(1) and other substantive changes. *See generally* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF OCT. 26, 2017 (2017), https://www.uscourts.gov/sites/default/files/a3_0.pdf [https://perma.cc/HQ2V-AW8Q]; U.S. CTS., ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOKS (Apr. 26, 2018, Oct. 27, 2023 & Apr. 19, 2024), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books [https://perma.cc/XZ5Q-HC56].

219. *See generally* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024, *supra* note 124 (not considering Rule 609's normative or empirical foundations and instead requesting data on whether judges are adhering to the Rule's balancing test); Roberts & Simon-Kerr, *supra* note 202, at 385 ("The probabilistic rationale for admitting prior convictions as evidence of a propensity for untruthfulness is unsound on many dimensions."); *see also* Jeffrey Bellin, *Eliminating Rule 609 to Provide a Fair Opportunity to Defend Against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence*, 92 FORDHAM L. REV. 2471, 2472–73 (2024) (describing the proposal made to the Advisory Committee).

220. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, *supra* note 124, at 8–9; *see also* Capra & Richter, *supra* note 6, at 44–45 (arguing that Rule 609 "does not demonstrate a failure of the rulemaking process" because the existing balancing test suffices).

the claims made in the original proposal, the Committee eventually voted to add the word "substantially" to the balancing test under which prior convictions are admitted against defendants in criminal cases on the theory that at least some judges were getting the intended balance wrong.[221] At the time of writing, the notice and comment period for this proposal is ongoing.

This narrow focus on how Rule 609 is being applied—rather than on whether it promotes its stated purposes even when applied properly—exemplifies the Committee's rule-tending approach. Rule-tending does not allow evaluation of a rule's underlying assumptions, its practical implications, or its disparate impact on different communities. It can at times result in ameliorative changes, such as making more explicit the need to protect defendants in criminal cases from the risk of unfair prejudice, as the proposal to add "substantially" to the balancing test does. Yet rule-tending is also highly restrictive. It holds that the mandate is not to ensure that rules promote truth, justice, or the development of evidence law, but merely to ensure that existing rules are properly applied.

B. CHARACTER EVIDENCE

The evolution—or lack thereof—of Rule 404, which prohibits character evidence from being used at trial, again illustrates the rule-tending mode. Rule 404 embodies the paradigmatic principle that people be judged based on their conduct rather than their character.[222] Rule 404, too, is often justified on both empirical and normative grounds. Empirically, the concern is that jurors will be swayed by prior bad acts, assigning defendants blame regardless of the evidence in the current case.[223] Normatively, Rule 404 expresses a deeply-held tenet of American jurisprudence: Conduct, not character, should form the basis for punishment or liability.[224] Rule 404 has been criticized

221. *See* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF NOV. 8, 2024, *supra* note 188, at 74; ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF MAY 2, 2025, *supra* note 188, at 339. *See generally* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF JUNE 10, 2025 (2025), https://www.uscourts.gov/sites/default/files/document/2025-06-standing-agenda-book.pdf.pdf [https://perma.cc/PH52-XUKM].

222. *See, e.g.*, Buck v. Davis, 580 U.S. 100, 123 (2017) ("Our law punishes people for what they do, not who they are.").

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

224. *Buck*, 580 U.S. at 123; *see also* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA 272 (2d ed. 1923) (describing common law's baseline presumption that a "[d]efendant's bad character may not be offered against him" in criminal proceedings because it causes "unjust condemnation"); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1162 (1998) (describing the prohibition on character evidence as

along both dimensions, too.[225] Although most embrace the rule's normative premises,[226] some contend that it is hopeless to exclude character evidence from trial.[227] People will make character-based assumptions based on any evidence available, so there may be little utility—and significant downside—to admitting less evidence rather than more.[228]

Recent scholarship has added to this line of argument by focusing on what Bennett Capers has termed "evidence without rules"—all the unregulated trial inputs that may nonetheless be significant to fact finders, such as how a

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"[o]ne of the oldest principles of Anglo-American law"). There are some exceptions, like defamation suits or child custody disputes, where character is central to the cause of action. *See* H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 852 (1982) ("Occasionally, some trait of character is directly in issue as a substantive element of a charge, claim, or defense, and character evidence of the 'trace' variety is received to establish the trait in question. If, for example, a plaintiff sues the defendant for defamation by having called the plaintiff a swindler and a thief, the plaintiff must prove that honesty and fair dealing were his true characteristics . . . ."); FED. R. EVID. 404(a)(1) (prohibiting "evidence of a person's character or character trait" from being used to prove action in conformity).

225. *See, e.g.*, Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1546–49 (2001) (explaining that situationalism—the idea that "people's actions are situation-specific"—may undermine the premise of Rule 404); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 754–56 (1998) (discussing Rule 404's complexity, misuse, inconsistency, and side effects such as deterring defendants from testifying); Goodman, *supra* note 199, at 11 (examining inadequacies in Rule 404 exceptions and explaining how "[r]ace overlays the propensity inferences often drawn from prior bad act evidence"); Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 2 (2016) (arguing that Rule 404(b) disproportionately impacts non-white defendants because evidence of uncharged acts triggers racial biases in jurors); Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341, 388 (2006) (arguing that Rule 404 should allow propensity evidence for crimes with high recidivism rates but not those with low recidivism rates); Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 827 (2001) (arguing that Rule 404 is unclear and leaves all parties to trial feeling "short-changed"); Brown, *supra* note 69, at 50 (explaining that Rule 404 "rel[ies] on laypeople to assess blame" but does not "reconcile itself to the layperson's view of behavior"); Uviller, *supra* note 224, at 848, 853–57 (describing predictive evidence rules as "uncertain, inconsistent, and ill-defined"); Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 276 (2004) (arguing that evidence of bad character is more often introduced than evidence of good character although there should be an asymmetry that protects the accused).

226. *See, e.g.*, Leonard, *supra* note 224, at 1162; Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 99–103 (1996).

227. Brown, *supra* note 69, at 9 (explaining that the "tendency to infer character traits is . . . implicit and ubiquitous"); Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 90 (2013) (stating that banning character evidence is "futile and misguided" since "character is hardwired into our social relations").

228. Blinka, *supra* note 227, at 148 (discussing the propensity rule's "broad exceptions, glaring evasions, and clash with common sense and life experience"); Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 502–04 (2019) (arguing in favor of abolishing the propensity ban to "create doctrinal coherence," "improve judicial economy," and "eliminate the current disincentive for defendants to testify").

defendant is dressed or who is attending the trial.[229] Teneille Brown has pointed out that neuroscientifically, it is impossible for fact finders not to make assumptions about those on trial based on inputs like their facial features, tone of voice, how they dress, or the color of their skin.[230] Building on this scholarship, one of us has argued that demeanor evidence should be regulated as character evidence.[231] Professor Brown, by contrast, argues that the rule should be reconfigured to focus on excluding immoral character evidence.[232] These arguments all critique the rule's failure to provide equal protection from the risks of character propensity reasoning.[233] And they seek to enact the rule's normative commitment through rule modifications.[234]

Meanwhile, England, the progenitor of the character evidence prohibition, stopped excluding it from criminal trials in 2003.[235] England now allows similar prior convictions to be introduced to prove a defendant's guilt in a subsequent criminal case,[236] but largely eliminates the kind of impeachment with prior convictions allowed under Rule 609.[237] Judges are instructed to exclude prior convictions not highly similar to the charged crime, because they lack probative value.[238]

Under a rulemaking regime focused on purpose-driven rulemaking, both the steady stream of scholarly engagement with Rule 404 and England's decision to adopt an approach that is in many ways the opposite of the American one might be expected to prompt study and possibly change. Does Rule 404 really protect against character propensity reasoning? Or does empirical evidence actually support admitting highly similar prior bad acts or

229. Capers, *supra* note 3, at 869.

230. Brown, *supra* note 69, at 6.

231. Brennan-Marquez & Simon-Kerr, *supra* note 64, at 1509.

232. Brown, *supra* note 69, at 54 ("[The proposed] rule ratchets up the presumption against admissibility, such that most evidence of past immoral conduct should be excluded, regardless of whether it is technically used for a non-propensity inference.").

233. *See* Brennan-Marquez & Simon-Kerr, *supra* note 68, at 1521–50; Simon-Kerr, *supra* note 40, at 1847 (arguing for "rules around character that come[] closer to offering equal protection across lines of race, class, gender, and other subordinated statuses"); Capers, *supra* note 3, at 886 (explaining that evidence such as dress, demeanor, and race are at odds with "equal justice before the law"); Brown, *supra* note 69, at 11 (noting, for example, that Rule 404 heightens reliance on "immutable" characteristics).

234. *See* Brennan-Marquez & Simon-Kerr, *supra* note 68, at 1561–71; Capers, *supra* note 3, at 898–906; Brown, *supra* note 69, at 49–57; *cf.* Simon-Kerr, *supra* note 40, at 1848 (advocating "expand[ing] the perspectives of the rulemakers" by "invit[ing] the communities most likely to be misjudged by these rules into the process of rethinking them").

235. Criminal Justice Act, 2003, c. 44, §§ 98–112.1 (U.K.); *see* Brown, *supra* note 69, at 18.

236. Criminal Justice Act, 2003, c. 44, §§ 98–112.1 (U.K.).

237. *Id.* § 103(2).

238. *See id.* ("[A] defendant's propensity to commit offences of the kind with which he is charged may . . . be established by evidence that he has been convicted of—(a) an offence of the same description as the one with which he is charged, or (b) an offence of the same category as the one with which he is charged.").

convictions while excluding dissimilar ones—reversing the de facto workings of Rules 404 and 609 in the American system?

In this area as well, however, the Rules Committee has taken a rule-tending approach. It has not seriously investigated how the propensity prohibition, as enacted, relates to—and whether it effectuates—the traditional commitment to judging acts rather than character, let alone the rules' overarching purpose to promote truth and justice. Nor has it considered abandoning that commitment in favor of an approach like England's. Rather, the Committee has made a small change to the rule's notice provisions, intended to correct how judges apply the rule. This change concerns Rule 404(b), which allows evidence of prior bad acts to be used for a non-character propensity purpose.[239] A prosecutor can introduce evidence that a defendant stole a key that was then used to access the home the defendant is accused of robbing to show preparation for the robbery, even though a fact finder could also use that evidence to infer a character propensity, concluding that the defendant is just the kind of person who steals in general.[240] Scholars argued for decades that Rule 404(b) is systematically misused to admit prior bad acts even when their primary—and often only—relevance is to suggest a defendant's propensity to commit the charged crime.[241] Purpose-driven rulemaking might see this as another reason to consider whether the rule *can* work as intended. The Rules Committee, without purporting to rely on any data, instead proposed an amendment simply requiring prosecutors to give notice when seeking to admit prior act evidence and to explain why it would fit a permitted purpose.[242]

It is unclear what the amendment to Rule 404(b) has accomplished.[243] Scholars continue to question Rule 404 on both normative and empirical grounds.[244] The Committee has not indicated that any post-amendment study is being undertaken to assess the effects of the new notice provision or to engage with the ongoing criticism. As with Rule 609, the Rules Committee has restricted itself to the narrowest of questions: whether the rule's existing provisions are being applied correctly.

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239. FED. R. EVID. 404(b).

240. This example is drawn from Professors Capra and Richter. *See* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018).

241. *See, e.g.*, *id.* at 773 (describing rulemakers' concern with "restor[ing] the intended balance to the admission of other-acts evidence").

242. *See* FED. R. EVID. 404(b) advisory committee's note to 2020 amendment.

243. *See* Capra & Richter, *supra* note 240, at 773.

244. *See* Capers, *supra* note 3, at 869–71, 882; James Stone, *Past-Acts Evidence in Excessive Force Litigation*, 100 WASH. U. L. REV. 569, 596 (2022); Brown, *supra* note 69, at 15–16; Brennan-Marquez & Simon-Kerr, *supra* note 68, at 1557–58.

C. *HEARSAY*

Rule-tending also characterizes the Committee's approach to the hearsay regime, which has also been subject to longstanding critique.[245] The hearsay prohibition is meant to prevent less reliable evidence from forming the basis of fact finders' judgments.[246] Although both the rule and its exceptions are complex, at bottom it expresses a normative commitment to truth-seeking and justice, based on empirical assumptions about what types of information are less reliable and likely to distort fact-finding.

For decades, scholars have questioned whether the hearsay rule, with its myriad exceptions, is an effective way to tailor evidence at trials. Recent studies have cast doubt on the rule's underlying assumption that jurors give hearsay evidence too much credit.[247] Other research highlights the hearsay exceptions' weak empirical foundations.[248] For instance, the rules allow dying declarations, excited utterances, and present sense impressions into evidence on the grounds that the context in which such statements are made renders them particularly reliable. Modern medical and social science, however, undermine the premise that statements made while under the emotional influence of a stressful event would be more reliable; that people are particularly truthful when about to die from wounds inflicted in a homicide; and that people can't make up lies

245. *See, e.g.*, Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1351 (1987) (explaining that the current hearsay exceptions are problematic since "categorical generalizations about what enhances the reliability of hearsay are unvalidated"); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 6 ("The reason the hearsay rule has so few real friends today is that it excludes too much probative evidence with too little justification."); David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering* Queen v. Hepburn, 2022 SUP. CT. REV. 413, 442 (arguing that the hearsay rule is rooted in American slavery and causes more problems for "disempowered litigants"); Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1469 (2016) ("[T]he federal hearsay rule taken as a whole amounts to declaring that reliable hearsay evidence is admissible when necessary to a full adjudication of a case, and in addition thirty specific forms of hearsay evidence are routinely admissible. The bar to hearsay evidence is thus full of holes."); David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 605–06 (2006) (explaining that the hearsay rule stems from "historical events in England that have little to do with practice today" and it causes best evidence to be excluded); Milich, *supra* note 21, at 723 (arguing that modern empirical studies showing that "juries are fully capable of evaluating the strengths and weaknesses of hearsay evidence" support abolishing the rule).

246. Sklansky, *supra* note 245, at 15 ("The traditional justification for the hearsay rule is that out-of-court statements are so unreliable that the system is better off without them . . . ."); Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 485 (1998) ("The conventional and most common explanation for the hearsay rule rests on the assumption that hearsay evidence is less reliable than in-court testimony which is subject to trial safeguards, principally cross-examination."). *See generally* Nesson, *supra* note 9 (arguing that the hearsay rule promotes the external legitimacy of verdicts).

247. Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 924 (2015) ("Empirical hearsay studies continue to converge on the same conclusion: jurors are significantly more competent to evaluate hearsay evidence than policymakers credit them to be.").

248. *See, e.g.*, Nunn, *supra* note 14, at 1283 n.130; Liang, *supra* note 20, at 237–43.

quickly, making on-the-fly descriptions particularly credible.[249] Scholars have offered many proposals for bringing the rules up to date with scientific understanding.[250] Others have disagreed that new empirical understandings warrant a change, arguing that these utterances may still be more reliable than other hearsay, or that it is nonetheless efficient to maintain these exceptions.[251] These are precisely the kinds of empirical and policy-based questions and trade-offs a rulemaking body should consider through rulemaking best practices.

Scholars concerned with access to justice have cited the hearsay rule as a significant barrier to litigant self-representation.[252] Given America's acknowledged access to justice crisis, scholars have argued, we should simplify an excessively complicated rule to open courtrooms to more people and achieve more justice writ large.[253] Scholars have proposed ways of simplifying the rule, such as excluding hearsay evidence when the probative value is low and the risk of unfair prejudice is high, and letting the fact finder sort out the rest.[254] These arguments take a broad view of what a just outcome would look like,[255] and their solution—simplifying or eliminating the rule—finds support in empirical research about how decision-makers actually use hearsay.[256]

Finally, evidence scholars have begun to question the premise that hearsay is a lesser form of evidence. Recent scholarship has shown that the strict prohibition on hearsay has at times been used to enforce slavery and

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249. *See supra* note 20 and accompanying text.

250. *See, e.g.*, Orenstein, *supra* note 48, at 179–83 (explaining psychological criticisms of the excited utterance exception and proposing an amendment); Angela Conti & Brian Gitnik, Note, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 236–50 (1999) (proposing an amendment to the excited utterance exception in part due to newer psychological studies). *See generally* Liang, *supra* note 20 (explaining the empirical issues with dying declarations).

251. *See, e.g.*, Panel Discussion, *The Philip D. Reed Lecture Series: Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1343 (2016) (statement of Professor Ronald Allen citing efficiency and reliability of existing hearsay exceptions and arguing that "dispos[ing] of these exceptions because a justification for them that was articulated a hundred years ago turns out to be disverified by a recent article on psychology misses the point").

252. *See, e.g.*, Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1079–80 (2022) (explaining how the complexity of hearsay rules impact pro se litigants); Sklansky, *supra* note 245, at 415 (describing how the hearsay rule is rooted in American slavery and can be an "instrument of justice" (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 557 (2d ed. 1923))).

253. Budzinski, *supra* note 252, at 1076 (stating that "complex legal rules present an access-to-justice barrier" and "require an overhaul to make them simpler, fairer, and more accessible").

254. *See* Eleanor Swift, *A Response to the "Probative Value" Theory of Hearsay Suggested by Hearsay from a Layperson*, 14 CARDOZO L. REV. 103, 109 (1992) (considering yet rejecting the idea of "a 'probative value' theory of regulation").

255. *See, e.g.*, Macleod, *supra* note 63, at 230–33 (arguing for a broad view).

256. Sevier, *supra* note 247 ("It is becoming increasingly apparent that the decisional accuracy rationale for the hearsay rule is crumbling under the weight of empirical research."); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 699 (1992) (discussing a study in which jurors "did not give much weight to hearsay evidence").

repression.[257] Other scholars have argued that the prohibition on hearsay disfavors modes of communication used by less powerful groups, modes that may be less direct or formal but nonetheless accurate.[258] Similarly, exceptions like the excited utterance exception may "privilege[] speech by those who feel entitled to complain and expect to be heard."[259] And at the same time, corporations benefit from the business records exception, which gives them leeway to easily and cheaply funnel certain evidence into court.[260]

The Rules Committee did make a substantial amendment to the hearsay rules shortly after it was reconstituted, creating a rule that people could forfeit the right to keep hearsay evidence out of court if live testimony was unavailable through their own wrongdoing, by intentionally making a witness unavailable for trial.[261] Yet even this move followed a common law trend in which every circuit to address the question had already recognized this exception. In the face of more recent challenges to the hearsay rule and its exceptions, the Rules Committee has again restricted itself to rule-tending. Its most dynamic recent intervention was to modify Rule 807, hearsay's rarely-used residual exception, to "fix a number of problems that the courts have encountered in applying it."[262] Another significant change allowed corporations to avoid "expense and inconvenience" by permitting them to lay the foundation for admitting business records using affidavits.[263] These tweaks—an attempt to make an almost entirely dormant rule less dormant, a pro-business modification that makes the business records exception cheaper to employ, and an early codification of well-established common law practice—are in keeping with the Committee's rule-tending orientation. They are interventions intended to maintain or bolster the existing structure of the rules.

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257. Sklansky, *supra* note 245, at 424 (describing how the Supreme Court turned hearsay into an "unforgiving rule of exclusion" when it was utilized to stop freedom suits in the United States); *see* Jeffrey Bellin, *Examining the American Hearsay Prohibition's Roots in Slavery*, *in* CRITICAL EVIDENCE, *supra* note 4.

258. Aviva Orenstein, *Hearsay & Confrontation from a Feminist Gaze*, *in* CRITICAL EVIDENCE, *supra* note 4.

259. *Id.*

260. *See* FED. R. EVID. 803(6)(b).

261. Memorandum from Ralph K. Winter, Jr., Chair, Advisory Comm. on Fed. Rules of Evidence, to Hon. Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Prac. & Proc. 3 (May 15, 1996), https://www.uscourts.gov/sites/default/files/fr_import/EV5-1996.pdf [https://perma.cc/LNP2-HD2R]. The Committee has made other amendments to the hearsay rules. For example, one such change made clear in the wake of *Crawford v. Washington*—which meant that the Confrontation Clause would no longer provide protection from unreliable hearsay if that hearsay was nontestimonial—that both statements against interest offered by the prosecution and those offered by the defense must have corroborating circumstances. Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Prac. & Proc. 494–96 (May 12, 2008), https://www.uscourts.gov/sites/default/files/fr_import/EV06-2008.pdf [https://perma.cc/3SGQ-QC76].

262. FED. R. EVID. 807 advisory committee's note to 2019 amendment.

263. *See* FED. R. EVID. 803(6) advisory committee's note to 2000 amendment.

In contrast, the Committee has been wary of purpose-driven rulemaking. For example, in 2016 the Committee considered "four separate proposals" for amending the excited utterance exception, some citing well-substantiated claims that the exception rests on shoddy empirical foundations.[264] After a symposium on hearsay reform,[265] the Rules Committee asked the Federal Judicial Center for an analysis of the existing scholarship on these issues.[266] The Rules Committee meeting agenda for 2016 contains the resulting memorandum, which is quite circumspect regarding the reliability of this evidence. On the one hand, the memo explains, "[t]he literature suggests that it generally is more difficult to create a lie than to tell the truth" and that "time pressure and the need for coherent narratives . . . render the task of lying even more cognitively taxing."[267] On the other hand, the memo notes that "simply because a task is difficult does not mean it is impossible," and that research "suggests that humans have a default response when presented with an opportunity to lie," such that "when there is a motivation to lie, the default response would be to lie."[268] Finally, the memo notes that "emotion may impair perception and other mental processes that may be important to accurate observation," meaning that statements "made 'under the stress of excitement' . . . may be less reliable."[269] In its eventual report to the Standing Committee, the Rules Committee summarized this memo as concluding that "there is significant empirical data to support the premises that: 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie."[270] The Committee explains that, "[c]onsequently, the Committee determined that there was no need at this point to amend" the relevant rules "due to any reliability concerns."[271]

This foray into the existing empirical literature is laudable, and we commend the Rules Committee for requesting the analysis. We also have no doubt that the analysis was done in a responsible and informed way. At the

264. *See* SESSIONS, III, *supra* note 162, at 63.

265. *See generally* Panel Discussion, *supra* note 251. That symposium conversation at times does invoke the purpose of the rules. Professor Allen, for example, takes the position that rules like 803(2) are efficient and at least as reliable as many other witness statements. *Id.* at 1342.

266. *See* Memorandum from Timothy Lau to Advisory Comm. on Evidence Rules 283 (March 5, 2016), https://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda_book_final_o.pdf [https://perma.cc/NCD8-ZC7C] (noting that, following a symposium on hearsay reform, "a member of the [Rules Committee] suggested that the Federal Judicial Center conduct original, experimental research examining the reliability of [present sense exception and excited utterance] hearsay evidence," and that "[t]he Center offered to prepare a summary of the scholarly literature as preliminary step," producing an "informational" memorandum "intended to serve as a framework for further discussion"); *see also id.* at 302–03 (suggesting experiments that could be devised to assess the reliability of such statements).

267. *Id.* at 284.

268. *Id.*

269. *Id.*

270. SESSIONS, III, *supra* note 162, at 64.

271. *Id.*

same time, there seems to be some disconnect between the research memo and the Committee's conclusions. The memo itself is somewhat equivocal on the reliability of present sense impression and excited utterance evidence, noting that it is more difficult to lie than not, but also that the motivation to lie can lead to a default practice of lying and that emotional excitement can impede accurate perception.[272] And the memo starts off emphasizing that it does not offer conclusions about the reliability of such evidence, but only serves in an "informational" capacity to provide "a framework for further discussion."[273] The Rules Committee report to the Standing Committee, in contrast, cites only those parts of the memorandum that support, not those that cast doubt on, the reliability of this kind of evidence. And rather than treating it as a "framework for further discussion," the Rules Committee used the memo as a reason to stop investigating the issue—a basis for not acting.[274] Moreover, the Committee provided no opportunity for interested parties to comment on the memo's analysis, or the Committee's rather partial summation of it, before rejecting the proposed changes.

In its report to the Standing Committee, the Rules Committee also noted two prudential concerns with changing Rule 803(2). First, "consideration would have to be given to whether there should be similar treatment for other exceptions that have been found controversial."[275] And second, amending only these two rules would "be contrary to a systematic approach to amending the Federal Rules of Evidence."[276] As a result, "the Committee determined that there was no need at this point to amend" either rule.[277] This is illuminating. Rather than start off on a "systematic" review of controversial exceptions, the Committee explains that the potential need for such review is a reason *not* to take any action at all. As far as we can tell, the Committee has never systematically reviewed the hearsay exceptions' empirical basis. This comports with the rule-tending approach, which favors conservative minimalism over purpose-driven and systematic reassessment.

D. EXPERT TESTIMONY

The Rules Committee has also responded to developments around expert testimony by rule-tending. The use of expert testimony in court, along with the rules that govern it, has received widespread criticism.[278] For example,

272. *See supra* notes 266–69 and accompanying text.

273. Memorandum from Timothy Lau, *supra* note 266.

274. SESSIONS, III, *supra* note 162, at 64.

275. *Id.* at 63–64.

276. *Id.* at 64.

277. *Id.*

278. *See, e.g.*, *supra* notes 53–54 and accompanying text (discussing modern critiques of forensic science); Section I.B (explaining the tension between promoting justice and seeking truth empirically in the Rules of Evidence and court practices); Capers, *supra* note 199, at 1872–76 (discussing Rule 702 in the context of critical race theory).

studies by nationally-recognized experts have found little validity to many of the forensic sciences regularly relied on by courts, finding fundamental problems with everything from fingerprint examination to bite mark analysis,[279] which remain leading causes of wrongful convictions.[280] Citing a mountain of empirical data, scholars have critiqued the failure to put any real guardrails around invalid forensic testimony.[281] As a normative matter, critics have argued that the current expert regime advantages prosecutors and deep-pocketed corporations at the expense of criminal defendants and litigants who can't afford experts.[282] Still others have questioned judges' capacity to serve as gatekeepers of expert testimony at all.[283] From perverse incentives for experts to manipulate valuation in corporate litigation, to the manipulability of expert qualification, to contention over how experts should testify, little about the present regime meets with scholarly approval.[284]

In a now-familiar pattern, rulemakers have not engaged with the fundamental normative or empirical questions such criticisms raise about the

279. NAS REPORT, *supra* note 54, at 173–75; PCAST REPORT, *supra* note 54, at 85–87.

280. Beety & Oliva, *supra* note 54, at 502 ("[I]nnocent people have been charged, convicted, imprisoned and even executed for crimes they did not commit on the basis of flimsy and unreliable fire evidence."); Sinha, *supra* note 53, at 882 ("[J]unk dressed up as scientific analysis has contributed to nearly a quarter of all documented convictions of innocent people to date.").

281. *See, e.g.*, Sinha, *supra* note 53, at 908–16 (describing the efforts to regulate how forensic evidence is used in court).

282. 21 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, KENNETH W. GRAHAM, JR. & DANIEL D. BLINKA, FEDERAL PRACTICE AND PROCEDURE § 5008 (2d ed. 2025 & Supp. 2025) ("The largest group of [FRE] amendments (10) favor the prosecution in criminal cases . . . ."); Sinha, *supra* note 53, at 896–97 (explaining that forensic disciplines naturally align with the prosecution since practitioners "work for and communicate heavily with prosecutors and rarely work collaboratively with defense lawyers without prosecutors listening in"); Gonzales Rose, *supra* note 3, at 2297 ("[E]ven when expert testimony is permitted, the cost is prohibitive to most low-income defendants who are represented by a public defender."); Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317, 319 (2007) ("Some commentators have suggested that in the United States trial by jury is evolving into trial by expert.").

283. *See, e.g.*, Cheng et al., *supra* note 120, at 328 (stating that judges often "apply the rules in an analytically tortured fashion to engineer the desired admissibility outcome"); Linda Sandstrom Simard & William G. Young, Daubert*'s Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457, 1458 (1994) ("Federal Rule of Evidence 702 is not self-explanatory, and any approach that depends on the district court judges acting as gatekeepers necessarily runs the risk of idiosyncratic approaches to admissibility.").

284. *See, e.g.*, Andrew MacGregor Smith, *Using Impartial Experts in Valuations: A Forum-Specific Approach*, 35 WM. & MARY L. REV. 1241, 1242 (1994) (explaining the "incentive for parties' experts to artificially inflate or deflate their appraisals"); David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 25–30 (2015) (explaining continued divisions in the court over reliability of experts); *id.* at 30–36 (discussing conflict over the limitation of expert testimony to that which is based upon facts that reliably support their opinion); *id.* at 36–42 (outlining conflict over the requirement that methodology must "be objectively testable"); Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1580 (2018) (critiquing Rule 702's reliability language and explaining the court's misuse of the rule).

expert testimony regime. Instead, they have tended to the existing rules, applying small patches. Well over a decade after the first national study showed grave problems with the forensic sciences,[285] the Rules Committee moved to make two small changes to Rule 702's expert qualification provisions. First, rulemakers clarified that the proponent of expert testimony has the burden of showing that the testimony meets the rule's requirements.[286] Rather than a rule change, the rulemakers explained that the amendment was necessary to fix "incorrect application[s]" of the rules.[287] Second, rulemakers endeavored, through a small change in wording,[288] to constrain how experts describe their conclusions: "Forensic experts should avoid assertions of absolute or one hundred percent certainty . . . if the methodology is subjective . . . ."[289] Again, rulemakers emphasized that "[n]othing in the amendment imposes any new, specific procedures"; it merely "clarif[ied]" the rules' already existing prescriptions.[290] Although this is an area where the Supreme Court has occasionally issued decisions offering guidance on factors that courts should consider when assessing expert reliability, those decisions leave ample space for rulemakers to act to ensure reliability.[291]

The utility of the Committee's small adjustments to the expert testimony rules is debatable, and again, we find no evidence that the Committee has plans to study their effects. What is clear, however, is the Committee's focus on rule maintenance rather than rule reform to ensure its mandate is carried out. The Committee has not engaged purpose-driven rulemaking, which would require thinking through the normative dimensions of the existing expert evidence regime and grappling with the devastating failures of justice illuminated by empirical research.

E. EVIDENCE OF INSURANCE

A brief survey of Rule 411, which makes evidence of liability insurance inadmissible, rounds out our discussion. In this relatively bland territory, we can see how rule-tending—focusing on conservation of existing structures rather than seeking to ensure the rules carry out their purposes—can have perverse consequences.

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285. *See generally* NAS REPORT, *supra* note 54 (published in 2009).

286. FED. R. EVID. 702 advisory committee's note to the 2023 amendments.

287. *Id.*

288. FED. R. EVID. 702(d). The wording changed as follows: "the *expert's opinion reflects a reliable application of* the principles and methods to the facts of the case." *Id.* (emphasis added to indicate change in wording).

289. FED. R. EVID. 702 advisory committee's note to 2023 amendments.

290. *Id.*

291. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993) (noting that "[m]any factors" will bear on whether trial judges will determine whether expert scientific testimony is scientifically valid but declining "to set out a definitive checklist or test"); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999) (explaining that *Daubert*'s "list of factors was meant to be helpful, not definitive").

Originally, Rule 411 was rooted in the idea that talking about insurance risks inviting jurors, who would know that an insurance company would be paying anyway, to award higher damages.[292] Jurors might also see having insurance as evidence of lack of caution or wrongdoing.[293] And finally, the rule supports the collateral source rule, which holds that courts won't reduce damages for plaintiffs just because they have other sources of compensation.[294] Scholars have long questioned whether excluding evidence of insurance can accomplish any of these goals.[295] After all, insurance is a matter of common knowledge. The Arizona Jury Project, which looked at actual juror deliberations, found that jurors speculated about insurance in eighty-five percent of cases, even when there was no testimony about it.[296] Not only did jurors speculate about it, but that speculation very often influenced their verdicts.[297] Further, jurors seemed concerned that plaintiffs would be compensated by both insurance and the jury award.[298] That is, where the rule supposedly prevents juries from giving plaintiffs too little, actual juries seem to worry that plaintiffs might get too *much*. This data suggests that Rule 411 not only fails to prevent insurance from mattering in trials but may even have the undesired opposite effect. The rule sets out to ensure that jurors don't award higher than proper damages at the expense of the insurance company, but research suggests that it leads jurors to award *lower* than proper damages instead.

In light of these long-standing empirical findings about the rule's efficacy and impact on plaintiffs, one might expect rulemakers to reconsider Rule 411's normative justification or how its goals might best be accomplished. After all, by failing to modify the rule, rulemakers have effectively embraced a totally new idea: that plaintiffs should recover *less* because jurors lack access to evidence about insurance. We have been unable to find a defense of this

292. Heidi H. Liu, *Provisional Assumptions*, 95 S. CAL. L. REV. 543, 549 (2022) ("One underlying rationale for Rule 411 is the intuition that a defendant should not incur greater liability or damages than she otherwise would merely because she has (responsibly) purchased insurance that will pay the judgment.").

293. *See id.*

294. *Id.* at 550.

295. *See, e.g.*, Calnan, *supra* note 46, at 1188–89 ("Contrary to the notion that insurance references promote jury indoctrination, critics assert that such references in fact have no impact upon the decisions of juries because most jurors these days already presume that defendants carry liability coverage. Any indoctrinating effect which might result, they maintain, can be eliminated by appropriate cautionary instructions by the court."); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1895 (2001) ("To the extent that jurors enter the courtroom unsure about the role that insurance should play and to the extent that courts decline to address the issue, the ground is laid for juries to rely on their own assumptions in determining how to treat the issue of insurance.").

296. *See* Diamond & Vidmar, *supra* note 295, at 1893.

297. *Id.* (explaining that the effect of insurance on the verdict "could not be ruled out" in about forty percent of studied cases).

298. *Id.* at 1890 ("The question of potential double recovery for the plaintiff came up frequently.").

anti-plaintiff bias in the literature. And yet, the empirical evidence suggests that this is the de facto regime under which the federal courts operate. Rule 411 has never been amended.

* * *

This Part has looked at how the Rules Committee has addressed some of the most sustained and well-founded critiques of evidence rules. We are not the first to note that the Committee has consistently rejected calls for major reform, nor that its proposed changes tend to be as minimal as possible.[299] What we contribute here is a structural observation: This tendency results naturally from an approach to rulemaking focused on conserving the status quo rather than fulfilling the purpose of the rules. The Rules Committee's vision of rule-tending ties it to existing rules. If circuits are split on how a rule should be applied, if the Supreme Court's newest innovation creates a de facto change, or if the Committee is persuaded that enough judges are misunderstanding a rule, change is warranted. Rules must be applied correctly, after all. But unlike purpose-driven rulemaking, which seeks to accomplish the statutory goals behind a legal enactment, rule-tending is structurally unresponsive to arguments that rules are inconsistent with truth-seeking or lead routinely to injustice. Instead, rule-tending takes the rules and their premises as a given—it makes existing rules a purpose unto themselves.

As this Part has shown, by doing so little, the rule-tending approach accomplishes a great deal. It closes off the potential for reassessment, engagement, and the kind of accountable rulemaking that we see in other areas requiring the effectuation of complex legal mandates. And it entrenches a status quo that many argue benefits powerful interests, as in prior conviction impeachment, the rules around character evidence, and the expert evidence contexts. What would it look like to switch from rule-*tending* to a regime of rule*making*? We take up this question in the next Part.

IV. KEEPING EVIDENCE REAL

Using agency rulemaking as a comparator, the preceding two parts explained why the current structure and orientation of evidence rulemaking does not serve the rules' statutory purposes. Evidence rulemaking procedures neither require nor enable rulemakers to reliably consider how their decisions comport with their mandate, while the Rules Committee's homogeneous composition is epistemically limiting, contributing to a failure to recognize problems the rules cause. The preceding Part reviewed a number of rules and doctrines that highlight these weaknesses. Rather than demand some particular resolution to the problems we raise, we suggested that the Committee's rule-tending approach should be replaced with more active, and more accountable, rulemaking. This Part considers how that transformation could start. By adopting or approximating some subset of the agency rulemaking characteristics discussed

299. *See, e.g.*, Nunn, *supra* note 4, at 940–41.

in Part II, rulemakers could dramatically improve the accountability of evidence rulemaking. In particular, we advocate increasing rulemakers' accountability to the public; broadening rulemakers' knowledge through outreach and advisory groups; modifying the Rules Committee's personnel; and clarifying the Committee's mandate. We then respond to the main arguments against such a change that emerge from the literature.

A. AVENUES FOR IMPROVEMENT

Change could start with the Rules Committee's internal processes. Currently, the Committee lacks standard, reliable avenues for interested and knowledgeable people to provide input into rulemaking. Information arrives in ad hoc ways that often seem tied to personal connections or individual interests.[300] As a government body using delegated authority to make rules that govern significant populations, the Committee has an obligation to make itself available to the public it affects—even if no statute prescribes it. A first step toward improving accountability, then, would be increasing its interaction with members of the public. That would involve both improving its current reason-giving practices and building new channels for public engagement.

Currently, the U.S. Courts website invites the public to "participate in refining" evidence rules through a "cooperative process."[301] A proposal submitted there gets a number; the Reporter reviews it and makes "recommendations."[302] One can view a list of submitted comments on another page, each with a notation of its status: "pending consideration" or "considered." Clicking through to a "considered" item, one may download the proposal and an indication of whether the Rules Committee decided to act on it. We are also assured that "[i]f the advisory committee decides to pursue the idea, it may seek empirical research assistance from the Federal Judicial Center."[303]

This is a good start: People have an opportunity to submit ideas and can even read the ideas of others. What is missing here, however, is reasoned engagement. A submitter is informed that the Rules Committee did or, more typically, did not take them up on their suggestion; but they will not necessarily

300. *See The Politics of (Evidence) Rulemaking*, *supra* note 127 at 736 (comment of Judge Fern Smith); Rice, *supra* note 22, at 819–20. For example, at their April 2024 meeting, the Rules Committee convened what it termed a "Symposium on Artificial Intelligence" for the first portion of the meeting. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2024, *supra* note 124, at 2. This involved presentations from three experts at the National Institute of Standards and Technology, three legal experts talking about the practical implications of artificial intelligence ("AI") for the legal system, and two law professors "with expertise in providing frameworks for the admissibility of A.I. evidence." *Id.*

301. *How to Suggest a Change to Federal Court Rules and Forms*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-suggest-a-change-federal-court-rules-and-forms [https://perma.cc/2LCR-XPU2].

302. *Id.*

303. *Id.*

learn *why*.[304] Did the Committee decide that the problem the proposal raised was insufficiently important? If so, it would be good to know how it assessed importance. Did the Committee decide that the issue the proposal raised was not actually problematic? In that case, proposers should be told why this issue is not normatively troubling. Having the ability to cast a proposal into the ether is a start, but it hardly suffices for accountable rulemaking. Moreover, descriptions of experiences with this process suggest that the consideration given to reform proposals is not always substantial or engaged.[305] As a government body, the Rules Committee not only needs to give public input serious attention; it also needs to demonstrate to the public that it has done so.[306] That calls for a standardized, transparent, responsive procedure for taking in, considering, and addressing public input.

The Rules Committee is, of course, under no statutory obligation to consider or respond to public input. But that doesn't mean it shouldn't do so anyway. Creating an internal norm mandating robust responsiveness to public proposals would be a big step toward some accountability. It would give the Rules Committee an opportunity to articulate its understandings of the kind of empirical grounding and normative reasoning that should guide rulemaking decisions, and it would also express a commitment to such reason-giving. And it would allow the Rules Committee to justify its refusals to change rules with reference to the arguments advanced by rule-change proponents, providing a salutary foundation for ongoing deliberation.[307] Publicly laying out a process outlining how proposals will be received and responded to—and then sticking to that process—could also improve rulemaking's legitimacy in the eyes of those it affects. In short, the Rules Committee could start to explain how ideas about the evidence rules—both its own and those of others—relate to the rules' overarching purposes.

Of course, a proposal portal would yield some fringe or irrelevant ideas. We feel confident that the members of the Rules Committee and their staff—experts in legal reasoning—can explain fairly efficiently why outlandish, irrelevant, or impossible proposals should not be considered. And in the end, if there really is a flood of improper entries, the Rules Committee can always limit its responses. Having fully reasoned responses to *some* serious proposals

304. *See generally The Politics of (Evidence) Rulemaking*, *supra* note 127 (providing examples of a typically cursory discussion of the Rules Committee's consideration of rule proposals in a report to the Standing Committee).

305. *See* Rice, *supra* note 22, at 839–41.

306. At present, reading meeting minutes in conjunction with reports to the Standing Committee would be the principal way that the public could try to discern what the Rules Committee had considered and why it did what it did.

307. Currently, reports to the Standing Committee describe proposals the Committee considered and what it decided to do, without much explanation or substantive engagement with arguments for the proposal. *See supra* note 162 and accompanying text (providing examples).

and fleshed-out explanations for refusing to take *some* actions would be a dramatic improvement over current practice.

The Rules Committee should also affirmatively seek out and incorporate outside perspectives and information. The Committee at present engages in some outreach, but that is limited to issues that Committee members already deem interesting or important.[308] That obstructs the Committee's awareness of issues it is not already concerned with, and leaves the discussion stuck in the areas the Committee itself wants to focus on. There are many ways to broaden the conversation, as our descriptions of innovations in agency public engagement indicate. The Rules Committee could issue broad requests for information from people in the field to determine what the burning issues are for scholars and practitioners. It could take cognizance of relevant existing work, which is voluminous. For just a couple of examples, the National Research Council's 2009 report on Strengthening Forensic Science[309] and the President's Council of Advisor's 2016 report on Forensic Science in the Criminal Courts[310]—major efforts involving interdisciplinary groups researching a broad sweep of pressing issues—could serve as models for proposal working groups. The Committee could convene community-based and expert advisory boards to evaluate the needs of the different groups who pass through the court system. In short, the Rules Committee enjoys a wealth of opportunities for improvement.

More change could come from the Chief Justice, who appoints Rules Committee members. As we have explained, these appointments have largely been limited to those with prosecutorial and corporate defense backgrounds. The Chief Justice could instead use these appointments to add different perspectives and experiences to the group. He could ensure broader representation among judges by allowing positions to rotate regularly rather than picking particular people, or by choosing judges and practitioners with different backgrounds and experience. Representation of prosecutors and defense attorneys could be further equalized by imposing a term limit on the DOJ representative matching those of other members, or ensuring that the federal defenders' representative serves terms as long as the representative from the DOJ. And the Rules Committee would also probably benefit from simply having more people, and more people who are not judges, on it. For example, every other federal rulemaking body has at least one voting member who is an academic.[311] For many years, that role on the Evidence Rules Committee has sat vacant.[312] Evidence is a vibrant and growing field among

308. For example, the Committee's consideration of the implications of AI for evidence, described *supra* note 300, was at the Committee's own initiative.

309. *See* NAS REPORT, *supra* note 54.

310. *See* PCAST REPORT, *supra* note 54.

311. *See Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees*, U.S. CTS. (June 23, 2025), https://www.uscourts.gov/file/78432/download [https://perma.cc/EC7C-XEE3].

312. *See supra* note 146 and accompanying text.

legal academics. Why not at least fill that seat? It could also be salutary to rotate the position of Reporter or broaden the role beyond one individual rather than vesting the power to shape what comes in and out of the Committee in one person for several decades. Any additions to the Committee membership providing a wider array of different viewpoints could help alert the Committee to relevant issues and also help keep it focused on fulfilling its legal mandate of furthering the rules' purposes.

Finally, Congress itself should step in and reform this system. Legislation could impose the changes we suggest, of course, but it could also set clearer standards and mandates for rulemaking. Congressional action could increase membership on the Committee and broaden its diversity. Congress could also loosen the control of the Chief Justice, a political appointee, by revising the Committee structure to make more positions relatively independent and relatively long-lasting. Financial support could allow the Committee not only to engage in more of the processes described above, but to hire some members not fully employed elsewhere, which would bring energy to the process. Legislation could mandate more canvassing of public input, more outreach to experts, and more responsiveness to both. In short, Congress could improve the situation by insisting on, and enabling, purpose-driven evidence rulemaking.

B. Addressing Objections to Change

One primary objection to any effort to shift from a rule-tending to a rulemaking regime is embodied in Chief Justice Rehnquist's admonition, when he reconstituted the Rules Committee, that the rules should change sparingly.[313] The "traditional" thinking goes that the rules "are purposely concise and were designed to be nimble."[314] On this view, changing the rules would be inefficient: Judges and attorneys would need to educate themselves on new rules and learn how to put them into practice.[315] At present, a trial attorney who took an evidence class in law school thirty years ago need never study the subject again to give good counsel and offer adequate representation. Further, states have largely followed the federal model, adopting similar or identical rules. This stability and uniformity in the rules gives predictability to litigants, lawyers, and judges alike and reduces gamesmanship. And change

313. *See, e.g.*, Rice, *supra* note 22, at 829 (describing Chief Justice Rehnquist's admonition to new chairs that the Committee should not "engage in law reform"); Rice, *supra* note 140, at 754–55 (describing Chief Justice Rehnquist's instructions to chairs that they should revise "minimal[ly]"). Justice Rehnquist expressed a similar view nearly a decade after passage of the FRE and during a time when there was no Committee overseeing the rules. In his majority opinion in *United States v. Abel*, he called the Court "merely a conduit when we deal with an undertaking as substantial as the preparation of the Federal Rules of Evidence," going on to observe that "Congress extensively reviewed our submission, and considerably revised it." United States v. Abel, 469 U.S. 45, 49 (1984).

314. Capra & Richter, *supra* note 5, at 1876.

315. *Id.*

might yield unintended consequences.[316] We agree that these considerations are important. At the same time, their unspoken subtext is that the rules are working: Why mess with a good thing?

This "if it ain't broke don't fix it" mentality runs aground on a serious problem: In many ways, it *is* broke. We cannot assume there are no problems just because those in the establishment do not experience them. For instance, by many accounts, the Rules of Evidence have contributed to a plea bargaining system inextricable from the ballooning of the carceral state.[317] Those whose careers involved serving as prosecutors may have found the plea bargaining system useful and count this as a positive development.[318] But others—including defendants in criminal cases, communities affected by high incarceration rates, and researchers concerned with the integrity of the criminal legal process—may have different, no less relevant, experience and expertise. Similarly, the rules' failure to constrain the admission of faulty forensic evidence has led to wrongful convictions, which has negative consequences for the falsely convicted and their communities, not to mention for the integrity of the justice system and for society as a whole.[319] Considering how the evidence rules work for everyone involved is the only way to realistically assess the relative benefits of stasis and change. As Professors Capra and Richter put it, if "the Rules are not serving contemporary trial needs," then "the costs generally associated with modification of the Rules are eclipsed by the need for change."[320] We agree, and would extend this insight beyond trial needs to encompass the broader purposes of the evidence rules as a system. Taking those purposes as a baseline would help rulemakers evaluate realistically whether the cost of change outweighs its benefit.

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316. *Id.*

317. *See, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461–64 (2005). *See generally* Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305 (2021) (setting out evidence rules that contribute to wrongful convictions and potential changes); Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 431–33 (2018) (making the case that "the parallel penalty dynamic"—the silence penalty and the practice of prior conviction impeachment—increase guilty plea rates); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 858 (2016); Eisenberg & Hans, *supra* note 214, at 1370.

318. Meanwhile, the committee members who are attorneys in private practice may not have had much occasion to consider plea bargaining at all, since arbitration and settlement have largely displaced litigation in the corporate world. *See, e.g.*, David Horton, *Forced Robot Arbitration*, 109 CORNELL L. REV. 679, 699–708 (2024) (describing jurisprudential changes that led corporations to choose arbitration over litigation for disputes with consumers); Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 130 (2015) (describing widespread corporate use of settlement to resolve claims with large groups).

319. *See generally* Beety & Oliva, *supra* note 54 (arguing that unreliable science should be barred from criminal cases as they are in civil cases). *See e.g.*, Sinha, *supra* note 53, at 882, 886–87; *see also* Jasmine B. Gonzales Rose, Asees Bhasin & Spencer Piston, *Antiracist Expert Evidence*, 134 YALE L.J. 2362, 2377–78 (2025); ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 121–39 (2019); Capers, *supra* note 199, at 1867; Cheng, *supra* note 7, at 412–14.

320. Capra & Richter, *supra* note 5, at 1894.

Further, when compared with the kinds of changes we see routinely in the agency rulemaking context, the potential disruption of changing some evidence rules looks less cataclysmic. If government rules can require car manufacturers to restructure entire production lines to include passive restraints in all cars,[321] they can surely ask judges to change the way they admit prior conviction evidence. The Supreme Court has not hesitated to throw out entire categories of constitutional entitlements just because lawyers and judges would have to keep up.[322] And the legal profession seems to assume that law will change; many state bar associations impose Continuing Legal Education requirements to ensure attorneys stay abreast. As in the agency context, evidence rulemakers can find ways to ameliorate disruptions, for instance by providing substantial guidance in practice notes or providing significant lead times before a rule comes into effect.

Another objection may be that, since Congress has itself legislated the evidence system, only Congress should make substantive changes to the Federal Rules of Evidence.[323] On this view, the legislative mandate is precisely to keep change minimal. This objection rests on the evidence rules' unique trajectory. Although other rules of court procedure have been promulgated by judicial committees under the auspices of the Rules Enabling Act, the evidence rules were themselves originally enacted as a statute.[324] That could argue against allowing *anyone* to amend them short of the normal constitutional process needed to change a statute.[325] Indeed, Professor Ethan Leib has argued that the current evidence rulemaking regime is simply unconstitutional: Evidence rule changes "effectively change statutory law that Congress passed and the President signed" without going through bicameralism and presentment.[326] Professor Leib argues that the Supreme Court lacks authority to "repeal [or alter] congressional statutes" absent the adjudication of a case or controversy that invalidates a statute for violating the Constitution.[327] In short, according to Professor Leib, "this delegation to the Supreme Court to alter, erase, or

321. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983).

322. *See, e.g.*, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242–43 (2022) (overturning a half-century of settled law guaranteeing a constitutional right to abortion).

323. *See* Capra & Richter, *supra* note 5, at 1903.

324. FED. R. EVID. REFS & ANNOS (describing congressional enactment of the FRE on January 2, 1975).

325. U.S. CONST. art. I, § 7; *see* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 921–22 (1983) (holding that action that changes the legislative status quo requires the full process outlined in Article I, Section 7). Note that the evidence rules were enacted as a statute before the Supreme Court decided *Chadha*, suggesting that the coalition that enacted the rules did not assume that bicameralism and presentment were always necessary to change a statute or its effectuation.

326. Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 914 (2022).

327. *Id.* at 915.

make ineffective statutes of the United States should be considered invalid under currently-settled constitutional law."[328]

In this Article, we take no position on the constitutionality of the evidence rulemaking regime; for purposes of our argument, we take the regime as we find it and argue for improving its process and outcomes. At the same time, we recognize that the evidence regime's statutory status is "unique" among rules.[329] This unique status, which raises real difficulties, likely contributes to the Committee's structurally-engrained hesitancy to amend the rules.[330] But this reasoning is misguided. If changing the statutorily enacted evidence code is unconstitutional or otherwise improper, then the judiciary may not revise the rules *at all*. Constitutionality does not hang on the significance of the change; it is quantity-neutral. If the judiciary is not properly authorized to change the rules, then inserting or deleting a word here or there violates the Constitution as much as eliminating a rule altogether or creating a brand new one. If the revision process is improper, the solution is not to keep rulemaking perfunctory on the theory that less change is less constitutionally offensive, but rather for the judiciary to refrain from making any changes at all until Congress brings the process into conformity with the Constitution.[331]

If, on the other hand, those involved in rulemaking treat the amendment process that Congress established as constitutional,[332] then they have no reason—and likely no authority—to tiptoe around change. Like constitutionality, the rule change procedure is neutral as to the size or significance of change: A word change gets the same procedure as a rule repeal. If revising a little is legitimate, revising a lot is no less so. And, crucially, Congress has provided not only a rule change procedure but also a statement of purpose—an "intelligible principle[]"—to guide that process: the purposes listed in Rule 102.[333] Any action—and any inaction—on the evidence rules should comport with the purposes Congress has set out. Moreover, absent proposed changes, there is no way to identify what Congress's present views might be. As Paul Rice pointed out years ago, Congress chose not to maintain the code;[334] it

328. *Id.*

329. *Id.* at 914.

330. *See* Capra & Richter, *supra* note 5, at 1903; *see also The Politics of (Evidence) Rulemaking*, *supra* note 127, at 740–45.

331. Professor Leib sets out an agenda. Leib, *supra* note 326, at 970–75 (arguing that "Congress should repeal . . . the FRE," "rewrite . . . the REA's supersession clause as it applies to the FRE," and perhaps also "pass[] actual laws of evidence that the rules of evidence would not be able to change," which should, like regulatory statutes, have "'intelligible principles' to help the Court in its rulemaking efforts to meet the basic demands of the non-delegation doctrine" as well as "take clear positions on the federalism implications about preemption and the constitutional jury right as well" (emphases omitted)).

332. *See supra* Section II.B.

333. *See supra* Part I; Leib, *supra* note 326, at 970–75.

334. *The Politics of [Evidence] Rulemaking*, *supra* note 127, at 740 (comment of Paul Rice).

"delegated rulemaking to the Supreme Court and the Judicial Conference," which then delegated it to the Rules Committee.[335]

Delegation is what our Congress usually does when it lays down broad goals, and there are good reasons why.[336] Congress itself is stretched thin, constantly changing, focused on reelection, and generalist, making it difficult to develop relevant expertise.[337] And the legislative process is sufficiently burdensome that, while it may set out goals, keeping up with new research, social developments, and other changes obstructs the pursuit of those goals.[338] Delegating authority to expert bodies allows Congress to ensure that the government as a whole pursues a broad range of goals inscribed in statute, without individual members of Congress taking on that herculean task themselves. Given lawyers and judges' close relationship to trial procedure, it makes sense to delegate authority over the evidence rules to them. But the very structure of delegation, as well as the instructions Congress has provided, suggest that a committee holding delegated rulemaking authority fulfills Congress's instructions when it actually wields that authority properly, rather than holding its power at bay.

Congress's own actions suggest as much. Since creating the delegated rulemaking process, Congress has not seemed overly concerned with evidence rules. In fifty years, it has drafted four rules and collaborated with the Rules Committee on two; and it has never invalidated a rule change proposal from the judiciary.[339] Refusing to act for fear of being insufficiently deferential to Congress turns out itself to be insufficiently deferential to Congress. Congress has delegated to the Rules Committee the task of engaging in purpose-driven rulemaking.[340] Limiting change based on concerns about propriety does not indicate deference to *congressional* preferences so much as instantiate the *Rules Committee*'s custom of minimizing change. But, as we have argued, that preference is not only normatively problematic; it fails to comport to the purposes set out in the rules themselves.

Those who take a more critical theoretical view of evidence rulemaking might make additional objections. One could argue, for example, that expertise

335. *Id.* at 740–41.

336. *See supra* note 84 (collecting sources).

337. *See, e.g.*, Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 85–86 (2019) (explaining that contemporary members of Congress "reside at the intersection of two fundamental and conflicting forces": the "constitutional mandate that they operate as generalists" and "represent their constituents with respect to a wide variety of topics and issues" and the need to "produce legislation that reasonably responds to, and intervenes in, a world" of practices and "institutions that has grown enormously complex," which "requires domain-specific expertise"). *See generally* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2019) (recounting how Congress delegates much of its work to unelected staffers within the legislative branch itself).

338. *See generally* Bernstein & Rodríguez, *supra* note 18.

339. *See supra* note 183 and accompanying text.

340. FED. R. EVID. 102.

and participatory democratic values are often in tension.[341] The reification of expert knowledge risks disempowering those whose knowledge comes from lived experience rather than elite institutions.[342] And it can serve to reinforce existing power hierarchies instead of supporting egalitarian goals like the pursuit of justice.[343] The existing rulemaking structure bears out this concern: The Committee is entirely staffed by legal experts who have made limited use of other forms of knowledge.[344] Yet, as we have explained, accountable rulemaking requires multiple kinds of knowledge and information. Rulemakers need to hear from people who have a stake in the outcome to understand what the real—sometimes unintended or obscured—effects of their decisions will likely be or have been. They also need to learn from those who do research in relevant areas. Agency initiatives suggest that research-based information and expert consultation can be successfully combined with community outreach.[345] And, crucially, agencies are held responsible for processing different kinds of input in reasoned ways.[346] The way to ameliorate tensions between different kinds of knowledge is not to shut most out, but to let more in.

Finally, some may argue that more process will bog the rules down in endless bureaucracy. It is fair to consider the costs of a process that involves broadening the voices on the Committee and extends involvement of other stakeholders. Put slightly differently, one might ask: Why turn to administrative rulemaking for answers when the administrative state is often targeted as inefficient? And how to address the glaring personnel differences—the way that agencies can usually employ lots of people with differentiated expertise while the judiciary is much more limited in both size and scope?

We would first suggest that maintaining rules that may ignore, or even undermine, their own mandates is hardly efficient. Efficiency looks for straightforward ways to accomplish some purposes; ignoring the purposes undermines that. In terms of resource and personnel constraints, we would not expect the Rules Committee to implement the full panoply of agency practices we have discussed. But those agency practices do provide ideas, approaches, and inspiration for making the evidence rulemaking process more accountable, realistic, and effective. The Rules Committee is not burdened with the layered statutory mandates and judicially created requirements heaped

341. *See, e.g.*, K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 730 (2020) ("[T]he specter of such community power—power that goes beyond mere input—is often terrifying to policy-makers and proponents of expert-driven 'good governance.'").

342. *See, e.g.*, Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 762–75 (2022) (describing problems with technocratically-created bail and detention algorithms and need for other sources of knowledge).

343. *See id.* (describing status hierarchy-reinforcing, anti-democratic nature of governance by technocratic algorithms in the criminal law context).

344. *See supra* Section II.B, Part III.

345. *See supra* Section II.A.

346. *See supra* Section II.A.

upon agencies; it has, for better or worse, not been subject to the same "procedure fetish" that bogs agency rulemaking down.[347] That leaves the Committee free to implement the most useful and adaptable changes without miring itself in endless procedure. True, the changes we propose would create more work for the Committee and would almost certainly require a larger and less monolithic group at the core of the enterprise. But ensuring that court adjudication proceeds along sensible lines rooted in justifiable, and legally mandated, reasons is a worthwhile end to work for.

CONCLUSION

Congress has delegated rulemaking authority to the Judicial Conference, and through it to the Rules Committee.[348] Delegation usually aims to enable greater and more sustained attention, subject matter expertise development, and procedural tools to make rulemaking inclusive, well-informed, and, above all, responsive to the congressional mandate. The result of this delegation in evidence, however, has been to divorce the rulemaking process from many of the statutory purposes it is intended to serve. Even as new science and evolving norms have sparked ever-growing critiques of the existing evidence structure, evidence rulemakers have constrained themselves to a process of rule-tending, treating the existing rules as ends unto themselves and confining themselves to the task of maintenance. The resulting misalignment between the express goals of the system and the methods and outcomes it produces threatens the very legitimacy of the federal evidence law regime.

We propose that evidence rulemakers shift from their current focus on rule-tending to fully embrace their delegated role as rule*makers*. To do so, we suggest that they adopt procedural best practices from another context in which Congress has delegated authority to rulemaking bodies in order to effectuate statutory mandates: administrative law. Working within the current rulemaking structure, we have proposed potential avenues to effectuate the rules' purposes through rulemaking that considers the rules' real-world effects, can respond to evolving scientific understandings and normative commitments, and is accountable to the many constituencies the rules serve. This procedural rigor is essential to the kind of purpose-driven rulemaking that supports substantive legitimacy. And it would help keep evidence real.

347. *See generally* Bagley, *supra* note 97.

348. *The Politics of (Evidence) Rulemaking*, *supra* note 127, at 740–41 (comment of Paul Rice).