

EVIDENCE OF MENTAL STATE IN CASES INVOLVING ALLEGATIONS OF RAPE OR SEXUAL ASSAULT

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This Article proposes reforms to the rules of evidence that apply in prosecutions and civil cases involving allegations of rape or sexual assault. The basic problem is that current rules do not align with scientific insights into the psychology of complainants, defendants, and jurors. In some cases, the current rules are the product of highly politicized rulemaking designed to demonstrate legislators' tough stand on violence against women. In other cases, the current rules reflect outdated assumptions about human psychology that do not make sense in the context of rape or sexual assault.

I advocate two categories of reforms. The first category would better protect defendants from prejudice and would strengthen rights to confront accusers. The second category would help to spare complainants from harassment that is immaterial, prejudicial, and likely to deter future reporting of sex crimes. I will also consider, and reply to, foreseeable objections to my proposed reforms. I conclude by identifying areas for future analysis.

Introduction	1224
I. Reforms to Improve Protection of Defendants.....	1226
A. Limiting Evidence of Propensity	1226
B. Reforming The "Hinckley Rule" on Expert Evidence	1233
C. Creating a Statutory Right of Confrontation.....	1238

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D. Adopting Safeguards for Prior Statements of Identification	1243
E. Admitting Retrospective Statements Regarding State of Mind	1246
F. Adding a Reliability Requirement to the Excited Utterance Rule	1250
G. Restricting Evidence of Plethysmography	1253
II. Reforms to Improve Protection of Complainants	1256
A. Recalibrating Admissibility of Prior Consensual Sexual Acts	1256
B. Revising Rules for Impeachment with Evidence of Parallel Suits	1261
C. Exposing Biased Statements in Jury Deliberations	1266
III. Foreseeable Objections	1268
A. Constraining Judicial Discretion	1268
B. Incentivizing Overcharging	1269
C. Bolstering Prosecution Under the Guise of Protecting Complainants	1271
D. Underestimating the Curative Effect of Jury Instructions	1271
E. Overlooking Deep-Seated Cultural Problems	1273
Conclusion	1273

INTRODUCTION

The interrelationship of evidence law and cognitive science requires careful attention. Sometimes rules of evidence and procedure do not keep up with scientific discoveries about the psychology of complainants, defendants, or jurors. I commend the *Fordham Urban Law Journal* for organizing a symposium on this important subject. In particular, Symposium Editor Alexandra Spano deserves praise for framing the topic in early 2025, coordinating logistics, and assembling a wide-ranging roster of speakers and authors.

Fordham is arguably the nation's premier law school in the area of evidence law. Professor Bennett Capers has been a leader in the field of critical evidence. Professor Dan Capra has served as the reporter for the Judicial Conference Advisory Committee on the Federal Rules of Evidence for the last three decades. Professor James Kainan has written important scholarship at the intersection of evidence law and criminal law. Professor Maggie Wittlin brings an impressive range of interdisciplinary tools to her analysis of evidence law and court procedure. As we discuss possible

reforms of evidence law, we should acknowledge the vital role played by Fordham at the forefront of such efforts.

My contribution to this Symposium will focus on the unique context of criminal and civil cases involving allegations of rape or sexual assault.¹ These cases are particularly challenging and heighten the importance of harmonizing evidence law with the findings of experts in cognitive science. To begin with, the evidence available in rape and sexual assault cases is often limited. While the phrase “he said, she said” is lamentable because of its gendered language, this phrase is widely used to refer to the absence of third-party witnesses in such cases.² Evidence of mental state—both the complainant’s and the defendant’s—often plays a crucial role in cases based on allegations of rape or sexual assault. Evidence rules in this area are highly politicized, due in part to the alliance of Democrats and Republicans in demanding a “tough” response to such crimes.³ In sum, the rules of evidence are important in cases involving allegations of rape and sexual assault, but the rules are especially prone to misalign with science in this area due to the impact of politics.⁴

I will argue that the current rules governing evidence of mental state in these cases should be reformed in several ways. The current rules are both overinclusive and underinclusive. Part I will propose reforms that would better protect defendants. Part II will suggest reforms that would better protect complainants. Part III will address foreseeable objections to my proposals. The conclusion will summarize this Article’s proposals and identify areas for further research, particularly unique state evidence rules that apply to intimate partner violence.

1. Civil suits for rape and sexual assault are more common than one might think. Plaintiffs who believe they have suffered rape and sexual assault might choose to sue not only the alleged assailant but also a range of third parties whose alleged negligence may be at fault, including employers who may have been careless in hiring or supervising the alleged assailant, landlords, or schools that did not maintain security in the building where the episode occurred, etc. *See, e.g.*, Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55, 57 (2006) (discussing results of multi-year study).

2. *See, e.g.*, *Tome v. United States*, 513 U.S. 150, 166 (1995) (noting that “[i]n almost all cases a youth is the prosecution’s only eyewitness,” heightening the importance of evidence rules’ bearing on the credibility of accusers in prosecutions for sexual abuse of children).

3. *See generally*, AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION*, 41–44 (2021) (pointing out the convergence of the Republicans advocating a “War on Crime” and the formerly leftist feminists advocating a pro-police, pro-prosecution response to domestic violence); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998) (focusing on rules adopted in 1990s to admit propensity evidence).

4. *See infra* Part I.A and I.B.

Of course, I recognize that evidence rules are not the only problem besetting prosecutions and civil suits for rape and sexual assault. Police practices, cultural norms, disparities in access to counsel, and other factors all play a role. While we should not be unduly sanguine about the potential efficacy of reforming evidence rules, we should also recognize that unfair and outdated rules need to be revised. The rules at issue in this Article, adopted from 1975 to 1995, require updates to keep up with the insights of cognitive science, and those updates should be a high priority for both state and federal rule makers in 2026, whether or not the updates will be sufficient to ensure fairness in prosecutions and civil suits for rape and sexual assault.

I. REFORMS TO IMPROVE PROTECTION OF DEFENDANTS

This Part proposes to amend several evidentiary rules in order to strengthen the protection of defendants in both civil and criminal cases involving allegations of rape or sexual assault. Part I.A proposes to restrict the admissibility of prior acts offered to show the defendant's propensity to commit sex offenses. Part I.B proposes to reform rules that govern the admissibility of expert testimony on mens rea in criminal cases. Part I.C proposes to expand the defendant's right of confrontation in criminal cases. Part I.D proposes safeguards that would reduce the danger of admitting prior statements of identification. Part I.E proposes to allow retrospective hearsay statements in which accusers discussed their state of mind at the time of the alleged offenses. Part I.F proposes to amend the hearsay rule admitting excited utterances. Part I.G proposes to restrict evidence of plethysmography. Collectively, these proposals would improve the reliability of evidence and would buttress the procedural rights of defendants.

A. Limiting Evidence of Propensity

The Federal Rules of Evidence and their state analogues generally recognize the danger of propensity evidence in both civil and criminal cases.⁵ Propensity evidence seeks to show that a person is prone to committing

5. See Tamara Lave & Aviva A. Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 797 (2013) (indicating that the "traditional Anglo-American rule prohibits circumstantial use of character evidence, known as 'propensity evidence,' whereby evidence of a person's particular characteristic or trait is offered to argue that the person acted in conformity with that trait or characteristic"); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754 (1995) (stating that "[p]ropensity evidence has long and justifiably been excluded in most circumstances"); Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Sexual Abuse*, 4 CRIM. L. F. 307, 314 (1993) (explaining that "the general prohibition on character evidence remains firmly rooted in U.S. law").

certain acts.⁶ When the pending action is a criminal prosecution or a civil lawsuit for an act that took place on a particular date, the admission of evidence concerning a similar act outside the date in the indictment or complaint raises the risk of substantial prejudice.⁷ The jury might conclude that a defendant is more likely to have committed the crime or tort at issue in the pending case if the defendant committed a similar act at a prior time.⁸ The propensity inference—sometimes referred to by the phrase “once a criminal, always a criminal”—makes it difficult to give the defendant a clean slate for a trial that is supposed to be about the alleged subsequent act. The admission of extrinsic act evidence does not necessitate a high quantum of proof,⁹ but it could have devastating effects on a jury that would otherwise need to consider the pending charge or complaint in a vacuum. The unfairness of trying a defendant based on evidence of an extrinsic act is apparent when one considers that the prosecution would likely have charged, or the plaintiff would likely have sued to recover from, the prior act if the evidence proving that act was truly credible.

In Federal Rule of Evidence 404 and its state analogs, the ban on propensity evidence appears in two places. Rule 404(a)(1) includes the following language: “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”¹⁰ Rule 404(b)(1) sets forth this

6. See Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 443–45 (2019) [hereinafter Sevier, *Legitimizing Character*] (explaining that propensity is an “often intense natural inclination or preference,” and tracing propensity evidence back to a notorious Roman trial in 56 B.C.).

7. See FED. R. EVID. 404 advisory committee’s notes (citing a concern raised by California Law Revision Commission that evidence of prior bad acts “subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened”).

8. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (“The State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury, and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”); Liebman, *supra* note 5, at 754–55 (indicating that “[p]ropensity evidence invites jurors to convict defendants or to find them liable not because they committed the acts alleged in the case but because they are bad people (or because their having offended and having been stigmatized for doing so in the past removes any reason to forbear stigmatizing them again . . .)”); Beale, *supra* note 5, at 314 (citing “irrelevance, prejudice, and procedural efficiency and fairness” as “three main reasons . . . for excluding evidence of prior acts to show propensity and conduct in conformity”).

9. See *Huddleston v. United States*, 485 U.S. 681, 690 (1988) (holding that, pursuant to Federal Rule of Evidence 104, the trial court may admit the prior act if the jury could reasonably find this fact by a preponderance of the evidence).

10. FED. R. EVID. 404(a)(1).

limitation: “Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”¹¹ There are exceptions to both limitations. A prosecutor can evade the ban in Rule 404(a)(1) to the extent that the accused puts character in issue.¹² Propensity evidence is also admissible when such evidence is offered for “another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”¹³ The exceptions to Rule 404 make the protection against propensity somewhat undependable, especially because permissible purposes such as proving motive and intent are akin to proving propensity,¹⁴ but there is at least a foundation for judges to exclude such evidence if a party can point out its prejudicial effect.¹⁵

In 1994, nearly two decades after the initial adoption of the Federal Rules of Evidence, Congress approved three subject-matter exceptions to the ban on propensity evidence. These exceptions allowed the admissions of prior similar acts to show propensity if the present case is a prosecution for sexual assault (Rule 413),¹⁶ a prosecution for child molestation (Rule 414),¹⁷ or a civil suit for either sexual assault or child molestation (Rule 415).¹⁸ These

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

12. In such an instance, because the defendant has opened the door by putting his character at issue, e.g., by raising an entrapment defense, the evidence is no longer subject to exclusion under Federal Rule of Evidence 404(b) because it is not extrinsic. *See also* FED. R. EVID. 405(b) (allowing evidence of specific extrinsic acts when offered to prove an element of an offense, claim, or defense).

13. FED. R. EVID. 404(b)(2).

14. The basic idea is that propensity is one’s natural inclination, which in turn is a function of one’s motive, intent, absence of mistake, etc. Ironically, these constituent elements of propensity are expressly mentioned as exceptions to the ban on propensity evidence. *See* FED. R. EVID. 404(b)(2) (permitting evidence showing “motive,” “intent,” and “absence of mistake” notwithstanding the ban on propensity inference in Federal Rule of Evidence 404(b)(1)). The internal contradiction in 404(b) has drawn criticism from commentators. *See, e.g.,* Sevier, *Legitimizing Character*, *supra* note 6, at 455 (indicating that the ban on propensity evidence is “incoherent, internally inconsistent, and according to some scholars, the legal equivalent of Swiss cheese”).

15. In addition to the provisions of Rule 404, the opponent can always invoke Rule 403, the catch-all rule that permits exclusion of evidence when the prejudicial effect substantially outweighs the probative value, but the interpretation of this rule is highly discretionary and therefore somewhat unpredictable. *See* FED. R. EVID. 403.

16. Rule 413 permits courts in criminal cases to “admit evidence that the defendant committed any other sexual assault” when a defendant is accused of sexual assault, with such evidence considered “on any matter to which it is relevant.” FED. R. EVID. 413(a).

17. Rule 414 mirrors the language of Rule 413 and applies that language to the context of prosecutions for child molestation. If the present accusation is child molestation, “the court may admit evidence that the defendant committed any other child molestation,” and this “evidence may be considered on any matter to which it is relevant.” FED. R. EVID. 414(a).

18. Rule 415 extends the approach of Rule 413 and Rule 414 to civil cases involving allegations of sexual assault and child molestation. In “a civil case involving a claim for relief

rules do not include any requirement that the person committing the prior act must have been convicted or even charged.¹⁹ Proponents of such evidence would need to give notice fifteen days in advance of trial,²⁰ but the new rules provided virtually no basis on which to exclude the evidence, so the value of the pretrial notice is unclear. Where applicable, Rules 413–15 simply erase the prohibitions of Rule 404.

When Congress considered the proposals to adopt Rules 413–15, their proponents' goal was simply to increase the success of lawsuits and prosecutions alleging sexual assault.²¹ Some comments in the legislative history indicate that sex crime is attributable to a unique and irresistible compulsion, so a history of such activity should be admissible even though prior criminal acts are inadmissible in other categories of prosecutions.²² There was no effort to harmonize the new proposals with the prohibitions in Rule 404.²³ Because Democrats and Republicans were eager to signal their tough stance against sex crimes, the exemption of these cases from the propensity ban had strong political support.²⁴ The normal vetting of Rule

based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation," and this "evidence may be considered as provided in Rules 413 and 414" (i.e., on any matter as to which the evidence is relevant). FED. R. EVID. 415(a).

19. See FED. R. EVID. 413(a), 414(a), 415(a) (omitting any requirement of a conviction or charge).

20. See FED. R. EVID. 413(b), 414(b), 415(b) (setting forth a fifteen-day notice requirement).

21. One of the chief sponsors of this legislation, Representative Susan Molinari, was quite explicit about the goal of facilitating successful prosecutions. "Sexual assault and child molestation do not ordinarily occur in the presence of multiple credible witnesses. The Rules of Evidence need to be changed to improve the ability of prosecutors to obtain convictions against the perpetrators of such crimes." Lave & Orenstein, *supra* note 5, at 805 n.47 (quoting 137 CONG. REC. 28031 (1991) (statement of Rep. Susan Molinari, Remarks to the House of Representatives on Proposed Amendment to the Federal Rules of Evidence in Cases of Sexual Assault and Child Molestation)); see also Beale, *supra* note 5, at 316–19 (explaining that proponents of these proposals sought to increase odds of success in prosecutions of rape and sexual assault); Lave & Orenstein, *supra* note 5, at 807 (noting instrumental goals discussed in legislative history of Federal Rules of Evidence 413 to 415 and characterizing proponents' purposes as lacking a "principled justification").

22. See Lave & Orenstein, *supra* note 5, at 808–12 (summarizing comments of proponents who made such arguments).

23. See Liebman, *supra* note 5, at 756 (explaining that the proposed Federal Rules of Evidence 413–15 "are so out of keeping with the pre-existing propensity provisions as to cause the propensity rules, taken as a whole, to lose coherence").

24. For a detailed discussion of the legislative history, see Micheal S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 969–72 (1998) (pointing out that contemporary critics thought that Congress was acting with "unusual fervor" in adopting Rules 413 to 415); see Liebman, *supra* note 5, at 756 (explaining that the proposed Federal Rules of Evidence 413 to 415 are "so out of keeping with the pre-existing propensity provisions as to cause the propensity rules, taken as a whole, to lose coherence").

amendments by judges, practitioners, and law professors did not occur before Congress adopted Rules 413–15.²⁵

Because federal courts see few sexual assault prosecutions or lawsuits, the nationwide impact of Federal Rules 413–15 has been limited.²⁶ One area where these rules have been impactful, however, is on Native American reservations. Under the Major Crimes Act, federal prosecutors can charge sex offenses on reservations in federal court,²⁷ and the possibility of using propensity evidence in such cases has made federal court a more favorable venue than state or tribal court in the eyes of prosecutors. A challenge to Federal Rules 413–15 on equal protection grounds failed, because the statutes did not facially discriminate against Native Americans on the basis of race,²⁸ but there can be little doubt that the statutes made Native American defendants more vulnerable to prosecutions for sex-related crimes.²⁹

Fewer than half of states have adopted versions of Rules 413–15.³⁰ Their reasons for this forbearance have varied. At least forty states adopted the

25. *See supra* note 24 and accompanying text (recounting that Congress bypassed the procedure established by the Rules Enabling Act whereby the Judicial Conference, involving judges, law professors, and practitioners, provides input on proposed revisions to the Federal Rules of Evidence; after adopting Rules 413 to 415, Congress received objections from the Judicial Conference, but Congress chose not to heed the objections).

26. *See* CHARLES DOYLE, CONG. RSCH. SERV., R42387, MANDATORY MINIMUM SENTENCING FOR FEDERAL SEX OFFENSES: AN ABRIDGED OVERVIEW 1 (2012) (“Sex offenses are usually state crimes.”).

27. The Major Crimes Act gives the federal government jurisdiction over Native Americans who commit enumerated felonies in “Indian country,” including “a felony under chapter 109A” and “felony child abuse or neglect,” to the same extent as if the defendants had committed the offenses within the exclusive jurisdiction of the United States. 18 U.S.C. § 1153. Such defendants “shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.” 18 U.S.C. § 3242.

28. The Supreme Court has held that classifications based on “Indian[]” status are “political rather than racial,” and are therefore subject to rational basis review. *Morton v. Mancari*, 417 U.S. 535, 552 n.24 (1974). Lower courts have applied the rational basis test to hold that Federal Rules of Evidence 413 to 414 withstand challenges under the Equal Protection Clause. *See United States v. Enjady*, 134 F.3d 1427, 1433–34 (10th Cir. 1998) (holding that Rule 413 meets the rational basis test because this rule facilitates the effective prosecution of sex crimes); *United States v. Castillo*, 140 F.3d 874, 884 (10th Cir. 1998) (rejecting equal protection challenge to Rule 414); *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005) (rejecting equal protection challenge to Rule 413).

29. *Cf. United States v. Begay*, No. CR 04-1979 MV, 2006 WL 8444146, at *6 n.6 (D.N.M. June 2, 2006) (“Native Americans are more likely than any other ethnic group to be incarcerated federally for assault. While Indians represent less than 2 percent of the U.S. population, they represent about 34 percent of individuals in federal custody for assault.”) (alteration in original) (quoting NATIVE AM. ADVISORY GRP., U.S. SENT’G COMM’N, REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN SENTENCING ISSUES TO THE U.S. SENTENCING COMMISSION 30–31 (2003)).

30. The following state rules mirror some or all of the provisions in Federal Rules of Evidence 413 to 415: Alaska R. Evid. 404; Ariz. R. Evid. 404(c); CAL. EVID. CODE § 1108

overall framework of the Federal Rules of Evidence,³¹ but there is no systematic process for copying federal updates, so states have generally been less likely to adopt federal amendments since the 1970s. Some states have considered and rejected Rules 413–15.³² Two years ago, New York was the most recent state to consider the adoption of Federal Rules 413–15. Following a New York appellate court decision in 2024 reversing Harvey Weinstein’s sexual assault convictions,³³ some New York legislators proposed that the state should adopt a version of Federal Rule 413.³⁴ The New York Legislative Assembly declined to do so.³⁵

Modern cognitive science does not support the arguments raised by the proponents of Federal Rules 413–15. There is no psychological evidence indicating that perpetrators of sex crimes are more prone to recidivism than are perpetrators of economic scams, drug crime, or violent offenses.³⁶

(West 2026); COLO. REV. STAT. ANN. § 16-10-301 (West 2026); FLA. STAT. ANN. § 90.404 (2026); GA. CODE ANN. §§ 24-4-413–414 (West 2026); 725 ILL. COMP. STAT. 5/115-7.3 (2026); KANS. STAT. ANN. § 60-455 (2026); MD. CODE CTS. & JUD. PROC. § 10-923 (West 2026) (current through the 2026 Regular Session); MICH. COMP. LAWS § 768.27b (2026); OKLA. STAT. tit. 12, §§ 2413–2414 (2007); TEX. CODE CRIM. PROC. ANN. art. 38.37 (West 2025); Utah R. Evid. 404(c); *see also* MO. CONST. art. I, § 18(c).

31. Daniel J. Capra, *The Phillip D. Reed Lecture Series: Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 FORDHAM L. REV. 1517, 1526 (2017) (indicating that at the time of this conference in October 2016, there were forty-four states that followed the Federal Rules of Evidence).

32. *See, e.g.,* State v. Perry, 842 S.E.2d 654, 661 n.4 (S.C. 2020) (explaining that “unlike other states that have adopted versions of Rules 413 and 414, we chose not to adopt these rules with our Rules of Evidence in 1995”).

33. In *People v. Weinstein*, 248 N.E.3d 691, 716 (N.Y. 2024), the New York Court of Appeals determined that the trial court should not have allowed testimony regarding uncharged alleged sexual acts because this evidence suggested an improper propensity inference.

34. *See* Julia Rock, *After Weinstein Decision, Democrats Push Sexual Assault Measure Biden and Schumer Once Fought*, N.Y. FOCUS (May 18, 2024) (on file with the *Fordham Urban Law Journal*) (noting that bill would adopt Federal Rule of Evidence 413 in New York; also reporting that South Dakota recently considered and rejected a similar bill).

35. *See* S. 9276, 2023–24 Leg., Reg. Sess. (N.Y. 2024) (indicating that the bill passed in the New York Senate but died in committee in the New York Assembly). A retrial of Weinstein resulted in his conviction even though New York had not revised its ban on propensity evidence in sex assault cases. *See* Alexa Herrera & Christina Fan, *Harvey Weinstein Facing Third Rape Trial in New York City*, CBS NEWS N.Y. (Apr. 14, 2026, at 20:59 ET), <https://www.cbsnews.com/newyork/news/harvey-weinstein-rape-trial-nyc-jury-selection/?intcid=CNM-00-10abd1h> [<https://perma.cc/3XND-L2FP>] (indicating that following appellate reversal, Weinstein was convicted on a portion of the rape counts in a 2025 retrial and is now awaiting trial on other rape counts).

36. *See* Lave & Orenstein, *supra* note 5, at 795–96 (criticizing the “bogus psychology and false empirical assertions” offered by congressional proponents of the unique evidence rules for prior sex crimes, indicating that “the psychological and criminological research on sex offenders does not support the high probative value assigned to prior bad acts in sex cases”); ROGER PRZYBYLSKI, U.S. DEP’T OF JUST. OFF. OF SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, RECIDIVISM OF ADULT SEXUAL

Moreover, even if there may be some cases in which sex offenders feel strong impulses to reoffend, there is no evidence that the recidivist tendency is universal among all sex offenders.³⁷ To put it differently, there is a scant basis in cognitive science to determine the guilt or innocence of an alleged sex offender based in part on allegations of similar acts preceding the time period covered by the present indictment, and the limited probative value of similar prior acts is evident in the exclusion of these acts from trials of murder, torture, and other serious crimes.³⁸

Evidence of prior similar acts cause great prejudice in trials of sex crimes. Research shows that a juror who learns a party has a history of committing any category of offense will be more likely to conclude that the party committed a similar offense charged in the indictment or alleged in the complaint.³⁹

The best way to deal with the misalignment of cognitive science and the rules for propensity evidence would be to eliminate Rules 413–15 altogether at both the federal and state levels. Moreover, the propensity ban in Rule 404(b) must be strengthened, so that the exceptions only apply to the extent that the opponent has opened the door by affirmatively raising issues such as motive, intent, knowledge, and mistake. Prosecutors and civil plaintiffs should be required to prove the allegations within the four corners of their indictments and complaints rather than sully defendants' characters with extrinsic evidence suggesting propensity.

OFFENDERS 4 (July 2015), <https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism> [<https://perma.cc/MS9G-YCMA>] (“Sex offenders . . . have higher rates of general recidivism than sexual recidivism.”).

37. See Gina Robertiello & Karen J. Terry, *Can We Profile Sex Offenders? A Review of Sex Offender Typologies*, 12 AGGRESSION & VIOLENT BEHAV. 508, 509 (2007) (indicating that “[S]ex offenders constitute a heterogeneous group of individuals who begin abusing for myriad reasons [T]he attitudes and beliefs that support their deviant behavior may vary.”); Mark E. Olver, *Mixed Sexual Offenders*, 4 SAGE ENCYCLOPEDIA OF CRIM. PSYCH. 905 (2019) (“Sex offenders are a diverse and heterogeneous group of offenders who differ in . . . psychological issues that contribute to the commission of a sexual offense.”).

38. See Liebman, *supra* note 5, at 756 (noting that there is no basis on which to presume that allegations of sex crimes should be subject to a different propensity rule from allegations of other crimes).

39. See Lave & Orenstein, *supra* note 5, at 803 (“Prior sex-crime evidence used to show propensity can be invasive and staggeringly prejudicial Recent psychological evidence reinforces the proposition that the accused faces insurmountable prejudice when the jury learns of his prior sex crimes.”); Liebman, *supra* note 5, at 755 (citing social science research for the proposition that “[p]ropensity evidence often is credited by jurors with having more weight than it deserves”).

B. Reforming The “Hinckley Rule” on Expert Evidence

Federal Rule of Evidence 704 allows expert testimony on the ultimate issue in a civil or criminal case.⁴⁰ Thus, experts can opine directly on issues such as damages in a civil case, the actus reus in a criminal case, or causation in either a civil or criminal case.⁴¹ The common law had previously excluded such evidence on the ground that it would usurp the function of the jury, but the boundaries for the ultimate issue were sometimes hard to discern,⁴² so Rule 704 simply allowed expert testimony on any issue as to which that testimony would be both helpful and reliable.⁴³

In 1981, John Hinckley, Jr. attempted to assassinate President Ronald Reagan.⁴⁴ The next year, the prosecution of Hinckley resulted in a verdict of not guilty by reason of insanity.⁴⁵ Expert testimony on Hinckley’s mental state played a role in the jury’s decision to acquit him.⁴⁶ Bipartisan outrage over the *Hinckley* verdict led Congress to modify Rule 704 as part of the Insanity Defense Reform Act in 1984.⁴⁷ Again acting without vetting by the Advisory Committee on Federal Rules of Evidence, Congress carved out an exception to the ultimate issue rule for expert testimony on mens rea in a criminal case.⁴⁸ The new Rule 704(b) provided as follows: “In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.”⁴⁹ After the adoption of Federal Rule 704(b), experts could only give opinions that might indirectly bear on the mental state of the accused, but experts could not opine directly on mental state in criminal cases.⁵⁰

40. Federal Rule of Evidence 704(a) provides as follows: “An opinion is not objectionable just because it embraces an ultimate issue.” FED. R. EVID. 704(a).

41. *See id.*

42. *See* FED. R. EVID. 704 advisory committee’s notes (explaining that common law rule excluding opinions on ultimate issues was “unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information”).

43. *See* FED. R. EVID. 704(a).

44. *See* Sean P. Reilly, Note, *Federal Rule of Evidence 704(b): A Remedy in Need of a Cure*, 28 REGENT U. L. REV. 111, 115–16 (2016) (summarizing history of Hinckley’s assassination attempt, his trial, and congressional reaction to the jury’s verdict).

45. *See id.* For rulings on various motions, including motions related to the insanity defense, see generally *United States v. Hinckley*, 529 F. Supp. 520 (D.D.C. 1982).

46. *See Hinckley*, 529 F. Supp. at 115–16.

47. *See id.*

48. *See* David Cohen, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 545–47 (1988) (recounting the legislative history of Fed. R. Evid. 704(b)).

49. FED. R. EVID. 704(b).

50. *See id.*

The rationale behind the new Federal Rule 704(b) was not entirely clear. The most important consideration seemed to be addressing the public outrage over the use of the insanity defense in the *Hinckley* case,⁵¹ not creating a coherent and internally consistent set of rules for the admission of expert evidence in criminal cases. Proponents of the revised Rule 704(b) suggested that expert testimony on mens rea was dangerous because it would confuse juries and invade their province on the factual issues that they alone should decide.⁵² Yet these proponents offered no evidence that these concerns should arise uniquely in the context of evidence on mens rea. Moreover, the difficulty juries experience in attempting to discern mens rea⁵³ might make evidence on this ultimate issue particularly valuable, not confusing. The risk of confusion might be greater with oblique expert testimony that tangentially addresses mens rea than with on-point expert testimony about the mental state that is an element of the offense.

A small minority of the states adopted versions of Federal Rule 704(b).⁵⁴ One reason for the limited adoption was that most states did not automatically copy amendments to the Federal Rules of Evidence after adopting the initial template in the 1970s.⁵⁵ In addition, the new rule seemed oddly incongruous with the rest of the expert rules. Many states chose to address the widespread dissatisfaction with the insanity defense by amending

51. *See id.*; Reilly, *supra* note 44, at 115–16.

52. *See* Cohen, *supra* note 48, at 545–47.

53. As a general matter, juries face significant challenges in assessing mens rea, and the assessment of mens rea varies considerably. *See, e.g.*, Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1334 (2014) (“Summarizing these empirical studies as a whole, it is apparent that there is much variation in jurors’ abilities to accurately assess defendants’ mental states.”).

54. It appears that only five states have adopted Federal Rule of Evidence 704(b) in those states’ evidence codes or other statutes. *See* Ariz. R. Evid. 704(b) (adopting federal version verbatim); Utah R. Evid. 704(b) (same); Wyo. R. Evid. 704(b) (adopting a slightly modified version of federal rule); Md. R. 5-704 (adopting all of federal rule and adding another sentencing at the end: “This exception does not apply to an ultimate issue of criminal responsibility.”); *see also* CAL. PENAL CODE § 29 (West 2026) (“In the guilt phase of a criminal action, any expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.”).

55. *See Rules: Federal Rules of Evidence*, FED. JUD. CTR., <https://www.fjc.gov/history/work-courts/rules-federal-rules-evidence> [<https://perma.cc/Z3ZM-UTPH>] (last visited on August 27, 2026) (noting that some states “did not always track” revisions to the Federal Rules of Evidence; accordingly, “even in some jurisdictions that adopted the original federal rules, there remains a lack of total uniformity”).

the defense itself, or the procedures for raising it, rather than adopting versions of Federal Rule 704(b) in their evidence codes.⁵⁶

In 2024, the U.S. Supreme Court issued a decision in *Diaz v. United States* that drew significant attention to Federal Rule 704(b).⁵⁷ In a criminal prosecution for drug trafficking, the Court considered whether an expert's opinion on the mental states of traffickers *in general* would violate Rule 704(b)'s prohibition on expert testimony concerning a particular defendant's mens rea.⁵⁸ The *Diaz* majority held that so long as the expert did not opine about *all* drug traffickers (a group that would necessarily include the accused), and opined instead about *most* traffickers, the opinion would comply with Rule 704(b).⁵⁹ Dissenters in *Diaz*, including both Republican and Democratic appointees to the Supreme Court, complained that the majority's ruling allowed experts for the prosecution to make highly prejudicial generalizations about mental state that a jury would likely impute to the accused, even if the prosecution used the qualifying language that the Court required.⁶⁰

The expert's proper role in criminal prosecutions requires redefinition because of Rule 704(b) and its interpretation in *Diaz*. DNA evidence has made proof of the actus reus fairly straightforward in many such cases, so mens rea is often the dispositive issue.⁶¹ A defendant may claim unawareness that the accuser withheld consent, and the defendant may need

56. Virtually all the states that adopted the Federal Rules of Evidence continue to use the original version of Rule 704 without the "Hinckley Rule." See *supra* note 54 and accompanying text. Some of these states have expressly rejected the federal approach. See e.g., *Pundyk v. State*, 467 P.3d 605, 608–09 (Nev. 2020) (reversing conviction due to trial court's exclusion of expert testimony on mens rea of accused); Pa. R. Evid. 704 comment ("F.R.E. 704(b) is not adopted. The Federal Rule prohibits an expert witness in a criminal case from stating an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or a defense. This is inconsistent with Pennsylvania law.").

57. 602 U.S. 526 (2024).

58. See *id.* at 532–36.

59. See *id.* (holding that because the expert, a law enforcement officer, offered an opinion about most drug traffickers, but not about the defendant in particular, the expert's opinion did not violate the prohibition in Rule 704(b)).

60. Justices Kagan and Sotomayor joined in a dissenting opinion written by Justice Gorsuch. See *id.* at 543 (Gorsuch, J., dissenting) ("Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what 'most' people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like 'most' people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess . . .").

61. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235 (2015) (stating that DNA evidence makes actus reus "easy to prove" in a rape prosecution); Kari Hong, *Rape by Malice*, 78 MONT. L. REV. 187, 190 (2017) (indicating that proving the defendant's mental state "is often the hardest part of criminal prosecution").

to offer expert testimony to explain his unique cognitive or emotional state that was relevant to whether he believed in good faith that he had consent. Cognitive science has shown that some people have impairments affecting their ability to sense consent.⁶² Expert testimony could be very valuable on this issue.⁶³ Expert testimony would not simply be a get-out-of-jail card for the rich; the government would have its own expert, and indigent defendants could also afford to hire experts with help from the trial court pursuant to Federal Rule 706.⁶⁴

The *Diaz* ruling portends ominously for prosecutions of rape and sexual assault. There is a significant risk that the government could offer expert testimony about the general tendency of people in certain categories to force themselves sexually on victims. For example, a government expert might opine that gang members who engage in sex acts in the presence of fellow gang members are usually less concerned about consent because rape is an initiation ritual for new recruits.⁶⁵ A government expert might opine that prisoners generally have the mindset that consent is unnecessary for sex with a cellmate.⁶⁶ It is possible that a law enforcement official might offer a

62. See Reinhard Eher, Martin Rettenberger & Daniel Turner, *The Prevalence of Mental Disorders Among Incarcerated Contact Sexual Offenders*, 139 ACTA PSYCHIATRICA SCANDINAVICA 572, 575–78 (2019) (listing examples of mental disorders among study group of over 1500 subjects, including paraphilic and personality disorders; reporting that “[92.9%] of sexual offenders were diagnosed with a mental disorder,” and “the great majority received multiple diagnoses”); Allison Sigler, *Risk and Prevalence of Personality Disorders in Sexual Offenders* (2017) (M.A. thesis, John Jay College of Criminal Justice) (on file with the *Fordham Urban Law Journal*) (“Studies suggest that about seventy percent of incarcerated sexual offenders have been diagnosed with a mental disorder, with about fifty percent meeting diagnostic criteria for a personality disorder.”); Susan McElroy et al., *Psychiatric Features of 36 Men Convicted of Sexual Offenses*, 60 J. CLINICAL PSYCHIATRY 414, 414–20 (1999) (reporting high rate of various disorders among subjects in study).

63. See *Diaz*, 602 U.S. at 540 (Jackson, J., concurring) (opining that “given the biases, stereotypes, and uneven knowledge that many people have about mental health conditions, [defense] expert evidence could help jurors better understand a defendant’s condition and thereby call into question a *mens rea* that might otherwise be too easily assumed.”). Justice Jackson stated that the present version of Rule 704(b) could possibly allow for limited expert testimony “contextualizing” the defendant’s case. *Id.* The problem with the current regime, however, is that the expert must proceed gingerly in testifying about any matter adjacent to the ultimate issue of *mens rea*, leaving the lay jury to draw its own inferences about whether the defendant’s mental health condition negated *mens rea*.

64. Federal Rule of Evidence 706 and its state counterparts authorize a court to appoint an expert witness on “a party’s motion or on its own,” and the court can use public funds to pay for an expert assisting an indigent party. FED. R. EVID. 706.

65. Such testimony would likely come from a law enforcement officer—as was the case in *Diaz*—which raises a greater risk of prejudice. See *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988) (“When the expert is a government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert’s testimony is greatly increased.”).

66. Again, such testimony would likely come from a law enforcement officer. See *id.*

dangerous and prejudiced opinion that men of a certain race or ethnic background generally coerce women and girls into sex.⁶⁷ Cognitive science does not support generalizations about a common mental state among rapists or sexual assailants. To the contrary, experts agree that the population of sex offenders is heterogeneous.⁶⁸ Universal profiling of sex offenders is likely to be less reliable than profiling of drug smugglers on the U.S.–Mexico border.⁶⁹ Not only does broad-based expert opinion about sex offenders lack probative value, but it also could have a prejudicial impact on juries, leading jurors to rely on facile extrapolations rather than carefully scrutinizing the evidence concerning the specific incident at hand.⁷⁰ The irony is that generalized expert evidence on mens rea in sex-related prosecutions—even

67. The Supreme Court should have been aware of this risk when it issued the *Diaz* opinion, because only a few years earlier, the Court considered a case in which a law enforcement officer sitting on a jury shared wild opinions about what he considered to be the sexually predatory habits of Hispanic men. *See generally* Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017). In a prosecution for alleged sexual abuse of minor girls, this juror told the other jurors that he “believed the defendant was guilty because, in [the juror’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” *Id.* at 212–13 (citation omitted). The juror stated his belief that Mexican men are physically controlling of women because of their sense of entitlement. *See id.* He further stated, “I think he did it because he’s Mexican and Mexican men take whatever they want.” *Id.* at 213 (citation omitted). He said that in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” *Id.* (citation omitted). The former law enforcement officer shared these opinions during jury deliberations, not in open court, but the effect was so devastating that the Court ordered a new trial, and created a new exception to the rule against disclosing jury deliberations. *See id.* at 225–26, 229. *See generally* Gemini Alexis Creason-Parker, *The Police, Rape Myths, and Fictional Media: How Law & Order (SVU) Depicts Police-Based Rape Myths on Screen*, 26 J. CRIM. JUST. & POPULAR CULTURE 21 (2026) (explaining that law enforcement officials are prone to accepting rape myths).

68. *See* Robertiello & Terry, *supra* note 37, at 509 (“Unfortunately, sex offenders constitute a heterogeneous group of individuals who begin abusing for myriad reasons. Many offenders do not fit into discreet [sic] categories. Sex offenders have unique personal and criminal histories, and the attitudes and beliefs that support their deviant behavior may vary.”); Olver, *supra* note 37, at 905 (“Sex offenders are a diverse and heterogeneous group of offenders who differ in age, victim preferences, motivation, degree of planning, type of contact with the victim, and psychological issues that contribute to the commission of a sexual offense.”). It is possible that a defense expert could present evidence of heterogeneity among sex offenders, and this evidence could rebut the generalizations offered by the prosecution’s expert, but a more efficient approach would be to prohibit these generalizations categorically.

69. Indeed, generalizations by experts may be more plausible in the context of drug smuggling on the U.S.–Mexico border than in the context of sex crimes. There are only a finite number of ways to smuggle contraband across the border, but there are a much wider range of ways to commit rape or sexual assault.

70. *See* *Diaz v. United States*, 602 U.S. 526, 549–53 (2024) (Gorsuch, J., dissenting) (explaining the prejudicial effect of generalized expert testimony concerning the mens rea of a broad class of offenders, especially when an expert can, with the judge’s imprimatur of approval under Rule 702, offer a probabilistic opinion about the mental state of a group that includes the defendant).

though permissible under the Supreme Court's holding in *Diaz*—is far more dangerous than the particularized expert opinions Congress sought to exclude when passing Rule 704(b).⁷¹

The time has come to amend Rule 704(b) so that it better regulates the admissibility of expert evidence on mens rea. The following language would be preferable: “In a criminal case, an expert witness may state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense, but an expert may not state an opinion about whether a broad group has a particular mens rea.” Rule 704(b) should also include a stricter balancing test, such as the test that appears in Rule 703.⁷² The revised version of Rule 704(b) should include this sentence: “Expert testimony on mens rea is only admissible if the probative value significantly outweighs the prejudicial effect.”⁷³

C. Creating a Statutory Right of Confrontation

The right to confront accusers arises under the Sixth Amendment of the U.S. Constitution.⁷⁴ When applicable, the Confrontation Clause gives the accused the right to cross-examine the accuser.⁷⁵ A witness subject to the Confrontation Clause must take the oath and submit to jury observation of demeanor.⁷⁶ According to the legendary evidence scholar John Henry

71. See Reilly, *supra* note 44, at 115–16.

72. Federal Rule of Evidence 703 provides, in part, as follows: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. . . . [I]f the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”

73. This is a strict test that places a higher burden on the proponent than does the typical balancing test under Rule 403. See FED. R. EVID. 403 (providing that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”). Under Rule 403, the proponent would prevail if probative value and prejudice were in equipoise. Under the proposed amendment to Rule 704(b), the proponent would lose if probative value and prejudice were in equipoise.

74. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” (emphasis added)).

75. See *California v. Green*, 399 U.S. 149, 158–62 (1970) (mentioning that constitutional right of confrontation requires cross-examination).

76. See *id.* (stating that oath and jury observation of demeanor are additional safeguards that are part of constitutional confrontation right).

Wigmore, these safeguards are “the greatest legal engine ever invented for the discovery of truth.”⁷⁷

The need to confront accusers is especially great in prosecutions for rape and sexual assault. These prosecutions usually turn on the credibility of the accuser.⁷⁸ Due to the advent of modern rape kits and the reliability of DNA analysis, the physical act at issue in a rape prosecution is often not in doubt.⁷⁹ The key question is often whether the accuser gave consent for the sexual encounter.⁸⁰ Unconfronted hearsay statements by the accuser regarding the alleged crime could be devastating.⁸¹ If the statements evade cross-examination, they might not be tested, and the jury might ascribe credibility under circumstances that deserve suspicion. However, if the accuser is subject to cross-examination on the statements, the jury will have an opportunity to evaluate the accuser’s credibility. A hearsay statement alleging rape might persuade the jury to convict, even if live testimony by the same accuser would have drawn skepticism due to cross-examination, the witness’s oath, and jury observation of demeanor.

Unfortunately, the Supreme Court’s current jurisprudence under the Sixth Amendment limits the confrontation right based on faulty assumptions about human psychology. In *Crawford v. Washington*, the Court held that the Confrontation Clause only applies when the facts show that the declarant intended to give a “testimonial” statement—a statement that the declarant intended to be accusatorial.⁸² A follow-up decision in *Davis v. Washington* indicated that when the declarant gave a statement during an “ongoing emergency”—such as when police have not yet secured the scene of an alleged crime—the statement is presumably nontestimonial because the declarant’s goal of securing help from the police must have been the

77. See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn ed., 4th rev. ed. 1974).

78. See John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 IND. L. REV. 613, 630 (2018) (indicating that “credibility disputes are especially important” in rape cases).

79. See Baker, *supra* note 61, at 235 (indicating that DNA evidence makes actus reus “easy to prove” in a rape prosecution).

80. See Ben A. McJunkin, *Rape as Indignity*, 109 CORNELL L. REV. 385, 385 (2024) (“The topic of sexual consent predominates any discussion of rape law. . .”).

81. In this context, the term “unconfronted” means statements as to which the defendant is unable to exercise his right of confrontation.

82. 541 U.S. 36, 50–54 (2004) (articulating test for discerning whether a hearsay statement qualifies as “testimonial” and is therefore subject to the Sixth Amendment’s Confrontation Clause). While the Court did not define the term “testimonial” precisely, the Court listed settings in which a statement is likely to be testimonial, and also stressed the importance of circumstances in which a reasonable declarant would foresee later prosecutorial use of the statement.

controlling impulse.⁸³ The temporal boundary of an ongoing emergency is easy to discern, and lifts a statement from the ambit of the Confrontation Clause, even if the circumstances indicate that the declarant could plainly foresee later prosecutorial use of the statement. In effect, the Supreme Court ruled out the possibility of multiple competing motivations: an intent to summon help during an ongoing emergency must be mutually exclusive with an intent to lay the groundwork for a criminal prosecution.⁸⁴

So too does the Supreme Court's modern confrontation jurisprudence exempt certain statements made to audiences other than the government. A rape survivor's statement to a doctor might be for the purpose of obtaining medical care,⁸⁵ but the declarant might also foresee that the doctor will relay the statement to law enforcement, especially when the doctor is obligated to do so under mandatory reporting statutes.⁸⁶ Similarly, a statement to a friend about a regrettable sexual encounter might foreseeably end up in a police report, but the immediate goal of social interaction is presumed to obscure any expectation of prosecutorial use.⁸⁷ Once again, the Supreme Court's rigid definition of testimonial hearsay does not consider any possibility that a person could have two competing motivations, one of which is accusatorial. The Supreme Court presumes that the alternate motivation

83. 547 U.S. 813, 824 (2006) (exempting from definition of "testimonial" a statement made during an ongoing emergency). Justice Scalia, the author of the majority opinions in both *Crawford* and *Davis*, took the position that the declarant's perspective, rather than the perspective of law enforcement officers, is the key consideration in evaluating whether an ongoing emergency exists. Transcript of Oral Argument at 6, *Michigan v. Bryant*, 562 U.S. 344 (2011) (No. 09-150) (stating the dispositive issue is "the purpose of the declarant, not of the questioner").

84. See *Davis*, 547 U.S. at 827–28 (determining that hearsay declarant's 911 call about domestic violence was "plainly a call for help" rather than a report to facilitate prosecution of a past crime, and was therefore nontestimonial and beyond the scope of the Confrontation Clause).

85. See, e.g., *State v. Muttart*, 875 N.E.2d 944, 957 (Ohio 2007) ("Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid.").

86. For a fifty-state survey of mandatory reporting statutes relating to child abuse, see THOMSON REUTERS, *50 State Statutory Surveys: Criminal Law, Mandatory Child Abuse Reporting*, 30 SURVEYS (West, Oct. 2025).

87. See, e.g., *Gray v. Haws*, No. 2: 07-cv-1545, 2010 WL 3210861, at *9 (E.D. Cal. Aug. 10, 2010) (holding that when a survivor of intimate partner violence made statements to her friends, those statements were not testimonial for purposes of *Crawford*; "the circumstances under which the victim made these statements to her friends does not intrude upon the core concern of the right to confrontation, and thus are not testimonial"). A statement to a friend would not qualify as testimonial under the formality test advocated by Justice Thomas in *Davis*. He insisted upon "some degree of solemnity before a statement can be deemed 'testimonial.'" 547 U.S. at 836 (Thomas, J., concurring in part and dissenting in part).

must completely overshadow any cognizance that the declarant is making a statement police and prosecutors will later use as evidence.

Justice Scalia believed that originalist jurisprudence necessitated the restriction of confrontation rights to statements that were “testimonial” in nature.⁸⁸ But his taxonomy of testimonial and nontestimonial statements is not good policy.⁸⁹ Scalia’s framework has proven so unworkable that Republican appointees on the Supreme Court now openly discuss the need to revise it.⁹⁰ The most fundamental problem with Scalia’s framework is the naïve assumption that humans always have a unitary motivation, and that whenever one’s motivation includes an intention that is distinct from accusing, a court should conclude that the overriding motivation is non-accusatorial.⁹¹ Interestingly, Scalia himself eschewed such an all-or-nothing approach to discerning motivation when he wrote the majority opinion in *Whren v. United States*,⁹² which acknowledged dual motivations by police officers who pulled over a defendant for a traffic violation when the real intent was to search the defendant’s vehicle.

Modern cognitive science cannot abide by the assumption that a human being always has a unitary motivation.⁹³ Studies have repeatedly shown that a single person can simultaneously hold two motivations for undertaking a

88. See *Crawford v. Washington*, 541 U.S. 36, 50–54 (2004) (defining the term “testimonial” and declaring that the Confrontation Clause only applies to hearsay statements meeting this definition).

89. See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 288–91 (2006) (arguing that, as a policy matter, the “testimonial” standard in *Crawford* and its progeny does not extend confrontation rights widely enough, so statutes should extend these rights further).

90. See *Franklin v. New York*, 145 S.Ct. 831, 831 (mem.) (2025) (Alito, J., respecting denial of certiorari) (discussing need to revisit *Crawford* because conditioning confrontation rights on definition of “testimonial” is proving unworkable); *id.* at 834–37 (Gorsuch, J., respecting denial of certiorari) (criticizing *Crawford* and *Davis* because ability of accused to confront accuser should not depend on discerning precise purpose of hearsay statement).

91. In one case interpreting the application of the Confrontation Clause to hearsay offered against the accused, Justice Ginsburg commented during oral argument that a victim of a violent crime providing information to law enforcement could have two simultaneous motives: addressing the present emergency and facilitating a later prosecution of the accused. See Transcript of Oral Argument, *supra* note 83, at 5.

92. 517 U.S. 806, 812–13 (1996) (determining that vehicle stop complied with Fourth Amendment’s requirement of reasonableness when officer had dual motives including an intent to enforce traffic law and an intent to investigate that vehicle’s possible involvement in drug crime).

93. See Iskra Fileva, *Ulterior Motives*, PSYCH. TODAY (May 11, 2020), <https://www.psychologytoday.com/us/blog/the-philosophers-diaries/202005/ulterior-motives> (on file with the *Fordham Urban Law Journal*) (“[M]ost people are complex We often have more than one reason for action.”); accord Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1108 (2018) (“[H]uman beings are complex, and our motivations are often mixed.”).

particular action.⁹⁴ Sometimes different parts of the brain are the source of different concurrent motivations.⁹⁵ One motivation does not rule out an alternate motivation. The two can co-exist.

Application of these psychological insights would call for extension of confrontation rights to all circumstances when later prosecutorial use of a statement is foreseeable. If the Supreme Court remains reluctant to expand confrontation rights,⁹⁶ amendments to evidentiary rules could do so.⁹⁷ For example, a state legislature could amend that state's version of Rule 611 to provide that whenever a hearsay declarant in a criminal case has made a statement under circumstances indicating that later prosecutorial use of the statement would be likely, that statement is not admissible unless the

94. See, e.g., Amy Wrzesniewski et al., *Multiple Types of Motives Don't Multiply the Motivation of West Point Cadets*, 111 PNAS 10990, 10991–92 (2014) (finding in a large-scale study that West Point cadets simultaneously held multiple motivations for their conduct); Marc T. Kiviniemi, Mark Snyder & Allen M. Omoto, *Too Many of a Good Thing? The Effects of Multiple Motivations on Stress, Cost, Fulfillment, and Satisfaction*, 28 PERSONALITY & SOC. PSYCH. BULL. 732, 741–42 (2002) (demonstrating that volunteers engaged in community service had multiple motivations for this work).

95. See Katherine Harmon, *Motivated Multitasking: How the Brain Keeps Tabs on Two Tasks at Once*, SCI. AM. (Apr. 15, 2010), <https://www.scientificamerican.com/article/multitasking-two-tasks/> [<https://perma.cc/BKC7-HTY9>] (“New research shows that rather than being totally devoted to one goal at a time, the human brain can distribute two goals to different hemispheres to keep them both in mind . . .”).

96. Some authors have argued that the judiciary has failed to innovate practical tests for untangling mixed motives. See, e.g., Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 728 (2019) (specifically criticizing the widespread reliance on the but-for standard to address mixed-motive cases).

97. So far seven states have codified confrontation rights in their evidence codes or criminal procedure statutes. These states are California, Massachusetts, Michigan, North Dakota, South Carolina, Texas, and Washington. Significantly, none of these states' confrontation statutes has conditioned the right on a definition of “testimonial” hearsay. CAL. EVID. CODE § 711 (West 2026) (“a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine”); MASS. GEN. LAWS ch. 263, § 5 (2026) (“A person accused of crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.”); MICH. COMP. LAWS § 763.1 (2026) (“On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.”); N.D. CENT. CODE § 29-01-06(3) (2026) (“In all criminal prosecutions the party accused has the right . . . [t]o meet the witnesses against the party face to face . . .”); S.C. CODE ANN § 17-23-60 (2026) (“Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.”); TEX. CODE CRIM. PROC. ANN. art. 1.25 (West 2026) (“The defendant, upon a trial, shall be confronted with the witnesses, except in certain cases provided for in this Code where depositions have been taken.”); WASH. REV. CODE § 10.52.060 (2026) (“Every person accused of crime shall have the right to meet the witnesses produced against him or her face to face.”).

declarant testifies in person and submits to cross-examination.⁹⁸ The fact of an ongoing emergency would not be dispositive. A 911 call is a call for help, but it is also “dial-in testimony” that requires confrontation.⁹⁹

D. Adopting Safeguards for Prior Statements of Identification

Federal Rule of Evidence 801(d)(1)(C) and its state analogs treat prior statements of identification as non-hearsay even when offered for the truth of the matter asserted. This rule exempts from the hearsay definition any statement that “identifies a person as someone the declarant perceived earlier,” so long as the declarant is presently testifying and available for cross-examination.¹⁰⁰

The broad sweep of Rule 801(d)(1)(C) contrasts with the narrower scope of other subpoints under Rule 801(d)(1). For example, Rule 801(d)(1)(A) classifies as non-hearsay a prior inconsistent statement by a presently available declarant who made this statement in a trustworthy setting, such as a prior trial, hearing, grand jury proceeding, or deposition.¹⁰¹ Rule 801(d)(1)(B) designates a prior consistent statement as non-hearsay if the declarant made this statement before the inception of an alleged motive to fabricate referred to by a cross-examining attorney.¹⁰² Rule 801(d)(1)(C) is remarkable because it does not include any unique reliability guarantees: it simply requires that the prior statement be one of identification, but there is no further requirement about the setting for the prior statement, the timing of the prior statement, or the use of procedural safeguards.¹⁰³

Prior statements of identification could conceivably be significant in a prosecution or civil suit alleging rape or sexual assault. To be sure, the

98. This would be an objective test based on how a reasonable person would perceive the circumstances. Alternatively, if the declarant subjectively intended to provide information for use in a later prosecution, that fact would be independently sufficient to necessitate cross-examination.

99. See Richard D. Friedman & Bridget Mary McCormack, *Dial-in Testimony*, 150 U. PENN. L. REV. 1171, 1239–44 (2002) (arguing that a caller to 911 foresees later prosecutorial use of the recorded statement, so the caller should be subject to confrontation if the prosecution uses this 911 call at trial).

100. FED. R. EVID. 801(d)(1)(C).

101. *But see* COMM. ON RULES OF PRAC. AND PROC., JUD. CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 16 (Sep. 2024) (indicating that an amendment to Federal Rule of Evidence 801(d)(1)(A) is under consideration that would delete language in the rule limiting application to statements made in certain formal settings).

102. See *Tome v. United States*, 513 U.S. 150, 167 (1995) (imposing rigid temporal sequence requirement for a prior consistent statement offered under Federal Rule of Evidence 801(d)(1)(B) to rehabilitate a witness after impeachment has explicitly or implicitly alleged a motive to lie arose on a particular date: such a statement is only admissible if it preceded the inception of alleged motive to fabricate testimony).

103. See FED. R. EVID. 801(d).

majority of sex crimes are committed against acquaintances,¹⁰⁴ and identification is rarely a challenging issue in those cases.¹⁰⁵ There are a few contexts, however, in which identification evidence could be very important in a case involving alleged rape or sexual assault. One example would be if the survivor experiences incapacitation (e.g., due to a drug ingested involuntarily) at the time of the unwelcome sexual contact, and identification must depend on the survivor's interaction with the alleged assailant before incapacitation. Sometimes the biological evidence cannot establish identity, perhaps because the responding officers or medical personnel did not use a rape kit, or because too much time passed between the incident and the use of the rape kit.¹⁰⁶ Sometimes a sexual assault does not leave behind biological material.¹⁰⁷ Sometimes the victim is alert through a sexual assault but glimpses the assailant only briefly.¹⁰⁸ In such cases, prior statements of identification can be an important part of the proof offered at trial, especially when the in-court identification is tentative.

104. See *Statistics: Perpetrators of Sexual Violence*, RAPE, ABUSE, AND INCEST NAT'L NETWORK (RAINN), <https://rainn.org/facts-statistics-the-scope-of-the-problem/statistics-perpetrators-of-sexual-violence/> (on file with the *Fordham Urban Law Journal*) (citing data from most recent National Crime Victimization Survey, indicating that thirty-one percent of rapes are committed by strangers).

105. By definition, acquaintance rape involves a perpetrator with whom the victim is already acquainted, so identification does not pose the same challenge in such cases as it does in cases of rape perpetrated by a stranger.

106. See Jessica Guarino & Anne Teigen, *States Make Gains in Battle Against Rape Kit Backlog*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 10, 2025), <https://www.ncsl.org/state-legislatures-news/details/states-make-gains-in-battle-against-rape-kit-backlog#:~:text=Many%20states%20struggle%20with%20backlogs,work%20toward%20eliminating%20their%20backlogs.> [<https://perma.cc/Z94F-P7EG>] (indicating that some law enforcement agencies do not prioritize investigations of alleged sexual assault, and there are long backlogs in submission of sexual assault kits to labs); *Some Sexual Assault Kits Aren't Sent for Testing: Why Not?*, GOV'T ACCOUNTABILITY OFF., WATCHBLOG: FOLLOWING THE FED. DOLLAR (Apr. 17, 2019), <https://www.gao.gov/blog/2019/04/17/some-sexual-assault-kits-arent-sent-to-crime-labs-why-not#:~:text=Image,-Why%20sexual%20assault&text=There%20are%20several%20reasons%20investigators,a%20kit%20to%20a%20lab> [<https://perma.cc/3V22-PR7X>] (listing, among other explanations, the fact that "[i]nvestigators may question the circumstances of the case or the victim's credibility and therefore choose not to submit a kit to a lab").

107. See Kimberly A. Lonsway et al., *Role of DNA Evidence in Sexual Assault Investigations, Part 1: The ABC's of DNA Evidence*, END VIOLENCE AGAINST WOMEN INT'L 7 (2016) ("[I]t is crucial to note that the absence of biological evidence does not necessarily mean that a particular sexual act did not occur. There are many reasons why biological evidence may not be available in a sexual assault case, including the fact that no medical forensic examination was conducted, too much time elapsed between the assault and the medical forensic examination, or the suspect wore a condom.").

108. A related problem is that, according to one analysis of cases involving allegations of rapes by strangers, seven percent of assailants wore masks. See Julien Chopin, Sarah Pacquette & Eric Beauregard, *Is There an "Expert" Stranger Rapist?*, 34 SEX ABUSE 78, 90 (2021).

Cognitive science casts doubt on the accuracy of pretrial statements purporting to identify an assailant. One recurring issue is the suggestibility of police procedures.¹⁰⁹ Cross-racial identifications pose special problems, because the declarant may be too willing to give an affirmative identification of virtually anyone presented by police if that suspect is of the same race as the defendant.¹¹⁰ Reactivation of trauma during the identification could distort identification as well.¹¹¹ For all these reasons, researchers have repeatedly warned about the potential unreliability of statements purporting to identify an alleged sexual assailant.¹¹²

In-court cross-examination during trial is not always a sufficient safeguard to ensure the reliability of a prior statement identifying the defendant in the current trial. Cross-examination can probe biases or defects in memory, if the witness will make concessions on these matters. But cross-examination at the time of trial is of little avail in exposing defects at the time

109. See *United States v. Wade*, 388 U.S. 218, 228–29 (1967) (discussing the “obvious” risk of suggestibility “inhering” in pretrial lineups or “showup[s]” conducted by police).

110. See Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCH., PUB. POL’Y & L. 230, 231 (2001) (reporting that “a Black innocent suspect has a fifty-six percent greater chance of being misidentified by a White eyewitness than by a Black eyewitness”); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCH., PUB. POL’Y & L. 3, 5–13 (2001) (summarizing relevant studies and concluding that probability of a mistaken identification is 1.56 times greater in the cross-race context than the same-race context); Heather M. Kleider & Stephen D. Goldinger, *Stereotyping Ricochet: Complex Effects of Racial Distinctiveness on Identification Accuracy*, 25 L. & HUM. BEHAV. 605, 605 (2001) (stating that cross-racial identifications are usually less accurate than same-race identifications); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 79 (2008) (“Social science studies have long shown that cross-racial identifications are particularly error prone.”); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938–40 (1984) (discussing several studies finding that White individuals are more accurate in identifying White faces than Black faces); Frederic Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 982 (1977) (“[C]onsiderable evidence indicates that people are poorer at identifying members of another race than of their own.”).

111. See Deryn Strange & Melanie Takarangi, *Memory Distortion for Traumatic Events: The Role of Mental Imagery*, 6 FRONTIERS PSYCH. 27, 27 (2015) (discussing “re-experiencing” symptoms associated with post-traumatic stress disorder” and the possibility that these symptoms could distort memory).

112. See Marina Sarochinski, Matthew Barry Johnson & Rossol Gharib, *The Weakest Link? Investigative Issues in Serial Sexual Assault That Lead to Wrongful Conviction*, 75 INT’L J. L., CRIME & JUST. 1, 2–3 (2023), <https://www.sciencedirect.com/science/article/pii/S1756061623000587> (on file with the *Fordham Urban Law Journal*) (citing various studies indicating that false identification of the assailant by the alleged victim can be a significant problem in prosecutions for rape or sexual assault, particularly if the identification is cross-racial).

of the initial perception or at the time of the later identification.¹¹³ In a high percentage of cases, a tentative pretrial identification may “harden” into a more confident identification at the time of trial.¹¹⁴

The best way to deal with these challenges is to limit the breadth of Rule 801(d)(1)(C). Rather than admit all prior statements of identification so long as the trial judge deems them relevant, the rule should only admit prior statements resulting from reliable procedures. One possibility would be to limit the scope of this rule to prior post-arrest identifications in the police station if the defendant had counsel present.¹¹⁵ Furthermore, the police would need to video record the entire identification procedure so that defense counsel could use it in suppression hearings or perhaps even present the recording as evidence at trial. This approach would increase the accountability of police and would increase the reliability of identifying statements. The bottom line is that hearsay is dangerous, and classifying some statements of identification as non-hearsay is only reasonable if there are circumstantial guarantees of trustworthiness. That principle pervades the hearsay rules, and the odd lack of safeguards in Rule 801(d)(1)(C) calls out for the need for reform.

E. Admitting Retrospective Statements Regarding State of Mind

Federal Rule of Evidence 803(3) and its state counterparts allow the admission of a hearsay statement in which the declarant discusses their then-

113. See, e.g., Taylor C. Lebensfeld & Laura Smalarz, *Cross-Examination Fails to Safeguard Against Feedback Effects on Eyewitness Testimony*, 3 WRONGFUL CONVICTION L. REV. 240, 241–48 (2022) (noting various “contaminants” including non-blind lineup administration, rehearsal, repeated questioning, and confirming post-identification feedback, indicating that cross-examination of identifying witness at trial is not necessarily effective in exposing these contaminants).

114. See *United States v. Wade*, 388 U.S. 218, 229 (1967) (stating that “[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial”) (alteration in original) (internal quotation omitted). The *Wade* majority expressed the concern that the crystallization of the witness identification by the time of trial might render the pretrial identification the actual determinant of guilt or innocence: “The trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching.” *Id.* at 235.

115. In *Wade*, the Supreme Court held that the Sixth Amendment requires the presence of defense counsel at certain pretrial identification procedures following indictment. *Id.* at 224–39. The Court did not extend the same protection to preindictment identification procedures, which are more common. This limitation of the constitutional protection—due to the fact that the Sixth Amendment sets forth trial rights—could be overcome by statutory extension of the right to counsel to all pretrial identification procedures. If a new version of Rule 801(d)(1)(C) only applied to pretrial identification procedures involving defense counsel, that amendment would create a strong incentive for police to avoid uncounseled lineups and “showups.”

existing state of mind or bodily condition.¹¹⁶ This hearsay exception usually does not extend to backward-looking statements.¹¹⁷ In other words, Rule 803(3) generally does not admit a statement in which the declarant discusses their state of mind on a prior day.¹¹⁸ The rationale for this rigid temporal boundary seems to be that statements regarding contemporaneous state of mind or bodily condition are highly reliable, and are probably better than any alternative evidence on such matters.¹¹⁹ By contrast, the declarant presumably does not have the same certainty when the declarant discusses a state of mind that existed a few days ago.¹²⁰

When one scrutinizes the policy reasons behind Rule 803(3), the key question is whether backward-looking statements regarding state of mind or bodily condition could possibly be reliable enough to merit admission, even though these statements are clearly less reliable than are statements about then-existing state of mind or bodily condition. Other provisions in the Federal Rules of Evidence seem to belie the assertion that backward-looking statements are always too unreliable. Indeed, the very next rule, 803(4), allows a backward-looking hearsay statement regarding state of mind or bodily condition if made to a medical audience for the purpose of obtaining medical treatment.¹²¹ Rule 803(3) itself allows a unique type of backward-looking statement: one that relates to the validity and terms of the declarant's

116. Federal Rule of Evidence 803(3) admits a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." FED. R. EVID. 803(3).

117. See, e.g., *State v. Tieman*, 207 A.3d 618, 623 (Me. 2019) ("Pursuant to Rule 803(3), statements of a declarant's then-existing state of mind or emotion are admissible as an exception to the rule against hearsay, whereas statements of memory—pointing backwards to the past—are not admissible under that Rule."); *United States v. Harwood*, 998 F.2d 91, 98 (2d Cir.1993) (observing that backward-facing statements are generally inadmissible under Federal Rule of Evidence 803(3)).

118. See Eleanor Swift, *The Problem of "Trustworthiness" in the Admission of State of Mind Hearsay Under California and Federal Evidence Law*, 36 SW. U. L. REV. 619, 642 (2007) (explaining "[c]ontemporaneity between mental state and making the statement has always been an element" of Federal Rule of Evidence 803(3)).

119. See *State v. Fulminante*, 975 P.2d 75, 85 (Ariz. 1999) ("The rationale for Rule 803(3) rests on two assumptions: (1) that declarant's statements have special reliability due to spontaneity and probable sincerity; and (2) because declarant's knowledge of his or her state of mind is inherently superior to any external, circumstantial account, there is a 'fair necessity' to use the declarant's statements." (internal citation omitted)).

120. See *id.*

121. Federal Rule of Evidence 803(4) allows a statement made for medical diagnosis or treatment, so long as the statement "describes medical history; past or present symptoms or sensations; their inception; or their general cause." FED. R. EVID. 803(4). Thus, the express language of this rule allows backward-looking statements.

will.¹²² These two provisions seem to indicate that the requisite reliability does not disappear for a backward-looking statement to a doctor or a backward-looking statement about one's intention when executing a will.¹²³

There could be a significant benefit to the accused if Rule 803(3) allowed backward-looking statements regarding the accuser's state of mind. For example, if the accuser had sex with the accused on January 1, and told the accuser's roommate on January 3 that the sex on January 1 had been consensual, then this statement could be admissible at trial pursuant to an expanded Rule 803(3). So too would a statement by the accuser to the roommate on January 3 regarding the accuser's intoxication on January 1. There would be no problem admitting these backward-looking statements in a civil trial, because the defendant could offer them as statements by the party opponent under Rule 801(d)(2).¹²⁴ The accuser is not a party in a criminal trial, though, and if the accuser does not testify in a manner that invites impeachment with a prior inconsistent statement,¹²⁵ the admissibility of the backward-looking statement on January 3 could be crucial to the defendant's trial strategy.

What does the cognitive science say? The crucial question is whether a person can remember a past mental state. If one's memory of past internal phenomena in the mind or body is hopelessly unreliable, then perhaps Rule 803(3)'s rigid temporal boundary makes sense. On the other hand, if a past mental or physical sensation is memorable, then there could be a rationale for extending Rule 803(3) to backward-looking statements. The limited research suggests that a person can accurately remember a past mental state or sensation of bodily condition.¹²⁶ Indeed, one study found that subjects could accurately remember past consent to sexual acts, even when some of

122. *See id.*

123. To be clear, the trustworthiness rationales for these two provisions are also related to the declarant's purpose, which presumably makes the declarant more careful. But it is noteworthy that the backward-looking nature of the statement is not disqualifying.

124. *See* FED. R. EVID. 801(d)(2)(A) (exempting from the definition of hearsay any statement "offered against an opposing party and . . . made by the party in an individual or representative capacity").

125. A prior inconsistent statement could be admissible for the truth of the matter asserted if the declarant made the statement in a prior trial, hearing, grand jury proceeding, or deposition. *See* FED. R. EVID. 801(d)(1)(A). Alternatively, a prior inconsistent statement could be admissible to show the fact of inconsistency rather than the truth of the matter asserted in that prior statement. *See* FED. R. EVID. 801(c).

126. *See* Laura Stevens et al., *Acute Alcohol Intoxication and Alcohol Expectancy Effects on Women's Memory for Consensual and Non-Consensual Sexual Activity*, 3113 FRONTIERS PSYCH. 1, 2–7 (2023) (in a study involving ninety women, some of whom were intoxicated, the subjects took part in a computer-based first-person simulation in which some scripts involved consensual sexual acts and some scripts involved nonconsensual acts; the subjects' later memories of their consent were generally accurate, even if the subjects had been intoxicated).

the subjects were intoxicated.¹²⁷ Another study found potential distortions in this recollection¹²⁸ but argued that the opponent would be able to explore these issues because the evidence rules allow for impeachment of hearsay declarants.¹²⁹

One's memory of a past mental condition need not be perfect for the proposed amendment to be a good idea. The rationale for a hearsay exception usually is not that statements covered by the exceptions are infallibly reliable.¹³⁰ Rather, it is generally sufficient if the statements covered by the exception are *relatively* infallibly reliable—i.e., better than any other evidence the proponent might be able to adduce on the matter at issue.¹³¹ Another recurring rationale for a hearsay exception is necessity: the statement covered by the exception is necessary to admit due to its importance in the pending case.¹³² Both considerations favor the extension of Rule 803(3) to statements regarding an accuser's past state of mind or bodily condition in a prosecution for rape or sexual assault. An out-of-court statement in which the accuser describes past consent to a sexual encounter might, in many cases, be more reliable than alternative evidence the accused could present on this subject. The materiality of consent is plain; this issue is frequently the central focus in a rape prosecution.¹³³ The best way to expand Rule 803(3) would be to delete the period at the end of the rule and add the following in the place of the period: “, or the accuser's state of mind

127. *See id.*

128. Deborah Davis & Elizabeth F. Loftus, *Remembering Disputed Sexual Encounters: A New Frontier for Witness Memory Research*, 105 J. CRIM. L. & CRIMINOLOGY 811, 817–50 (2015) (reviewing various factors—including motivation, intoxication, and environmental circumstances—which can distort memory of whether sexual encounters were consensual).

129. *See* FED. R. EVID. 806 (providing that “[w]hen a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness”).

130. *See* Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1488–97 (2016) (explaining that reliability is not the exclusive rationale for a hearsay exception; other considerations such as necessity come into play).

131. *See id.*

132. *See id.* The wills carve-out in the Federal Rule of Evidence 803(3) exemplifies the importance of necessity as a rationale for hearsay exceptions. The notes of the Advisory Committee on the Proposed Rules, appearing immediately after Federal Rule of Evidence 803, include the following discussion of the rationale for the unique treatment of statements regarding the execution of wills: “The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic.” FED. R. EVID. 803 advisory committee's note to the 1972 proposed rules.

133. *See* Debra Tedeschi, *Federal Rule of Evidence 413: Redistributing “The Credibility Quotient,”* 57 U. PITT. L. REV. 107, 125 (1995) (noting that in acquaintance rape cases, “consent is the main, indeed often the only, issue to be decided by the fact finder”).

at the time of the alleged offense in a prosecution for rape or sexual assault.”¹³⁴

F. Adding a Reliability Requirement to the Excited Utterance Rule

Federal Rule of Evidence 803(2), often referred to as the “excited utterance rule,” admits a hearsay statement “relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”¹³⁵ The proponent of an excited utterance needs to establish all of the following predicates: 1) the occurrence of an alarming event or circumstance; 2) the pendency of the declarant’s distress at the time of the statement; and 3) the relation of the statement to the startling event or circumstance.¹³⁶

When courts determine whether the proponent has made the first required showing, they almost always treat a crime of violence as a startling event or circumstance.¹³⁷ A statement by a declarant victimized in a crime of violence could meet this first requirement even if the declarant is not presently manifesting a great deal of distress because a court could assume that the nature of the experience would be startling for anyone.¹³⁸

Courts sometimes interpret the second requirement expansively.¹³⁹ The pendency of excitement can continue for twenty minutes or more for an

134. This Article’s proposed amendment of Federal R. Evid. 803(3) appears in italics below: “A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will, *or the accuser’s state of mind at the time of the alleged offense in a prosecution for rape or sexual assault.*”

135. FED. R. EVID. 803(2).

136. *Id.*

137. *See, e.g.,* State v. Stout, No. 02C01-9812-CR-00376, 2000 WL 202226, at *18 (Tenn. Crim. App. Feb. 17, 2000) (noting that a crime of violence is “clearly” a startling event or condition sufficient to meet the first element of Federal Rule of Evidence 803(2)); State v. Mickelson, 848 P.2d. 677, 684–85 (Utah Ct. App. 1992) (upholding trial court’s determination that sexual molestation could count as an exciting event or condition to meet the first predicate in Federal Rule of Evidence 803(2)).

138. One challenge is that people vary in the degree to which they show outward manifestations of distress, so the objective nature of the situation plays a role in assessing whether a given declarant is distressed. *See* Mara D. Afzali, *Letting Sleeping Dogmas Lie: A Response to Judge Posner’s Call to Reform the Res Gestae Exceptions to the Rule Against Hearsay*, 80 ALB. L. REV. 595, 603–04 (2017) (citing Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 725 (2015) (observing that people react differently to stress, and this variation creates challenges for the application of the excited utterance exception)).

139. *See* Friedman & McCormack, *supra* note 99, at 1179 (“Provided that the witness is still sufficiently ‘excited’ when giving her statement, courts are often willing to admit the statement despite a considerable time lapse between the excitement-evoking event and the statement.” (citing Camp v. State, 991S.W.2d 611, 613 (Ark. Ct. App. 1999)); 5 JOHN HENRY

adult.¹⁴⁰ Other times, courts have found that statements occurring long after the exciting stimulus nonetheless qualify as excited utterances. For example, the reappearance of an offender could rekindle the declarant's excitement, even though the startling event itself might be distant in time.¹⁴¹

The third requirement is generally easy to meet. A statement relates to a startling stimulus if it has any nexus to that stimulus.¹⁴² The statement need not "describe" the past event, which is a much stricter requirement that appears in the rule regarding the admissibility of present sense impressions.¹⁴³

Proponents often use the excited utterance exception in cases involving alleged rape or sexual assault.¹⁴⁴ This exception has been a boon for prosecutors.¹⁴⁵ One common application of the exception is to facilitate prosecutions of intimate partner violence when the survivor does not want to testify.¹⁴⁶ In such cases, the only evidence of the defendant's guilt might be a statement made by the survivor shortly after the event.¹⁴⁷ So long as the

WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1750 (James H. Chadbourn ed., 4th rev. ed. 1976) ("[T]he statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated . . . [T]here can be no definite and fixed limit of time. Each case must depend upon its own circumstances.").

140. See, e.g., *Prescott v. R & L Transfer, Inc.*, 111 F. Supp. 3d 650, 654–56 (W.D. Pa. 2015) (approving admission of an excited utterance twenty-three minutes after the event in question).

141. See, e.g., *United States v. Arnold*, 486 F.3d 177, 186 (6th Cir. 2007) (holding that a statement by an alleged victim of intimate partner violence was admissible even though she appeared to have made the statement more than twenty minutes after the assault; the defendant's reappearance near the time of the statement reactivated her excitement).

142. See, e.g., *United States v. Irizarry-Sisco*, 87 F.4th 38, 48 (1st Cir. 2023) (indicating that the "relating to" requirement of Rule 803(2) is "markedly broader" than the "describing or explaining" requirement of the directly adjacent Rule 803(1), which governs present sense impressions) (citing *United States v. Boyce*, 742 F.3d 792, 798 (7th Cir. 2014)).

143. *Id.* at 48; see FED. R. EVID. 803(1) (allowing "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it").

144. See Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 332 (2005) (describing the excited utterance exception as the "workhorse" in domestic violence prosecutions).

145. See Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 749 (2015) ("Overwhelmingly, it is the admission of excited utterances and not other hearsay exceptions that result in incarceration or execution . . .").

146. Excited utterances are valuable in prosecutions of violent crime, especially when victims recant or refuse to cooperate at the time of trial, as is common in prosecutions of intimate partner violence. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751 (2005) [hereinafter Lininger, *Prosecuting Batterers*] ("Approximately eighty percent of victims decline to assist the government in prosecutions of domestic violence cases.").

147. Indeed, the Advisory Committee notes following the initial version of Federal Rule of Evidence 803(2) point out that "on occasion the only evidence [of the startling event] may

excitement persisted to the time of the statement, and the statement related to the alleged assault, the prosecution has little trouble overcoming a hearsay objection (although the confrontation objection might be a separate challenge after *Crawford*).¹⁴⁸

The theoretical rationale for the excited utterance doctrine is two-fold. First, people who are under the stress of a startling condition lack the calm repose that is necessary to conceive of a self-serving lie.¹⁴⁹ This rationale posits that the stress has a “cleansing” function, disabling the part of the brain that could otherwise hatch a deceitful statement.¹⁵⁰ The second rationale is necessity: when a victim of violent crime is unavailable at the time of trial, the excited utterance shortly after the crime may be the only evidence that the prosecutor can use to show what happened.¹⁵¹

Modern cognitive science contradicts the notion that excitement makes a statement reliable.¹⁵² One problem is that, contrary to the rationale

be the content of the statement itself.” FED. R. EVID. 803 advisory committee’s notes to the 1972 proposed rules.

148. The hurdle of the Confrontation Clause remains, but it is surmountable in many instances, such as when police obtain an excited utterance while addressing an ongoing emergency, see *Davis v. Washington*, 547 U.S. 813, 822 (2006) (upholding admission of an excited utterance elicited during ongoing emergency), or when the defendant has purposefully and wrongfully procured the unavailability of the declarant, thereby effecting a forfeiture of confrontation rights, see, e.g., *Giles v. California*, 554 U.S. 353, 377 (2008) (explaining how a pattern of intimate partner violence could lead to forfeiture of confrontation rights).

149. The notes of the Advisory Committee on Proposed Rules, included at the end of Federal Rule of Evidence 803, indicate that an excited utterance is admissible because “circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.” FED. R. EVID. 803 advisory committee’s notes to the 1972 proposed rules.

150. *See id.*

151. *See* Saltzburg, *supra* note 130, at 1489–97 (explaining that the justification for hearsay exceptions rests not only on reliability but also on necessity). Excited utterances are particularly valuable to prosecutors in cases involving allegations of violence against vulnerable victims who do not want to testify at trial. *See* Lininger, *Prosecuting Batterers*, *supra* note 146, at 751. To be clear, the unavailability of the declarant is not a predicate for the hearsay exceptions in Federal Rule of Evidence 803 as it is for the exceptions in Federal Rule of Evidence 804.

152. The *Fordham Urban Law Journal*’s symposium in 2026 included several participants who focused on cognitive science relating to the excited utterance doctrine (Steven Baicker-McKee, Timothy Lau, and Justin Sevier). Rather than reproduce all the relevant studies here, I will briefly highlight some of the scholarship written by my co-presenters. *See* Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 131–74 (2017) (surveying cognitive science research that relates to assumptions underlying excited utterance exception); Timothy Lau, *Reliability of Excited Utterance Hearsay Evidence*, 87 MISS. L.J. 599, 609–39 (2018) (same); Justin Sevier, *On Hearsay Dragon-Slaying*, 67 FLA. L. REV. F. 269, 272 (2016) (“Although excitement may still a person’s capacity for untruthfulness, it is well-established that high levels of anxiety and arousal are associated with significant cognitive deficits in event perception, event encoding, and memory retrieval.”); *see also* Aviva Orenstein, “My God!” *A Feminist Critique of the Excited Utterance Exception to the*

underlying the excited utterance exception, excited people are capable of lying. They may not come up with the most skillful lies when they are alarmed, but they might still have an instinct to lie, especially when excitement heightens the feeling of desperation. A second problem is that a state of excitement may make the declarant an unreliable reporter. Distress can affect both perception and memory. Some research suggests that the salutary effect of excitement in diminishing deceit only lasts for a short period, during which time that same excitement distorts perception and memory, potentially making the statement unreliable. To put it differently, startled statements may be free of deceit but still dubious due to the problems that startling stimuli cause.

Can the excited utterance exception be saved? One potentially helpful amendment would add a reliability requirement that the opponent could invoke. Both the business records exception, Rule 803(6), and the government records exception, Rule 803(8), include a final sentence that allows a trial judge to exclude the statement at issue if the opponent points to circumstances showing a lack of trustworthiness.¹⁵³ The best way to update Rule 803(2) would be to delete the period at the end of the rule and add the following language: “unless the opponent shows that the circumstances at the time of the statement indicate a lack of trustworthiness.”¹⁵⁴

G. Restricting Evidence of Plethysmography

Penile plethysmography is a procedure that “involves placing a pressure-sensitive device around a man’s penis, presenting him with an array of

Hearsay Rule, 85 CALIF. L. REV. 159 (1997). At the risk of duplication, I am covering the topic of the excited utterance doctrine in my article in case anyone retrieves it on an electronic database without also reading the other symposium submissions that focus on that hearsay exception. I want my article to be “one-stop shopping” for anyone, including a legislator or legislative staffer, who is considering what reforms are necessary to make evidentiary rules more fair in cases involving allegations of rape and sexual assault. The excited utterance rule definitely should be on the list of rules that need reform.

153. See FED. R. EVID. 803(6)(E) (indicating that a record of a regularly conducted activity is admissible provided that “the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness”); FED. R. EVID. 803(7)(C) (allowing evidence of a gap in a business record provided that “the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness”); FED. R. EVID. 803(8)(B) (admitting a public record unless the opponent makes a showing of untrustworthiness).

154. This amendment reproduces language appearing in Federal Rule of Evidence 803(6)(E), Federal Rule of Evidence 803(7)(C), and Federal Rule of Evidence 803(8)(B). With the inclusion of the proposed amendment (highlighted in italics), Federal Rule of Evidence 803(2) would read as follows: “A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, *unless the opponent shows that the circumstances at the time of the statement indicate a lack of trustworthiness.*”

sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.”¹⁵⁵ The plethysmograph functions more or less like a blood pressure cuff.¹⁵⁶ The assumption is that engorgement of the male genitalia indicates sexual arousal in response to the images displayed at the time.¹⁵⁷

Courts sometimes make evidentiary use of plethysmograph results. This evidence is not admissible in a trial because plethysmography cannot pass the reliability test set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵⁸ However, some courts consider plethysmograph results in hearings when the rules of evidence do not apply to the same extent.¹⁵⁹ For example, courts sometimes rely on plethysmograph testing in connection with sentencing hearings, both as a condition of supervised release and as a basis for predicting future dangerousness of a convicted offender.¹⁶⁰ Courts also use plethysmograph results in civil family law matters, such as hearings on child custody.¹⁶¹ Courts additionally rely on plethysmograph evidence in determining whether to order release from involuntary civil commitment.¹⁶²

155. *United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006) (citation omitted).

156. See Lindsay Blumberg, *The Hard Truth About the Penile Plethysmograph: Gender Disparity and the Untenable Standard in the Fourth Circuit*, 24 WM. & MARY J. WOMEN & L. 593, 599–600 (describing the procedure).

157. See *Weber*, 451 F.3d at 554 (indicating that the test of a subject’s prurient sexual interests involves “presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses”).

158. 509 U.S. 579, 589 (1993) (establishing the reliability test for scientific evidence introduced under Federal Rule of Evidence 702); see also *Doe v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000) (holding that “courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence” at trial).

159. The Federal Rules of Evidence apply strictly in trials and not to the same degree in hearings. See FED. R. EVID. 1101(d). Part of the reason for this difference is that the jury is usually present in a trial but not in a hearing.

160. See, e.g., *United States v. Robles*, No. 25-10468, 2026 WL 908540, at *4 (5th Cir. Apr. 2, 2026) (rejecting challenge to sentencing order that included plethysmograph testing); *Tyler v. Dir. of Darlington Cnty. Det. Ctr.*, Civil Action 9:22-1623-MGL, 2026 WL 607420, at *1 (D.S.C. Mar. 4, 2026) (recounting that the judge had threatened incarcerated defendant with contempt of court for refusal to cooperate in plethysmograph testing); see also *Weber*, 451 F.3d at 554 (noting that plethysmography has become routine and “is often imposed as a condition of supervised release”).

161. See, e.g., *In re Marriage of Ricketts*, 43 P.3d 1258, 1260 (Wash. Ct. App. 2002) (stating that, in child custody dispute, father may be required to undergo psychosexual evaluation, including penile plethysmograph, if he has history of sexual offenses).

162. See, e.g., *In re Commitment of Schulpus*, No. 2023AP2154, 2026 WL 668465, at *2 (Wis. Ct. App. Mar. 10, 2026) (discussing use of plethysmograph in connection with decision not to release sex offender from involuntary civil commitment); *In re Commitment of Racinelli*, No. 2-24-0087, 2025 WL 2779320, at *5 (Ill. App. Ct. Sep. 29, 2025) (indicating

The argument to exclude evidence of plethysmography at all stages of litigation is compelling. To begin with, psychological research has raised serious doubts about the scientific validity of plethysmography.¹⁶³ The device measures arousal that may not be solely attributable to the images displayed.¹⁶⁴ Even if the device did accurately measure arousal, evidentiary reliance on the results would be akin to punishing “thought crime.” A person who has a prurient interest does not necessarily act on that interest,¹⁶⁵ and punishment of the interest alone is inconsistent with the notions of autonomy and self-determination that are the bedrock of the U.S. justice system.

Research has shown that some people are uniquely able to “beat” the plethysmograph.¹⁶⁶ These people can control their arousal, for example, by shifting their thoughts to something completely different from the images displayed during plethysmograph testing.¹⁶⁷ Only a subset of people subject

that plethysmograph testing was part of the evidence considered in determining whether involuntary civil commitment was necessary for a sex offender).

163. The American Psychiatric Association has declared that it is skeptical of plethysmography: “The reliability and validity of this procedure in clinical assessment have not been well established.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 567 (4th ed. 2000); *see also* Blumberg, *supra* note 156, at 600–04 (collecting evidence showing that plethysmograph testing is unreliable for various reasons); Allegra McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1593–94 (2014) (“In addition to its degrading invasiveness, penile plethysmograph testing is an unreliable predictor of an individual’s likelihood to perpetrate sexual harm. Studies of the link between arousal and activity strongly suggest that persons are often aroused in ways that do not at all predict their sexual activity Simply put, plethysmograph testing purports to predict sexual activity on the basis of arousal, but the link between arousal and activity is complex and tenuous at best.”); W.L. Marshall & Yolanda M. Fernandez, *Phallometric Testing with Sexual Offenders: Limits to Its Value*, 20 CLINICAL PSYCH. REV. 807, 810–13 (casting doubt on reliability of plethysmograph testing); Jason Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & C.R. L. REV. 1, 10–13 (2004) (citing studies that indicate significant problems with plethysmograph testing, including inconsistent results).

164. *See supra* note 163 and accompanying text.

165. *See* McLeod, *supra* note 163, at 1594 (“One may have sexually stimulating fantasies that one never acts on . . .”).

166. *See* AM. PSYCHIATRIC ASS’N, *supra* note 163, at 567 (stating “clinical experience suggests that subjects can stimulate response by manipulating mental images”); *accord* Blumberg, *supra* note 152, at 601–02 (discussing research that shows subjects can manipulate the plethysmograph test); *see also* McLeod, *supra* note 163, at 1593 (explaining that it is possible to “mask” one’s arousal during plethysmograph testing); *United States v. McLaurin*, 731 F.3d 258, 262–63 (2d Cir. 2013) (discussing risk of manipulation leading to inaccurate results); *United States v. Weber*, 451 F.3d 552, 564 (9th Cir. 2006) (indicating that “[a] predominant concern with plethysmograph testing is its susceptibility to manipulation via faking,” and noting “studies have acknowledged that subjects can control their sexual arousal during the test, thereby posing a threat to the validity of plethysmograph testing”); *Nelson v. Jones*, 781 P.2d 964, 967 (Alaska 1989) (citing expert testimony for the proposition that the penile plethysmograph is “susceptible to cheating”).

167. *See supra* note 166 and accompanying text.

to plethysmography actually reveal their true interest in the images.¹⁶⁸ When plethysmograph results are so easily manipulable, it is risky for courts to rely on them. A substantial risk exists that sentenced offenders capable of disguising their interest under plethysmograph surveillance will win release.¹⁶⁹ Even if plethysmography might have a legitimate therapeutic use in certain contexts,¹⁷⁰ it does not belong in court. A blanket ban on this evidence, as well as any expert testimony that relies in part on plethysmography, is necessary to avoid an Orwellian nightmare.¹⁷¹

II. REFORMS TO IMPROVE PROTECTION OF COMPLAINANTS

This Part proposes to amend several evidentiary rules in order to strengthen the protection of complainants—i.e., accusers in criminal prosecutions and plaintiffs in civil suits. Part II.A proposes to fortify the rape shield law so that the complainant's prior consensual sexual history is more difficult to admit. Part II.B proposes to limit impeachment of accusers on the ground that they harbor bias due to their financial interest in parallel civil litigation. Part II.C proposes to liberalize the rules admitting evidence of misogynistic comments during jury deliberations. These various proposals all seek to reduce prejudice among jurors and mitigate the hardship experienced by complainants.

A. Recalibrating Admissibility of Prior Consensual Sexual Acts

At both the federal and state levels, rape shield laws generally forbid, or at least limit, the introduction of prior consensual sexual history as evidence

168. See *supra* note 166 and accompanying text.

169. See David Ho, *Ineffective Treatment of Sex Offenders Fails Victims*, BMJ (Jan. 27, 2015), <https://www.bmj.com/content/350/bmj.h199> (on file with the *Fordham Urban Law Journal*) (“After these [plethysmography] sessions, if offenders have kept out of trouble they stand a better chance of early release from prison. . . . To be clear: convicted sex offenders are sent to prison, undergo this treatment programme, are deemed to have been somewhat rehabilitated, and are released to the public; however, they are as likely to offend as before receiving treatment.”); see also Carol Gilchrist, *An Examination of the Effectiveness of California's Chemical Castration Bill in Preventing Sex Offenders from Reoffending*, 7 S. CAL. INTERDISC. L.J. 181, 189 (1998) (“If the Department of Corrections relies on these assessments [based on penile plethysmography], it may release offenders that are still dangerous to society; studies have demonstrated that offenders can manipulate results for both tests and therefore deceptively ‘good’ offenders may be released.”).

170. Treatment for sexual deviancy sometimes relies on plethysmography even in the absence of clear evidence concerning the therapeutic value of this procedure. See, e.g., *McLaurin*, 731 F.3d at 263 (noting dearth of evidence in the record as to therapeutic benefits of plethysmography).

171. The criminalization of thoughts was one of the most horrific themes in George Orwell's novel 1984. See *Weber*, 451 F.3d at 554 (stating that “one would expect to find a description of such a procedure gracing the pages of a George Orwell novel rather than the Federal Reporter”).

to show that the complainant consented to the sexual activity alleged in the indictment or tort complaint.¹⁷² There are several reasons for this prohibition.¹⁷³ First, the evidence has scant relevance to the question of whether the complainant gave consent to sex with the defendant. Second, the evidence of prior consensual sexual history could cause prejudice among certain jurors, who might think that an “unchaste” complainant is not credible or does not deserve protection from the defendant’s advances. Third, the admission of such evidence could dissuade victims of rape and sexual assault from bringing legal action in the first place. They may fear the “try-the-victim” strategy used by some defense attorneys and may forgo any legal action to avoid the traumatization caused by cross-examination about their sexual history.

There is an exception, however, in the federal rape shield law and many of its state counterparts, allowing admission of evidence concerning prior consensual sexual history involving both the complainant and the defendant in the current case.¹⁷⁴ The reasoning behind this exception seems to be that a complainant’s past consent to sexual activity with the defendant belies the claim that the most recent sexual incident was involuntary.¹⁷⁵ In other words, past consent with a particular partner increases the likelihood of

172. See FED. R. EVID. 412(a) (“The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition.”). All fifty states have rape shield laws modeled after the federal version. See Marah DeMeule, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 145 (2004).

173. The Advisory Committee notes to Federal Rule of Evidence 412 discuss its rationale. The rule “aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process,” and “[b]y affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.” FED. R. EVID. 412 advisory committee’s note to the 1994 amendment.

174. See FED. R. EVID. 412(b)(1)(B) (indicating that in a criminal case, a court may admit “evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor”); *cf.* FED. R. EVID. 412(b)(2) (“In a civil case, the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”). States generally have added versions of these exceptions to their rape shield laws. See Sydney Janzen, *Amending Rape Shield Laws: Outdated Statutes Fail to Protect Victims on Social Media*, 48 J. MARSHALL L. REV. 1087, 1091 (2015) (“Since the passage of FRE 412, legislatures in all fifty states have enacted their own rape shield laws in accordance with the federal rule.”).

175. See NAT’L CRIME VICTIM L. INST., EXCLUDING EVIDENCE OF SPECIFIC SEXUAL ACTS BETWEEN THE VICTIM AND DEFENDANT UNDER RAPE SHIELD 3 (2010) (discussing “marginal relevance” of evidence regarding prior consensual sex between accuser and accused, and recommending elimination of this exception).

consent with the same partner on the date in question, or at least casts doubt on testimony claiming that such consent was lacking.

This exception is an ill fit with present attitudes about sexual activity, particularly among young people. A casual “hook-up” is more common now than in the past.¹⁷⁶ Even if one episode of sexual activity is entirely consensual, that fact does not indicate ongoing consent to further sexual activity with the same partner. The modern mindset is to consider each prospective sexual encounter separately, without any notion that prior consent forecloses the opportunity to turn away a new advance.¹⁷⁷ To put it differently, one who says “yes” five times does not automatically forgo the possibility of rejecting the sixth proposition.¹⁷⁸ Another important consideration is that modern sexual habits among young people span a wider range of acts (and include a wider range of participants) than was the case decades ago,¹⁷⁹ so consent to one version of sex with a particular defendant

176. See Justin Garcia et al., *Sexual Hook-Up Culture: A Review*, 44 AM. PSYCH. ASS’N MONITOR, 1, 2 (2012) (defining hookups as brief uncommitted sexual encounters between individuals who are not romantic partners or dating each other). This has emerged from more general social shifts taking place during the last century, and today sexual behavior outside of traditional committed romantic pair-bonds has become increasingly typical and socially acceptable. See *id.*

177. See Grant Hilary Brenner, *Sexual Consent Among Emerging Adults: A Leading Edge of Social Change*, PSYCH. TODAY (Feb. 16, 2022), <https://www.psychologytoday.com/us/blog/experimentations/202202/sexual-consent-among-emerging-adults-leading-edge-social-change> (on file with the *Fordham Urban Law Journal*) (indicating that modern approach to consent and long-term commitment is more “fluid” than in the past); see also Maeve Sheridan, *Ask and You [Might Not] Receive: Consent in Long-Term Relationships*, NAT’L SEXUAL VIOLENCE RESOL. CTR. (Apr. 11, 2019), <https://medium.com/sexual-assault-awareness-month-2019/ask-and-you-might-not-receive-consent-in-long-term-relationships-802b3d031b83> (on file with the *Fordham Urban Law Journal*) (challenging historic assumptions about ongoing nature of consent between familiar sexual partners, noting that “being in a long-term relationship does not mean consent is a given,” and “consent can change any minute”).

178. The modern sensibility is that each sexual act, even with a familiar partner, requires fresh consent and that past consent does not necessarily support an inference of ongoing consent. See, e.g., *Understanding Consent*, AM. SEXUAL HEALTH ASS’N (Feb. 3, 2026), <https://www.ashsexualhealth.org/understanding-consent/> [https://perma.cc/TRP7-VN6J] (“Just because someone consented to sexual activity once does not mean consent will be given every time. Even if someone has consented 100 times it does not mean they will consent the 101st. Consent may be given at the beginning of sex but then taken back.”).

179. See *National Survey of Sexual Health and Behavior*, IND. U. BLOOMINGTON, <https://nationalsexstudy.indiana.edu/keyfindings/index.html> [https://perma.cc/5WPD-T8DZ] (last visited on Aug. 28, 2026) (indicating that recent national survey shows “enormous variability in the sexual repertoires of U.S. adults,” both with respect to categories of sexual acts and involvement of multiple partners); see also Debby Herbenick et al., *Prevalence and Demographic Correlates of “Rough Sex” Behaviors: Findings from a U.S. Nationally Representative Survey of Adults Ages 18–94 Years*, 54 ARCHIVES SEXUAL BEHAV. 3435, 3435 (2025) (“Rough sex behaviors have become [increasingly] prevalent among young adults in the U.S. and internationally.”); Ruth Lewis et al., *Heterosexual Practices Among Young People in Britain: Evidence from Three National Surveys of Sexual Attitudes and Lifestyles*,

may have less probative value as evidence of ongoing consent to a different type of sex with that same defendant.

Skepticism about the probative value of evidence concerning prior consensual sex between the complainant and the defendant seems to align with the trend toward an “affirmative consent” standard in criminal statutes and campus regulations.¹⁸⁰ The new approach emphasizes the need for explicit, unambiguous consent to the most recent sexual encounter.¹⁸¹ Inferences of consent based on circumstances or history are increasingly dubious. The trend toward an affirmative consent standard in substantive law is incongruous with the decades-old evidence rules that assume the relevance of prior sexual encounters involving the parties in the instant case.

Not only does such evidence lack probative value, but it also raises a significant risk of prejudice. Research indicates that mock jurors frequently harbor bias against a hypothetical complainant who consented to sexual activity with the defendant prior to the disputed incident.¹⁸² From the

61 J. ADOLESCENT HEALTH 694, 694 (2017) (reporting study results indicating that people between the ages of sixteen and twenty-four are taking part in a wider range of sexual practices compared to twenty years ago).

180. See Arzoo Karki et al., *Policy Paper on Affirmative Consent*, BERKELEY CTR. ON COMPAR. EQUAL. & ANTI-DISCRIMINATION L. 1, 1 (Mar. 6, 2024) (discussing emergence of affirmative consent standard in the U.S. as well as many other countries); see also Jocelyn Noveck, *In Defining Consent, There’s a Gap Between Law, Culture*, LEGALNEWS.COM (May 23, 2019), <https://legalnews.com/Home/Articles?DataId=1474516> [<https://perma.cc/284J-8EN7>] (indicating that several university campuses and state criminal codes have adopted affirmative consent standards); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442 (2016) (“An estimated 1,400 institutions of higher education have adopted disciplinary standards that codify an affirmative definition of sexual consent.”); Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS: J. WOMEN CULTURE & SOC’Y 257 (2016) (“In a vigorous new trend supported by many feminists, affirmative consent requirements are appearing in campus sexual conduct codes and in a parallel campaign for reform of state-based criminal law.”).

181. See Nicholas Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1345 (2005) (“An affirmative consent standard requires that, for sex to be considered consensual, it must have been consented to by the woman in advance. In short, if the instigator of a sexual interaction wishes to do anything, he or she must inquire whether his or her partner wishes that to be done, and that partner must receive freely given consent to continue. In the absence of such consent, the activity cannot be seen as voluntary for both parties.”).

182. See generally Bailey Fraser, Emily Pica & Joanna D. Pozzulo, *Admissibility of Prior Sexual History Evidence: Examining Its Impact on Mock-Jurors’ Judgments When Gender and Race Are Considered*, 44 BEHAV. SCI. L. 20, 21 (2025) (“Furthermore, research suggests that when the complainants and defendants had a prior sexual relationship, mock-jurors viewed the case as less ‘clear-cut’ than one involving stranger rape, leading to a lower likelihood of conviction”); see also Jillian Jordan & Roseanna Sommers, *Sexual Assault Victims Face a Penalty for Adjacent Consent*, 121 PROC. NAT’L. ACAD. SCI. 1, 1 (2024) (finding in study involving over 12,000 participants that victim-blaming in hypothetical sexual assault case was significantly more likely if the assault followed voluntary sexual intimacy between the complainant and the defendant); Louise Ellison & Vanessa Munro,

standpoint of a juror with traditional values, a complainant who previously consented to sex with the defendant cannot be heard to deny consent in the most recent instance.¹⁸³ Because prior generations did not vacillate so much in giving and withholding consent with a particular partner, elderly jurors may have trouble appreciating that sex could be involuntary between two people who voluntarily engaged in past sex.¹⁸⁴ Such a juror might make the mistake of assuming that consent is “permanent,” because consent had a more enduring character for past generations.¹⁸⁵

The ratio of probative value to prejudicial effect has evolved with respect to prior consensual sex between the complainant and the defendant. The probative value is now generally lower, and the prejudicial effect remains significant. In light of this evolution, the current language in the federal rape shield law and its state analogs is out of date and needs revision.

The best approach would be to adopt a stricter balancing test when a defendant in a criminal or civil case wants to offer evidence of prior consensual sexual history with the complainant. The inverse of the basic balancing test found in Federal Rule of Evidence 403, the “reverse 403” test, would be appropriate in this context. The court would not admit evidence of prior consensual sexual history involving the complainant and the defendant unless the proponent were to show that probative value, supported by particular facts and circumstances, substantially outweighed prejudicial effect. Federal Rule of Evidence 609 presently uses that stricter test to determine the admissibility of convictions over ten years old to impeach a witness.¹⁸⁶ A proposed amendment to Federal Rules of Evidence (already approved by the Judicial Conference Advisory Committee on the Federal Rules of Evidence and awaiting approval by the U.S. Supreme Court and Congress) would apply the “reverse 403” test to a non-dishonesty felony

Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of Previous Relationship in (Mock) Jury Deliberations, 17 INT’L J. EVIDENCE & PROOF 299, 320–22 (2013) (reporting study results indicating that prior intimacy between accuser and accused made mock jurors less likely to vote for rape conviction).

183. See NAT’L CRIME VICTIM L. INST., *supra* note 175, at 3 (explaining that such an accuser may be deemed “unrapeable” due to prejudice resulting from admission of evidence concern prior consensual acts between the accuser and the accused).

184. See generally Bianca Klettke, et al., *Perceptions of Credibility of Sexual Abuse Victims Across Generations*, 44 INT’L J. L. & PSYCH. 91–97 (2016) (presenting evidence that elderly people may be more likely to doubt accusers in rape prosecutions).

185. See Malachi Willis, Kelli N. Murray & Kristen N. Jozkowski, *Sexual Consent in Committed Relationships: A Dyadic Study*, 47 J. SEX. & MARITAL THERAPY 669, 669 (2021) (discussing traditional “normative beliefs that assuming the sexual consent of committed partners is okay”); see also Sheridan, *supra* note 177 (expressing concern about the old-fashioned belief that “consent is implied in a relationship”).

186. See FED. R. EVID. 609.

offered against the defendant in a criminal case.¹⁸⁷ Such caution makes sense when the prejudicial effect of evidence could be devastating while the probative value is uncertain and possibly negligible.

There should be symmetry in rules that restrict evidence of sexual history. As discussed above, this Article has advocated tighter limits on evidence of a defendant's prior sexual conduct. It seems only fair to strengthen protections for complainants as well. A trial about a sex act on a particular date should focus on that date. Courts should rarely admit extrinsic evidence to support *inferences* about what a complainant or defendant did on the date in question.

B. Revising Rules for Impeachment with Evidence of Parallel Suits

Cross-examination may generally explore grounds for bias. A witness may have a bias if there is any circumstance, including self-interest, which could create an ulterior motive that could distort testimony.¹⁸⁸ Impeachment for bias usually involves asking the witness about the circumstance that allegedly gives rise to the ulterior motive. Alternately, courts allow the introduction of extrinsic evidence—i.e., evidence other than admissions on cross-examination of the target witness¹⁸⁹—to show that the witness could possibly harbor bias.¹⁹⁰ In criminal cases, the Supreme Court has shown a strong interest in allowing evidence of bias, opining that such evidence is “almost always relevant.”¹⁹¹ The Court has indicated that impeachment of

187. See PRELIMINARY DRAFT: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE, COMM. ON RULES OF PRAC. AND PROC. JUD. CONF. OF THE U.S. 104 (Aug. 2025). In addition, the “reverse 403” test is used in other rules such as Federal Rule of Evidence 703, which allows otherwise inadmissible evidence that underlies expert opinions, and Federal Rule of Evidence 412(b)(2), which authorizes a judge in a civil case to admit evidence of the complainant's prior sexual behavior or sexual predisposition.

188. See Roger Park & Tom Lininger, NEW WIGMORE: A TREATISE ON EVIDENCE § 6.1 (2026) (“In all jurisdictions, cross-examination may properly inquire into grounds for bias—that is, a motive that leads the witness to slant his or her testimony.”).

189. In this context, the term “intrinsic” means inside, and the term “extrinsic” means outside. Impeachment with intrinsic evidence means impeachment with evidence that is inside the scope of cross-examination (i.e., admissions by the target witness). Impeachment with extrinsic evidence means impeachment with any evidence other than admissions by the target witness during cross-examination. Impeachment to show bias may rely on either intrinsic or extrinsic evidence, while impeachment to show prior non-convicted untruthful acts relies solely on intrinsic evidence. See FED. R. EVID. 608(b) (providing that “extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness”).

190. See *id.* (indicating that bias may be proven with extrinsic evidence, that is, evidence outside the scope of admissions on cross-examination of the target witness).

191. *United States v. Abel*, 469 U.S. 45, 53–56 (1984) (upholding admission of bias evidence indicating that witness had bias to favor defendant because both were members of a prison gang; even though this evidence might be prejudicial to the defendant, the high

an accuser on the ground of bias is sometimes a necessary part of the defendant's confrontation right under the Sixth and Fourteenth Amendments.¹⁹²

In prosecutions for rape or sexual assault, defendants occasionally try to impeach accusers with evidence of parallel civil suits.¹⁹³ A typical version of this cross-examination seeks to undermine the accuser's credibility by pointing out that a conviction in the criminal case could be admissible as evidence in the later civil suit, and could potentially enrich the accuser.¹⁹⁴ Because prosecutors generally insist that the criminal case precede the civil case, the accuser is vulnerable to impeachment suggesting that the former is a contrivance to facilitate a recovery in the latter.¹⁹⁵

Civil suits for rape and sexual assault are becoming more common.¹⁹⁶ Sometimes the complainant seeks damages from the alleged assailant.¹⁹⁷

probative value of the bias evidence justified admission, especially where the trial court took steps to minimize prejudice).

192. See *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (holding that accused has constitutional right to cross-examine accuser with evidence of bias).

193. See, e.g., *Commonwealth v. Hanford*, 937 A.2d 1094, 1098–99 (Pa. Super. Ct. 2007) (determining that accused rapist was entitled to some cross-examination of accuser about parallel civil suit although trial court properly limited scope of this cross-examination); see also *Shelby v. State*, 819 S.W.2d 544, 550–51 (Tex. Crim. App. 1991) (holding that trial court should have allowed accused rapist to cross-examine accuser about civil suit alleging same facts at issue in rape prosecution); *Commonwealth v. Elliot*, 473 N.E.2d 1121, 1127 (Mass. 1985) (holding that in rape prosecution, trial court erred by barring defendant from cross-examining accuser about her intent to file civil tort claim); *State v. Ferguson*, 450 N.E.2d 265, 271 (Ohio 1983) (in rape prosecution, “we hold that accused is permitted to cross-examine the prosecuting witness as to the witness’ [sic] pending or contemplated civil action against the accused, in order to demonstrate any possible bias or prejudice arising out of the witness’ financial interest in the outcome of the prosecution”). See generally *Park & Lininger*, *supra* note 188 at § 6.3.10 (collecting cases in which accusers in criminal prosecutions were subject to impeachment for bias because of impending tort suits arising from same facts at issue in criminal cases).

194. See *supra* note 193 and accompanying text.; see also Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1606 (2007) [hereinafter Orenstein, *Special Issues*] (“Although a defense attorney cross-examining a rape victim alleging that she has made her complaint just to get money from the accused is tapping into rape myths, such a question is not covered by rape shield. It falls squarely within impeachment for bias under the current rules of evidence.”).

195. See Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1635 (2008) [hereinafter Lininger, *Is It Wrong*] (noting that prosecutors sometimes pressure rape accusers to postpone filing of civil actions so that the criminal and civil actions are not simultaneous).

196. See Patrick Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 890 (2013) (mentioning “sharp increase in civil actions for rape and other sexual misconduct”); see also Lininger, *Is It Wrong*, *supra* note 195, at 1568–73 (same).

197. See Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons*, 10 J. TORT L. 1, 34 (2017) (reporting that in rape and sexual assault cases, a small percentage of “intentional tort suits are brought directly against the assailant”).

Sometimes the complainant seeks damages or injunctive relief from a third party such as a landlord, employer, or school official whose alleged negligence increased the likelihood of the assault.¹⁹⁸ Third-party suits outnumber suits against alleged perpetrators by a significant margin.¹⁹⁹

There are several reasons to limit impeachment of an accuser with evidence of a civil suit arising from the same facts as the instant prosecution. First, the impeachment sometimes has dubious probative value because it does not expose an ulterior motive distorting testimony. Pursuing a wider range of remedies does not corrupt the motives of a rape or sexual assault survivor. In both the criminal and civil systems, the goal is accountability for a grievous harm. A survivor's desire to see a criminal sanction for a sexual predator is not inconsistent with, or in tension with, a survivor's desire to invoke the civil remedial system. Restitution is available in a criminal prosecution,²⁰⁰ so an accuser who files a civil lawsuit is not tacking in an entirely new direction. Indeed, it would be more noteworthy if a survivor of rape or sexual assault did *not* file a parallel civil claim, because the standard of proof is lower in civil court (preponderance of the evidence versus proof beyond a reasonable doubt).²⁰¹ Moreover, a third-party claim for injunctive relief does not seek enrichment of the claimant, but rather seeks to put safeguards in place to avoid the victimization of others in the future. In sum, it is unduly facile to assume that every parallel civil suit is motivated by greed and that the possibility of recovery creates bias that slants a survivor's testimony in a civil case.

Significant prejudice could result from cross-examination that faults an accuser for bias related to a potential parallel civil suit. Many jurors in rape prosecutions view accusers skeptically from the start, and when these jurors hear cross-examination suggesting that avarice may motivate the accusation, it could be hard for the jurors to give the accusers' testimony fair

198. *See id.* (stating that some "tort claims for sexual assault are brought as 'third-party' negligence claims against institutional defendants, holding landlords, schools, and commercial enterprises liable for failing to take reasonable precautions to prevent assaults").

199. *See id.* (indicating that "the vast majority" of tort claims for sexual assault are brought against third parties rather than against the assailants themselves).

200. *See, e.g.,* CHARLES DOYLE, CONG. RSCH SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES, at i (2019) (mentioning that in the federal system, "crimes of violence, fraud, or property loss will usually require a sentencing court to order restitution"); *see also* NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY, U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME 356 (1998) ("In the decade that followed the 1982 passage of the Victim and Witness Protection Act, every state passed statutes addressing restitution, most following the lead of the federal model. . . . As of 1995, 29 states had followed federal law in mandating restitution in all cases . . .").

201. *See* Park & Lininger, *supra* note 188 at § 6.3.10 ("If she did not seek civil damages, the defendant in the criminal case might conceivably impeach her on the ground that she doubts her allegations would prevail in a civil action.").

consideration.²⁰² There is an instinctive tendency for some jurors to dismiss rape complaints by resorting to stereotypes about conniving and deceitful accusers.²⁰³ For a juror who begins with this orientation, evidence of a parallel civil suit could throw gas on the fire.

Consider the possibility that survivors who foresee embarrassing impeachment for bias arising from civil suits might prefer to sidestep any criminal proceeding and focus solely on civil litigation.²⁰⁴ After the Supreme Court strengthened confrontation requirements two decades ago, a prosecution for rape or sexual assault is unlikely to succeed without

202. See William Friedlander & Alexandra Rudolph, *The Bias Beneath: Uncovering Juror Bias in Sexual Assault Cases*, PLAINTIFF MAG., June 2010, at 2 (discussing various categories of jury bias, including suspicion that alleged sexual assault survivor is trying to win the "litigation lotto"); see also Lininger, *Is It Wrong*, *supra* note 195, at 1610–11 ("Because of a psychological phenomenon that might be termed the ulteriority heuristic, jurors attempt to make sense of perplexing facts by resorting to a familiar explanation: people lie to advance their hidden selfish motives, especially greed. . . . Moreover, the cognitive structure of availability bias leads jurors to favor readily available evidence (details of accusers' civil suits) over less available evidence (details concerning the sexual misconduct alleged by the prosecution)."); Orenstein, *Special Issues*, *supra* note 194, at 1606 ("The jurors may ascribe or be susceptible to the rape myth that women who cry rape have something personal to gain from the accused's downfall, such as . . . cold cash."); see also BENJAMIN BARRETT, JR., ASSOC. OF TRIAL LAWS OF AM., BIAS IN SEXUAL ASSAULT CASES, 1845, 1845 (2006), Westlaw 2 Ann.2006 ATLA-CLE 1845 ("Jurors are suspicious of plaintiffs. Underlying this suspicion is the bias that the plaintiff has an ulterior motive, usually money, for bringing the case . . ."); Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 439, 461 (2006) (discussing jurors' susceptibility to a defense strategy portraying the accuser as an "unstable money-grubber" and further asserting that jurors are prone to regard accusers in rape prosecutions as "gold-digging" and "hoping to seek damages in a subsequent civil suit, especially if the defendant is wealthy"); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1051 (1991) (surveying psychological research to show that jurors feel a need to posit a "just world," and so they grasp at explanations that do not require them to ponder human capacity for such depraved crimes as rape).

203. See Orenstein, *Special Issues*, *supra* note 194, at 1604.

204. For example, when Kobe Bryant faced a high-profile prosecution for rape, his defense attorneys announced that they planned to impeach her on various grounds, including the fact that she was bringing a parallel civil suit. This announcement drew widespread media attention. Though the Bryant prosecution never proceeded to trial, the media's unflattering coverage of Bryant's accuser had a nationwide impact in dissuading other potential rape accusers from cooperating in criminal prosecutions. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1376–78 (2005) [hereinafter Lininger, *Bearing the Cross*]; see also Elaine D'Aurizio, *Kobe Bryant Rape Case Seen Having a Chilling Effect*, THE REC. N.J., June 15, 2004, at A1 (faulting the Bryant case for underreporting of rape); Blaine Harden, *Bryant Case Is Called a Setback*, WASH. POST, Sep. 3, 2004, at A8 (stating that employees at Rape Victim Advocates of Chicago—the largest rape crisis center in the Midwest—reported that rape victims sought counseling but did not want to press charges due to fears related to the Bryant case); Cathy Maestri & Ben Goad, *Southern California Activists Decry Bryant Decision*, RIVERSIDE PRESS-ENTER., Sep. 3, 2004, at A01 (stating that in Riverside, California, there was no decline in the number of rape victims seeking counseling, but the number of victims willing to press criminal charges did decline due to fears about the ordeal of trial).

cooperation by the accuser.²⁰⁵ Society as a whole would suffer if survivors of these crimes merely negotiated civil dispositions and the perpetrators escaped with impunity, preying on new victims.

What law reform would be the best way to address this problem? Evidence codes should impose stricter requirements for impeachment of accusers with evidence of parallel civil suits.²⁰⁶ Once again, a “reverse 403” test would offer the best hope of sorting meritorious impeachment from harassment that lacks significant probative value. A new rule should insist that the defendant in a criminal case cannot impeach the accuser for bias arising from a civil suit for the same alleged conduct unless the defendant can show that the probative value of this impeachment, supported by particular facts and circumstances, would substantially outweigh the prejudicial effect.²⁰⁷ Of course, if impeachment of the accuser with evidence of a civil suit were necessary to comply with the defendant’s Sixth Amendment right of confrontation, that imperative would trump any contrary considerations of prejudice.²⁰⁸

205. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (requiring that testimonial hearsay, i.e., a hearsay statement given to a government agent in a formal setting accusing the defendant of a past crime, is not admissible without an opportunity for cross-examination); *see also* GUIDING AND SUPPORTING A VICTIM’S CHOICE TO PARTICIPATE IN THE PROSECUTION OF SEXUAL VIOLENCE, RTI INT’L (2022), <https://sakitta.org/toolkit/docs/14405SAKIVctmChoiceProsecution.pdf> [<https://perma.cc/2U7Q-VBKL>] (“Even highly skilled prosecutors may not be able to overcome the legal challenges of a sexual assault case without a victim’s testimony.”).

206. These requirements could go in a new subpoint of the rape shield law. *See* FED. R. EVID. 412.

207. Adoption of that balancing test in this context makes sense because the test appears in several other contexts where courts insist that proponents must “show their work” to earn the admission of potentially prejudicial evidence. Federal Rule of Evidence 609 already uses this balancing test for impeachment with non-dishonesty convictions that are more than ten years old. A pending amendment to Federal Rule of Evidence 609, already approved by the Judicial Conference Advisory Committee on the Federal Rules of Evidence and awaiting approval by the U.S. Supreme Court and Congress, would take the same approach in evaluating impeachment of any witness other than the accused with evidence of a non-dishonesty conviction. *See* COMM. ON RULES OF PRAC. AND PROC. JUD. CONF. OF THE U.S., *supra* note 187. In addition, the “reverse 403” test is used in other rules such as Federal Rule of Evidence 703, which allows otherwise inadmissible evidence that underlies expert opinions, and Federal Rule of Evidence 412(b)(2), which authorizes a judge in a civil case to admit evidence of the complainant’s prior sexual behavior or sexual predisposition. *See* FED. R. EVID. 703; FED. R. EVID. 412(b)(2).

208. Whether impeachment during cross-examination is a constitutional concern turns on the relevance of the impeachment evidence. *See, e.g., Quinn v. Haynes*, 234 F.3d 837, 850 (4th Cir. 2000) (holding that trial court’s exclusion of certain impeachment evidence during defendant’s cross-examination of accuser in prosecution for sexual assault did not implicate constitutional issues because the probative value was scant and prejudicial effect was significant); *see also Roundtree v. United States*, 581 A.2d 315, 321 (D.C. 1990) (finding no constitutional right to impeach accuser in prosecution for sexual assault when proffered evidence was not relevant). As noted previously, the evidence of an accuser’s parallel civil

C. Exposing Biased Statements in Jury Deliberations

In 2017, the Supreme Court considered whether comments during jury deliberations could be admissible evidence to show that racial prejudice tainted a verdict.²⁰⁹ That case, *Peña-Rodriguez v. Colorado*, was a criminal prosecution of a Hispanic defendant for sexual assault of two minor girls.²¹⁰ One juror had made racist comments during deliberations, and had generalized that men of Mexican ancestry are more likely to commit sexual abuse.²¹¹ The Supreme Court noted that a strict rule normally prohibits any evidentiary use of comments made during jury deliberations,²¹² but the Court held that the Sixth and Fourteenth Amendments require an exception for comments evincing racial bias.²¹³ The Court concluded that an inquiry into jury deliberations should be permissible where “a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant.”²¹⁴

As noted in prior sections of this Article, there is a risk that jurors approach the topics of rape and sexual assault with significant biases,²¹⁵ and it is foreseeable that some jurors could articulate these biases in deliberations. Yet no published judicial opinion has extended the holding of *Peña-Rodriguez* to sexist or misogynistic comments by jurors. In *United States v. Brown*, the Eleventh Circuit explicitly held that *Peña-Rodriguez*

suit may have dubious impeachment value, so the accused does not necessarily have a constitutional right to introduce such evidence.

209. See *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210–11 (2017).

210. See *id.* at 211.

211. According to affidavits submitted by two other jurors, the juror in question made several inflammatory remarks during deliberations. He told the other jurors that he “believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” *Id.* at 213. This juror stated his belief that Mexican men are physically controlling of women because of their sense of entitlement. See *id.* He further stated, “I think he did it because he’s Mexican and Mexican men take whatever they want.” *Id.* He said that in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” *Id.*

212. Federal Rule of Evidence 606(b) generally forbids a juror from testifying or providing an affidavit concerning “any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.” FED. R. EVID. 606(b). Colorado’s version of Rule 606(b) is substantially similar. COLO. R. EVID. 606(b). The purpose of these rules is to protect the finality of verdicts, safeguard against harassment of jurors after they render their verdict, and facilitate candid and forthright deliberations without fear that jurors’ comments will later become public. See FED. R. EVID. 606(b).

213. See *Peña-Rodriguez*, 580 U.S. at 222–25.

214. *Id.* at 225.

215. See *supra* notes 182–84 and accompanying text.

does not apply to gender-related bias.²¹⁶ The Third and Sixth Circuits have also refused to extend *Peña-Rodriguez* beyond the context of racial bias, although these circuits did not confront the issue of gender bias as directly as did the Eleventh Circuit.²¹⁷ The limited application of *Peña-Rodriguez* to racial bias is due in part to the adoption of the Fourteenth Amendment shortly after the Civil War, indicating that the Amendment prioritized racial justice for the freed slaves.²¹⁸ Another rationale for limited application of this exception is the Supreme Court's concern that jurors are uniquely reticent to disclose racial bias during voir dire,²¹⁹ so post hoc consideration of racist comments in deliberations might be the only way to ferret out bias.

The compartmentalization of *Peña-Rodriguez* as a race-only rule stands in stark contrast to the wide extension of other constitutional safeguards against jury bias. *Batson v. Kentucky*²²⁰ and its progeny apply not only to preemptory challenges of jurors due to race, but also to challenges due to gender.²²¹ In *Duren v. Missouri*, the Court found unconstitutional a state rule that caused significant underrepresentation of women on juries.²²² Bias in jury deliberations is always wrong, and the need to restrict gender-related bias is no less urgent than the need to restrict racial bias.²²³

Federal Rule of Evidence 606(b) and its state counterparts should be amended to allow admission of evidence concerning racist or sexist comments during jury deliberations if those comments had a substantial effect on the verdict. Inclusion of such a provision in evidence codes would

216. See 934 F.3d 1278, 1303 (11th Cir. 2019) (declining to extend *Peña-Rodriguez* to juror comments evidencing gender bias, observing that “neither this Court nor the Supreme Court has ever suggested that gender bias warrants an exception” to the general rule against using juror comments during deliberations as a basis to impeach a verdict).

217. In *United States v. Nucera*, the Third Circuit opined that the exception created by *Peña-Rodriguez* is “narrow and specific: it requires a clear statement that a juror voted for conviction based on racial animus toward, or stereotypes about, the defendant.” 67 F.4th 146, 151 (3d Cir. 2023) (emphasis omitted). In *United States v. Brooks*, the Sixth Circuit determined that *Peña-Rodriguez* requires “express statements of racial animus,” and indicated that extending the Court’s holding to race-neutral statements would risk the possibility that the “exception would eventually swallow the rule.” 987 F.3d 593, 605 (6th Cir. 2021) (emphasis omitted).

218. See *Peña-Rodriguez*, 580 U.S. at 222.

219. See *id.* at 224.

220. 476 U.S. 79, 89, 94–95 (1986) (forbidding race-based preemptory challenges of prospective jurors, and specifying a procedure for reviewing challenges).

221. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (applying *Batson* rule to preemptory strike of a juror based on gender discrimination).

222. See 439 U.S. 357, 370 (1979) (striking down state rules that limited representation of women in venire).

223. Cf. *Peña-Rodriguez*, 580 U.S. at 252 (Alito, J., dissenting) (noting that there is no principled reason to forebear from extending the holding of *Peña-Rodriguez* to sexist comments by jurors during deliberations).

eliminate the need to cite a constitutional basis for the rule. The protection could extend not only to defendants in criminal cases, who have the strongest claim to constitutional protection, but also to complainants. To be sure, the Double Jeopardy Clause would still forbid retrial after an acquittal,²²⁴ so the prosecution could not appeal a verdict for the defendant based in part on sexist or misogynistic comments in the jury's deliberations. But the new rule would have a salutary effect in civil cases,²²⁵ which are not subject to the Double Jeopardy Clause. Further, the possibility of an evidentiary hearing probing sexist comments in the jury room could have a substantial deterrent effect, reducing the frequency of such comments (especially if trial judges gave jury instructions warning that such hearings could occur).

III. FORESEEABLE OBJECTIONS

This Part considers possible objections to the foregoing proposals. Part III.A addresses the argument that constraints on judicial discretion could lead to suboptimal evidentiary rulings in individual cases. Part III.B considers whether this Article's proposed limits on evidence of prior uncharged acts could incentivize overcharging that would circumvent these limits by enlarging the scope of admissible evidence. Part III.C responds to the objection that the victims' rights agenda is really just a subterfuge to help prosecutors. Part III.D addresses the argument that jury instructions would be an adequate safeguard to prevent prejudice and would avoid the need to overhaul evidentiary rules. Part III.E considers whether reforms to evidence rules would be ineffectual because the problems plaguing rape and sexual assault cases are attributable to more deep-seated cultural forces. Notwithstanding the various foreseeable objections, this Article's proposals would be beneficial on balance.

A. Constraining Judicial Discretion

Many of the foregoing proposals would limit judicial discretion and insist on a more uniform approach to admitting and excluding evidence. Constraints on judicial discretion often draw criticism on the ground that individual judges are in the best position to weigh the benefit and harm of

224. See *Fong Foo v. United States*, 369 U.S. 141, 143–44 (1962) (emphasizing that an acquittal, even if procedurally flawed, terminates jeopardy for purposes of the Double Jeopardy Clause and therefore forecloses any further prosecution on the same charge).

225. So far, the only published opinion applying the *Peña-Rodriguez* rule to civil cases is *Harden v. Hillman*. See 993 F.3d 465, 481–82 (6th Cir. 2021) (finding the constitutional basis for applying *Peña-Rodriguez* in civil cases in the Fourteenth Amendment, not the Sixth Amendment, which applies solely to criminal trials).

particular evidence.²²⁶ According to this view, different circumstances could justify deviation from a uniform approach. The trial judge, who has the best vantage point from which to observe the gestalt of the courtroom, the credibility of witnesses, and the reaction of the jury, should have broad discretion to rule on the admissibility of evidence. This faith in judicial discretion has a long history in the United States and is part of the reason why appellate courts give deferential review to trial courts' evidentiary rulings.²²⁷

Nonetheless, there are several legitimate reasons to limit judicial discretion as this Article has proposed. First, the risk of bias among judges and juries is unusually high in cases involving allegations of rape or sexual assault.²²⁸ Second, judges who face election—i.e., virtually all judges in state court—face tremendous public pressure when they handle this category of cases, and political considerations do not always align with procedural justice.²²⁹ Third, judges are too busy to stay abreast of new research in cognitive science, and they may persist with outdated assumptions. Fourth, as the Supreme Court has noted in the particular context of sexual assault prosecutions, judicial discretion in the admission of evidence leads to unpredictability,²³⁰ which could complicate trial preparation, reduce plea bargaining, and convert a criminal trial into a game of roulette. Finally, even when discretionary rulings are the best means of admitting or excluding evidence, the current rules do not frame the balancing inquiry properly. Discretion should not be eliminated altogether. Rather, the evidentiary rules need greater nuance to guide discretion.

B. Incentivizing Overcharging

One possible criticism of this Article's proposal to limit extrinsic evidence of the defendant's prior conduct is that the prosecution might circumvent the

226. See, e.g., *State v. Awbery*, 382 Mont. 334, 338 (Mont. 2016) ("The Rape Shield Law cannot be applied to exclude evidence arbitrarily or mechanistically, and it is the trial court's responsibility to strike a balance between the defendant's right to present a defense and a victim's rights under the statute.") (internal citations omitted).

227. See *Carroll v. Trump*, 124 F.4th 140, 157 (2d Cir. 2024) (noting, in an appeal of a lawsuit alleging sexual assault, that appellate review of evidentiary rulings must be highly deferential; only a "manifestly erroneous" ruling constitutes abuse of discretion).

228. See *supra* notes 181–83 and accompanying text; Lininger, *Is It Wrong*, *supra* note 195, at 1585 (discussing judicial bias in rape cases).

229. See KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES, BRENNAN CTR. FOR JUST. 1–2 (Dec. 2, 2015) (reporting results of empirical study showing correlation between political advertising in judicial elections and tough sentences in a range of criminal cases).

230. See *Tome v. United States*, 513 U.S. 150, 164–65 (1995) (criticizing judicial discretion and favoring a categorical approach to admissibility with respect to prior consistent statements by complainants in child sexual abuse cases).

limit by charging the prior acts. Charged offenses are not extrinsic,²³¹ so evidence of those offenses would not be subject a new ban on propensity evidence. It would be no small irony if a new evidentiary rule intended to protect defendants actually led to harsher charges.

This concern is unwarranted. Eliminating Federal Rules of Evidence 413 and 414 and their state counterparts would not distort charging practice. Without Rules 413 and 414, the admissibility of prior acts evidence would be judged under Federal Rule of Evidence 404(b) and its state analogs—the approach currently used for all categories of prosecution except those involving sex crimes or child abuse.²³² Though prosecutors could duck the restrictions of Rule 404(b) by converting the uncharged prior acts into new counts of the pending indictment, few prosecutors use this strategy.²³³ The prior acts were uncharged for a reason. Proof of the prior acts beyond a reasonable doubt must have seemed unlikely, and that is why prosecutors did not charge them in the past. Adding fragile charges to the pending indictment might expand the scope of admissible evidence, but it would undermine the overall credibility of the prosecution in the eyes of the jury.²³⁴ Acquittal on those dubious counts might increase the likelihood of acquittal on the most recent count. Cautious prosecutors generally do not solve Rule 404(b) problems by expanding charges,²³⁵ so it is unlikely that prosecutors would attempt that strategy in rape and sexual assault cases if Rule 404(b) took over for Rules 413 and 414 in regulating the admissibility of prior uncharged acts.

231. See EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §1:1–1:17 (2025 ed.) (defining uncharged misconduct evidence and distinguishing it from other categories of evidence).

232. Federal Rules of Evidence 413–15 apply to cases involving allegations of sexual assault and child molestation exempting such cases from Federal Rule of Evidence 404. See discussion *supra* Part I.A. There are no other subject matter exclusions from Federal Rule of Evidence 404.

233. For a general discussion of the reasons why prosecutors are wary of bringing weak charges to trial, see Jenia I. Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., 2012).

234. See Andrew Leipold & Hossein Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 395–96 (2006) (pointing out that “adding a weak charge may undermine the government’s credibility with the jury, possibly infecting the other, stronger charges”).

235. See *id.* (noting tactical danger of adding a charge to address a concern about the fragility of another charge).

C. Bolstering Prosecution Under the Guise of Protecting Complainants

Some scholars have criticized the “feminist war on crime.”²³⁶ According to these critics, the law has gone too far in prioritizing the interests of crime victims and their advocates. New rules adopted for the ostensible purpose of protecting women are strengthening the power of prosecutors and exacerbating mass incarceration.²³⁷ A critic with these concerns might object to the victim-oriented proposals in Part II, *supra*. In blue states that ordinarily safeguard the procedural rights of defendants, women’s groups could persuade legislatures to erode those rights in cases involving allegations of rape and sexual assault.²³⁸ In the eyes of these critics, the real beneficiaries of the feminist war on crime are not female crime victims, but prosecutors.²³⁹

While there is some merit in the critique of overcriminalizing intimate partner violence, the particular proposals set forth in Part II, *supra*, do not deserve such criticism. These proposals would simply shield complainants from certain categories of mistreatment, especially on the stand, when they seek recourse from the legal system. For example, the proposals would stop impeachment that has scant probative value, that inflames the bias of the jury, and that could deter future reporting of crime. Another proposal would reduce the likelihood that jurors would use explicitly sexist or misogynistic language in deliberations. None of the proposals would expand statutory crimes or increase the sentences prescribed for these crimes, which have been the primary concerns of critics who inveigh against the “feminist war on crime.”²⁴⁰

D. Underestimating the Curative Effect of Jury Instructions

Some critics might raise the concern that the proposals set forth in this Article reflect too much distrust of juries. For example, some of the proposals seek to limit juries’ access to potentially prejudicial information.²⁴¹ According to these critics, a basic faith in juries is necessary

236. See, e.g., Gruber, *supra* note 3, at 41–44 (arguing that feminists who consider themselves progressive, and who normally vote to protect defendants’ rights, sometimes team up with Republicans in favoring a harsh response to allegations of violence against women).

237. See Gruber, *supra* note 3, at 41–44.

238. See Gruber, *supra* note 3, at 41–44.

239. See Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1227–33 (stating that “the carceral state is antithetical to advancing the safety and security of all women,” but many feminists “advocate for more police, more prosecutions, and more prison”).

240. See Gruber, *supra* note 3, at 41–44; Levine, *supra* note 239, at 1227–33.

241. See, e.g., discussion *supra* Part I.A (proposing to limit admissibility of evidence regarding a defendant’s propensity to commit similar crimes), II.A (proposing to limit admissibility of evidence regarding the accuser’s prior consensual sex with the accused), and

to implement the Founders' intent of empowering laypeople to determine guilt or innocence in a criminal case, or to determine liability and damages in a civil case. The argument is that, rather than restrict the evidence available to juries, the best approach would be to show juries a wide range of evidence and instruct juries about how best to weigh this evidence.²⁴² Judicial instructions can identify risks that pertain to particular categories of evidence. If we trust juries to assess guilt or civil liability, why can we not trust them to handle individual pieces of evidence for which judges have provided interpretive guidance?

The notion that juries must have unfettered access to highly inflammatory evidence is naïve and dangerous. Our current evidence rules recognize the peril of showing juries prejudicial evidence: indeed, the current rules consist largely of safeguards that deny juries access to certain categories of evidence although the rules grant judges access to the same evidence.²⁴³ As noted previously, jury bias is especially problematic in cases involving allegations of rape and sexual assault. Instructions cannot solve the problem when juries receive highly inflammatory evidence.²⁴⁴ The Supreme Court held over a half century ago that unduly sanguine faith in jury instructions to cure prejudice in a criminal case is reversible error.²⁴⁵

II.B (proposing to limit impeachment of the accuser with evidence that she has filed a parallel civil suit seeking recovery for the acts at issue in the instant prosecution).

242. *See, e.g.*, *United States v. Sanchez*, 42 F.4th 970, 975 (8th Cir. 2022) (holding that, in prosecution for alleged sex crimes, jury instructions were sufficient to prevent prejudice arising from admission of evidence under Rules 413 and 414 concerning prior uncharged sexual assault).

243. *See, e.g.*, FED. R. EVID. 407–12 (categorically excluding otherwise relevant evidence concerning settlement offers, religious affiliation, defendants' insurance coverage, etc., on the ground that admission would cause prejudice and run afoul of various policy objectives); FED. R. EVID. 1101 (applying rules of evidence to trials, but not to hearings when only judges are present); FED. R. EVID. 104(b) (allowing judges to consider any nonprivileged information, whether or not that information would be admissible in a jury trial, as judges rule on preliminary matters such as admissibility of evidence).

244. *See* Pamela Sandberg, Tess M. S. Neal & Karey L. O'Hara, *Can Jurors Disregard Inadmissible Evidence? Using the Multiphase Optimization Strategy to Test Interventions Derived from Cognitive and Social Psychological Theories*, 15 BEHAV. SCI. 7 (2024) ("Appeals courts repeatedly affirm instructions to disregard as a sufficient safeguard of defendants' constitutional rights, despite research finding that jurors do not disregard when instructed.").

245. *See* *Bruton v. United States*, 391 U.S. 123, 126–30 (1968) (repudiating the notion that jury instructions are sufficient to stop a jury from considering prejudicial evidence for impermissible purposes); *see also* *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome with instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (internal citation omitted).

E. Overlooking Deep-Seated Cultural Problems

One especially compelling objection is that proposals for law reform do not address the underlying cultural issues that perpetuate sexual predation and that cause unfairness in both criminal and civil cases. These cultural issues include patriarchal notions about the subordinate status of women, retrograde assumptions about chastity as a condition for a valid complaint, indifference among law enforcement personnel and university officials about the need to protect against sexual abuse, and bias among prospective jurors who distrust accusers and believe “boys will be boys.”²⁴⁶ Some critics believe that rules like the rape shield law actually compound the problematic cultural issues, reinforcing the notion a chaste accuser is the *sine qua non* of a successful rape prosecution.²⁴⁷

The cultural problems are indeed formidable, but they do not obviate the need for incremental law reform. A defendant facing prosecution for rape deserves a fair trial, and it is little consolation for such a defendant when overbroad evidentiary rules remain in place because critics of the system believe that deep-seated cultural problems make any law reform hopeless. Similarly, when a survivor of rape or sexual assault summons the strength to take the stand, that witness should not be subject to ruthless harassment²⁴⁸ merely because misogynistic bias is endemic in American culture. The need for cultural transformation is not mutually exclusive with the need for incremental improvement of procedural rules: in fact, the advancement of one objective facilitates the pursuit of the other.

CONCLUSION

This Article has advocated for thirteen new rules or rule amendments that should appear in federal and state evidence codes. These amendments would reduce bias against both complainants and defendants in cases involving allegations of rape and sexual assault. Current law is deeply flawed due to misunderstanding of cognitive science, irrational antipathy toward accusers

246. The cultural problems listed here are so pervasive that they even shape the judgment of survivors as they decide whether to file complaints or make reports to police. *See generally* Karen Weiss, “Boys Will Be Boys” and Other Gendered Accounts: An Exploration of Victims’ Excuses and Justifications for Unwanted Sexual Contact and Coercion, 15 VIOLENCE AGAINST WOMEN 810 (2009) (setting forth findings from study involving 944 victim narratives).

247. *See* Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 854–71 (2013) (arguing that rape shield laws have compounded the problem by reinforcing the assumption that accusers in rape prosecutions should expect an accuser to be chaste).

248. *See* Lininger, *Bearing the Cross*, *supra* note 204, at 1355–58 (noting that cross-examination is particularly harsh and agonizing for accusers in prosecutions of sexual assault and listing harms resulting from this asperity, including revictimization of accusers, failed prosecutions, and reluctance of other sexual assault survivors to file charges).

and defendants, and political pressures on legislatures and judges. Changes to the evidence rules could help to improve fairness in court cases although basic cultural problems require remedial measures such as improved education, expansion of counseling and preventative services, and more thorough training of law enforcement personnel.

The limited space in this Article does not permit exploration of unique evidence rules at the state level that create unfairness in prosecutions and civil suits for sexual misconduct. Future scholarship should focus on at least three categories of unique state rules: 1) rules that allow impeachment of defendants with evidence of non-convicted prior acts involving intimate partner violence;²⁴⁹ 2) rules that admit an alleged victim's hearsay statements to any government audience with twenty-four hours of such violence;²⁵⁰ and 3) rules that admit prior domestic violence or sex crimes to show a defendant's propensity.²⁵¹ At the state level, bipartisan coalitions sometimes support bills to crack down on violence against women, and the resulting changes to evidence codes tend to escape the attention of commentators. Because the vast majority of prosecutions and tort cases involving sexual abuse end up in state court,²⁵² it is necessary to scrutinize closely the unique state-level rules that could cause injustice in these cases.

249. *See, e.g.*, Or. Rev. Stat. §40.355 (2026) (Oregon Evidence Code section 609(2) admitting, in prosecutions for certain sex crimes, impeachment evidence of prior intimate partner violence; permissible purpose is to attack credibility of defendant who testifies).

250. *See, e.g.*, Mo. REV. STAT. § 491.075 (2026) (permitting prosecution to introduce hearsay statements by sex abuse victims under eighteen or other vulnerable people).

251. *See, e.g.*, CAL. EVID. CODE § 1101(b) (West 2026) (allowing evidence of prior sex abuse to prove “whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented”); *see also* CAL. EVID. CODE § 1109 (West 2026) (allowing such evidence in prosecutions for certain sex crimes including those involving elder abuse and child abuse).

252. *See* BERRY, *supra* note 229 (indicating that state courts are responsible for over ninety percent of rape convictions).