NOTES

THE CONSTITUTIONAL DEMAND FOR EVIDENTIARY ASYMMETRY TO PROTECT THE ACCUSED

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INTRODUCTION

Evidence law's ultimate purpose is to maximize accurate fact-finding.[1] To encourage accuracy, evidence rules are typically applied symmetrically to both parties, allocating the risk of error equally.[2] To prevent errors, the rules exclude

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1. FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

2. *See* Dale A. Nance, *Allocating the Risk of Error: Its Role in the Theory of Evidence Law*, 13 LEGAL THEORY 129, 130–31 (2007) (book review) (explaining conventional framework in Anglo-American evidence law is to serve the goals of "(1) enhancement of accuracy in fact-finding, or, in other words, minimization of the risk of error; (2) minimization of the expenses that fact-finding procedures and decisions incur; and (3) apportionment of the risk of error with the consequent risk of misdecision between the parties to litigation."); *see also* Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 561 (2013) (explaining that evidence rules are applied symmetrically in civil cases but less symmetrically in criminal cases).

relevant evidence when deemed "unreliable."[3] Trial judges are granted significant discretion to decide whether certain evidence is "reliable" or not.[4] Admitting only relevant and reliable evidence is thought to aid factfinders in uncovering the ultimate truth.[5]

But, in criminal trials, "truthfinding is not the only value at stake."[6] Other values like the presumption of innocence, the moral force of criminal law, and the accused's liberty interest cut against maximizing accuracy. These principles are rooted in the Constitution, which grants the accused procedural rights in criminal trials that the prosecution does not enjoy.[7]

Criminal defendants' constitutional rights often conflict with established evidence rules, frustrating the truth-seeking goals of evidence law.[8] The Constitution requires some level of evidentiary asymmetry in criminal trials, in part to correct for the asymmetrical interests of the accused and the prosecution.[9] Constitutional rights, therefore, ought to limit the scope of evidence rules when applied to criminal defendants.

However, the Federal Rules of Evidence were not drafted with modern constitutional concerns in mind.[10] Rule 402 simply provides that "[r]elevant evidence is

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3. *See, e.g.*, FED. R. EVID. 801, 702; *see also* Madeline Smedley, Note, *Hearsay in the Modern Age: Balancing Practicality and Reliability by Amending Federal Rule of Evidence 801(d)(1)(A)*, 87 GEO. WASH. L. REV. 207, 209 (2019) ("The hearsay rule is a prime example of a limitation that enhances the reliability of evidence, as the rule's main function is to keep out statements if their trustworthiness cannot be adequately assessed."); *see generally* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (holding that Rule 702 requires trial judges to ensure expert testimony is reliable).

4. *See generally* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (holding that Rule 702 grants trial judges significant discretion in determining whether to admit expert testimony).

5. *See* FED. R. EVID. 102; Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom about Excluding Defense Evidence*, 86 GEO. L. J. 621, 632 (1998).

6. Goldwasser, *supra* note 5, at 632.

7. *See* U.S. CONST. amends. IV, V, VI.

8. *See infra* Part II.B.

9. *See* U.S. CONST. amends. V, VI (identifying rights specific to the accused, including the evidentiary right "to be confronted with the witnesses against him"); Nuno Garoupa, *Explaining the Standard of Proof in Criminal Law: A New Insight*, 25 SUP. CT. ECON. REV. 111, 112–13 (2017) (discussing how the constitutional requirement of a "beyond a reasonable doubt" burden of proof for criminal defendants has justified based on the assumption that a "false positive," or a wrongful conviction, is more costly than a "false negative," or a wrongful acquittal).

10. The Federal Rules of Evidence were first drafted in 1970 and codified in 1975. *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 957 (2022). However, some amendments to the Federal Rules have since focused on emerging constitutional problems. *See* Daniel J. Capra & Liesa L. Richter, *Long Live the Federal Rules of Evidence!*, 31 GEO. MASON L. REV. 1, 31–38 (2024). An example is Federal Rule of Evidence 803, which was partially drafted with the Confrontation Clause in mind. *See* FED. R. EVID. 803 advisory committee's note. It states:

> While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception [803(22)] does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation.

admissible"—unless the Constitution "provides otherwise."[11] And the Advisory Committee's Note to Rule 402 states that the "rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence."[12] With the exception of Rules 803(8) and 412,[13] the rules that frequently conflict with defense rights generally do not acknowledge that constitutional concerns might be at play—leaving constitutional enforcement to the accused and their counsel.[14] And, although amendments to the rules have focused on ensuring that criminal defendants are treated fairly,[15] substantive changes have thus far largely maintained the status quo.[16]

When applied to criminal defendants, this Note argues that certain evidence rules have attained supremacy over criminal defendants' constitutional rights. A review of the Federal Rules of Evidence that have come into repeated conflict with defendants' constitutional rights demonstrates how evidence regulation tends to occupy the field, depriving defense rights of any evidentiary bite. These rights include the right to present a defense, the right to be proven guilty beyond a reasonable doubt, and the right to an impartial jury. When these rights conflict with evidentiary values, courts are reluctant to find evidence rules unconstitutional on their face or even in their application. Ironically, although almost all evidence rules apply equally to the parties, in practice, some tend to favor the prosecution.

Id. Caselaw interpreting that Rule 803(6) may not be used to circumvent 803(8) has also generally been based on confrontation considerations. *See* FED. R. EVID. 803 advisory committee's note. The Advisory Committee's notes state:

> [T]he rule with respect to evaluate [sic] reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Id. As discussed in Part II.B, the confrontation right has been enforced more forcefully against the Federal Rules of Evidence since *Crawford v. Washington*, 541 U.S. 36 (2004).

11. FED. R. EVID. 402.

12. FED. R. EVID. 402 advisory committee's note.

13. *See* sources cited *supra* note 10; FED. R. EVID. 412(b)(1)(C) ("The court may admit . . . evidence whose exclusion would violate the defendant's constitutional rights.").

14. *See, e.g.*, FED. R. EVID. 702 (providing a framework for excluding expert testimony without advising that such exclusion might violate a defendant's right to present a defense).

15. *See* Capra & Richter, *supra* note 10, at 31–38 (discussing the Advisory Committee's efforts to ensure fairness for the criminally accused through a notice amendment to Rule 404(b), an amendment of Rule 804(b)(3) which originally placed a heavier burden on criminal defendants' introduction of hearsay statements against interest, an amendment that narrowed the breadth convictions that were automatically admitted under Rule 609, an amendment to Rule 106 which had been interpreted by some circuits to prevent criminal defendants from correcting a misimpression created by the prosecution, and the recent amendment to Rule 702 which limits overstatement by testifying experts).

16. *See* Nunn, *supra* note 10, at 961 (arguing that amendments adopted by the Advisory Committee since the Rules' inception are "demonstrative of an affinity for the status quo" and that "[m]issing [from the Federal Rules] is any attempt to expressly consider evidence law's role in falsely convicting scores of defendants exonerated by the Innocence Movement."). Professor Nunn also notes that the complicated process for amendment may be in part to blame for the lack of truly significant changes to the Rules: "[E]ven if rulemakers did deem a particular amendment desirable, the current bureaucratic maze establishes a de facto three-year process to actualize it." *Id.* at 958.

This Note argues that greater asymmetry in favor of criminal defendants is necessary to avoid evidentiary supremacy over constitutional rights and to enforce constitutional norms. Understood from this perspective, constitutional enforcement need not only occur through major doctrinal development—that is, overturning or abrogating cases that have weakened defense rights. Instead, implementing defense rights can occur through more constitutionally avoidant applications of evidence rules or through amendments to the rules themselves.

Part I begins with background on the constitutional principles that call for asymmetry, such as the values undergirding the right to be proven guilty beyond a reasonable doubt. Part I proceeds with a discussion of the Supreme Court's recognition of the demand for asymmetry as a means to enforce the supremacy of defense rights over evidence rules. The history of the Court's Confrontation Clause jurisprudence provides a helpful example of a constitutional right that was rescued from being absorbed into, and subservient to, modern evidence law.

Part II discusses how the application of certain evidence rules has overtaken or displaced other defense rights over time. First, Federal Rule of Evidence 702, which regulates the admission of testimony by expert witnesses, is generally applied asymmetrically—but in favor of the prosecution. This not only frustrates the rule's purpose of ensuring the reliability of expert witnesses, but also conflicts with the accused's constitutional right to present a meaningful defense. Second, Federal Rule of Evidence 606(b), the exclusionary rule which prohibits the use of jurors' testimonies about their deliberations to impeach a verdict, directly prevents the enforcement of the criminal defendant's right to an impartial jury.

Finally, Part III ends with an outline of several suggested approaches that may help to implement greater asymmetry in the Federal Rules of Evidence to prevent further constitutional displacement. Part III ultimately recommends amendment as the most effective approach for ensuring the accused's liberties are protected.

I. BACKGROUND

A. The Constitutional Demand for Asymmetry

The law—and evidence law in particular—likes to be perceived as even-handed.[17] As Professors Barbara Flagg and Katherine Goldwasser commented in 1998, "symmetry in law enjoys nearly the same status as mom, baseball, and apple pie: it is of the essence of the American way of life."[18]

By default, the Federal Rules of Evidence apply the same way in civil and criminal trials.[19] However, in criminal trials, the Constitution does not treat both parties the

17. *See, e.g.*, Karen Petroski, *The Rhetoric of Symmetry*, 41 VALPARAISO U. L. REV. 1165, 1184–85 (2007). *But see also* Dretke v. Haley, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting) ("The unending search for symmetry in the law can cause judges to forget about justice.").

18. Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L. REV. 105, 105 (1998).

19. FED. R. EVID. 1101.

same.[20] It grants criminal defendants several rights that it does not grant the state—the right to confront the witnesses against them,[21] the right to choose whether or not to testify on their own behalf,[22] the right to be proven guilty beyond a reasonable doubt,[23] and the right to an impartial jury.[24] As a result, criminal defendants' evidence, or objections to prosecution evidence, must be treated differently than prosecution evidence.

The Constitution's asymmetrical treatment of criminal defendants reflects the judgment that false convictions are a more egregious error than false acquittals.[25] This rationale can be traced back to the "Blackstone ratio," which posits that "it is better for ten guilty men to go free than for one innocent man to be convicted."[26] Enforcing a more exacting evidentiary standard against the prosecution also functions as an acknowledgement that "the moral force of the criminal law [might] be diluted" if the public is left to "doubt whether innocent men are being condemned."[27]

For example, *In re Winship*, the case in which the Supreme Court first formally recognized that criminal defendants have a due process right to be proven guilty beyond a reasonable doubt, outlines the constitutional preference for asymmetry.[28] The Court's opinion in *Winship* clarifies that, in a criminal trial, the defendant's liberty interest is of "transcending value," unlike the prosecution's interest in conviction.[29] And, in his concurring opinion, Justice Harlan reiterated Blackstone's ratio as incorporated into the Constitution's demand for due process.[30]

To secure these values, constitutional rights should supersede conflicting evidence rules that would otherwise apply equally to both parties.[31] After all, the Constitution is the "supreme Law of the Land."[32] If courts interpret compliance with the Constitution to require no more than compliance with the Federal Rules of Evidence, defense rights

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20. *See* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 821–22 (1989) [hereinafter Goldwasser, *Peremptory Challenges*].

21. U.S. CONST. amend. VI.

22. U.S. CONST. amend. V.

23. *See id.*; *see also In re* Winship, 397 U.S. 358 (1970) (finding that the due process clause requires the prosecution to prove every element of a crime beyond a reasonable doubt).

24. U.S. CONST. amend. VI.

25. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see also* Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY 1, 28 (2015) (explaining that "[a] common justification given for the proof beyond a reasonable doubt requirement is encapsulated in the 'Blackstone ratio'").

26. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see also* Lee, *supra* note 25, at 28.

27. *Winship*, 397 U.S. at 364.

28. *See id.* at 361–64.

29. *Id.* at 364.

30. *Id.* at 372 (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

31. *See* U.S. CONST. art. VI ("This Constitution ... shall be the supreme Law of the Land ...."); FED. R. EVID. 402 (explaining that evidence is admissible unless the Constitution provides otherwise); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

32. U.S. CONST. art. VI.

in the Fourth, Fifth, and Sixth Amendments might be rendered surplusage. Yet, as the foregoing discussion demonstrates, this is the case for several defense rights which have been taken over by a kind of evidentiary occupying of the field.[33] Trial judges' familiarity with the Federal Rules' sweeping regulatory framework for the admission of evidence risks becoming a kind of crutch against tackling constitutional problems.

Despite the special protections the Constitution gives the accused in criminal trials, the Federal Rules of Evidence include numerous exclusionary rules that apply equally to both parties in civil and criminal trials.[34] For the most part,[35] the Federal Rules of Evidence do not contemplate how to resolve conflicts between evidence rules and defense rights.[36] Nor do they advise trial judges on how to avoid constitutional problems. Alerting judges to a conflict between the application of an evidence rule and a right is therefore largely left to advocates—that is, criminal defense attorneys. Even Federal Rule of Evidence 412—which contains a rare direct reference to the defendant's rights—merely acknowledges the truism that "evidence whose exclusion would violate the defendant's constitutional rights" can be "admit[ted]" by the court.[37]

The danger is that evidence rules that broadly exclude evidence may be applied without regard to whether certain applications might violate the Constitution, resulting in constitutional violations that go unaddressed. Other laws passed by Congress that fail to address potential constitutional problems in their application are construed strictly.[38] For example, laws that fail to account for potential conflicts with free exercise rights[39] or federalism[40] frequently require a clear statement to indicate legislative intent to approach the verge of constitutionality. Without a clear statement, Congress is assumed not to have intended to create constitutional problems, and laws are construed to have a more limited scope.[41] It is worth questioning why the Federal Rules of Evidence ought to be treated differently. If rules

33. *See infra* Part III.

34. *See, e.g.*, FED. R. EVID. 801, 606.

35. *But see* FED. R. EVID. 412(b)(1)(C), 803(8). Although they do not directly reference constitutional rights, some other Rules do make exceptions for defendants or otherwise treat them asymmetrically. *See* FED. R. EVID. 404, 609; *see also infra* Part III.B (discussing how these rules address criminal defendants and whether they could be used as a model for amending other Rules like 702 and 606(b)).

36. *See* Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORN. L. REV. 57, 102 (2015); *see, e.g.*, FED. R. EVID. 702 (lacking guidance as to how to balance a defendant's right to present a complete defense with the framework for excluding unreliable expert testimony).

37. FED. R. EVID. 412(b)(1)(C); *see also* United States v. Carson, 870 F.3d 584, 593–595 (7th Cir. 2017) (holding that irrelevant evidence may be excluded without violating the defendant's constitutional rights).

38. *See, e.g.*, Bond v. United States, 572 U.S. 844 (2014).

39. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979).

40. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States.").

41. *See id.* at 464. It should also be noted that, under the Court's federalism-avoidance cases, a judge need not actually find the law would in fact be unconstitutional without avoidance. The constitutional problem need only be "potential." *Id.*

pose potential constitutional conflicts with defense rights, a clear statement rule might also be required before applying those rules broadly.

To make matters worse, trial judges' constitutionally un-avoidant application of evidence rules is frequently subjected to the deferential abuse of discretion standard of review.[42] This standard places an added burden on defendants to enforce their rights: if they fail to raise constitutional challenges at the trial-level, then unconstitutional decisions may receive appellate court deference.[43] Further, once an appellate court has found a certain application of the rules was *not* an abuse of discretion, defense counsel may be less likely to raise constitutional challenges to it. The result may well be a cycle in which appellate courts overlook constitutionally suspect rules and defendants interpret judicial deference as endorsement.

The Constitution demands that criminal defendants receive more evidentiary leeway on account of their heightened liberty interest. But the Federal Rules of Evidence contain exclusionary rules that make no mention of treating criminal defendants differently, or of the constitutional problems that are likely to arise in application. The burden is thus placed on defense counsel to raise these conflicts. If they do not, trial judges may apply the Federal Rules of Evidence in potentially unconstitutional ways. And the primary check on that decision-making process is highly deferential, constraining appellate courts' capacity to exert oversight on criminal trials and their evidentiary procedures.

The outcome is that certain evidence rules are perfectly situated to overtake constitutional concerns, which remain underenforced. To illustrate how this issue has surfaced historically—and how the Supreme Court helped to rectify it in one area—I turn now to a brief history of the confrontation right.

B. The Roberts *Effect and the* Crawford *Response*

To illustrate how the overenforcement of certain rules has eroded defense rights, it is helpful to consider a right whose erosion was later overturned. Defendants have a constitutional right "[i]n all criminal prosecutions . . . to be confronted with the witnesses against [them]."[44] Courts have long understood this right to mean that some out-of-court statements are inadmissible unless the defendant can "confront" the declarant through cross-examination.[45] In modern doctrine, the defendant's confrontation right is relatively powerful: it can exclude prosecution evidence in

42. *See, e.g.*, United States v. Foust, 989 F.3d 842, 845 (10th Cir. 2021).

43. After all, failure to assert a constitutional basis for an objection to an evidentiary ruling will generally waive that argument on appeal. *See* FED. R. EVID. 103; Ortiz v. Riggle, 677 F. App'x 261, 265 (6th Cir. 2017) (reiterating that an issue not raised in trial court is forfeited on appeal); United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 740 n.7 (10th Cir. 2018).

44. U.S. CONST. amend. VI.

45. *See generally* Mattox v. United States, 156 U.S. 237 (1895) (explaining the strength of defendants' Confrontation Clause rights).

direct contravention of the Federal Rules' scheme of admission.[46] But this was not always the case.

Like other defense rights, the confrontation "right would seem to have little significance if all it [did was] bar evidence that [was] already forbidden by nonconstitutional hearsay rules."[47] For years, however, confrontation rights were more or less redundant with the federal hearsay rules.[48] Under *Ohio v. Roberts* and its progeny, the prosecution needed only to show that the declarant was unavailable[49] and that their out-of-court statement fit within a "firmly rooted" hearsay exception, or else had "particularized guarantees of trustworthiness."[50]

The practical outcome of the *Roberts* doctrine was that statements that were reliable enough to be admitted under the hearsay rules were also good enough for the Confrontation Clause.[51] Effectively, the defendant's constitutional right to confront her witnesses had no separate power to exclude evidence in federal courts.[52] Instead, trial judges wielded discretion to exclude or admit testimonial statements based on how the hearsay rules dealt with reliability concerns.[53] Although the Constitution mandates that defendants have wider latitude to confront witnesses, in practice, the *Roberts* rule encouraged courts to employ pre-existing hearsay rules,

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46. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 323 (2009) ("Although the clerk's certificate would qualify as an official record under respondent's definition—it was prepared by a public officer in the regular course of his official duties— . . . the clerk was nonetheless subject to confrontation.").

47. Jeffrey Belin & Diana Bibb, *The Modest Impact of the Modern Confrontation Clause*, 89 TENN. L. REV. 67, 68 (2021).

48. *See* Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 800–02 (2000). Dickinson wrote:

> [T]he Court [under *Roberts*] has bound the Confrontation Clause and the hearsay rule under extremely transitory principles causing prior precedent to continually be pitted against new the factual scenarios presented to the Court. Instead of accepting the realization that the [*Roberts*] doctrine does not work, the Court remains faithful to the inharmonious relationship between the hearsay rule and the Confrontation Clause.

Id. See also Belin & Bibb, *supra* note 47, at 69–70 (2021) ("The [confrontation] right becomes redundant to the extent it simply bars evidence that is already inadmissible under nonconstitutional evidence rules.").

49. *See* White v. Illinois, 502 U.S. 346, 354 (1992) (narrowing the unavailability requirement significantly).

50. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

51. *See* Gary S. Lawson, *Confronting* Crawford*: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. 2265, 2275–76 (2017) ("In all instances, the clause is read [under the *Roberts* rule] to exclude unreliable or untrustworthy evidence and nothing more.").

52. *Id.* Lawson explained:

> If evidence was admitted by virtue of a hearsay exception that the justices on the Court circa 1980 would have learned about in law school half a century earlier, it automatically counts as 'reliable' and its admission therefore does not violate the Confrontation Clause. If it is admitted pursuant to some newfangled hearsay exception (for example, the 'catch-all' exception represented by Federal Rule of Evidence 807 and included in some state rules of evidence), then the Court will decide case by case whether the evidence is sufficiently reliable to be admitted over a Confrontation Clause exception.

Id.

53. *Id.*

essentially applying the right symmetrically to the defense and prosecution.[54] Under the *Roberts* rule, the confrontation right no longer had any bite.

Crawford v. Washington fundamentally altered this landscape.[55] It overruled *Roberts* and replaced it with a standard under which some out-of-court statements that would otherwise be admitted under the hearsay rules are excluded by defendants asserting their constitutional rights.[56] Relying on pre-Founding British history[57] and a dictionary from 1828,[58] Scalia upended and replaced the preexisting *Roberts* doctrine.

In so doing, Scalia also explained why the *Roberts* rule and its emphasis on hearsay policy was inconsistent with the Constitution.[59] "Where testimonial statements are involved," Scalia argued, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[60] Put another way, the Constitution's protection of the accused's confrontation right cannot be reduced to redundancy with the regulatory framework provided by modern evidence law.

Although *Crawford* ultimately reversed the trend of the confrontation right's absorption by the hearsay rules, the dominance of the *Roberts* rule prior to *Crawford* indicates that other defense rights are vulnerable to evidence rules' occupying the field. Trial judges' reliance on the regulatory landscape from the Federal Rules of Evidence has the potential to displace constitutional norms. Courts often find it easier to apply the familiar, clear-cut rules of evidence than to wrestle with complicated constitutional questions. Still, the sea change effected by *Crawford* shows that, even if there is more difficulty in application, doctrinal changes are possible, and warranted, when a right seems to have become redundant with evidence regulation.

II. THE PROBLEM: CONSTITUTIONAL RIGHTS ARE UNDER-ENFORCED BECAUSE EVIDENCE RULES ARE OVER-ENFORCED

Constitutional rights should override evidence rules.[61] But, outside the Court's Confrontation Clause jurisprudence, defendants' constitutional rights are still

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54. *Id.* at 2276–77. However, some prosecution evidence was excluded under the *Roberts* rule in rare cases because the hearsay exception asserted was not "firmly rooted." *See, e.g.*, Lilly v. Virginia, 527 U.S. 11 (1999) (plurality opinion).

55. 541 U.S. 36 (2004); *see also* Michael S. Pardo, *Confrontation After Scalia and Kennedy*, 70 AL. L. REV. 757, 763 (2019) ("*Crawford* revolutionized [evidence law] by effectively severing the ties between the Confrontation Clause's requirements and modern hearsay law."); Jerome C. Latimer, *Confrontation After* Crawford*: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 328, 329 (2006) (collecting cases from lower courts describing *Crawford* as a '"Copernican shift," a "substantial change," a "case of great importance," etc.).

56. *Crawford*, 541 U.S. at 68–69.

57. *See id.* at 52–54.

58. *Id.* at 51 ("[The Confrontation Clause] applies to 'witnesses' against the accused—in other words, those who 'bear testimony.") (quoting 2 N. Webster, An American Dictionary of the English Language (1828)).

59. *Id.* at 62–63.

60. *Id.* at 61.

61. U.S. CONST. art. IV, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land."). Some scholars have argued that constitutional rights or values should not always "trump" evidence rules. *See, e.g.*, Garrett,

being displaced by trial judges' adherence to the Federal Rules of Evidence.[62] Similar to its Confrontation Clause jurisprudence during the *Roberts* era, the Supreme Court has been reluctant to enforce other defense rights when they conflict with established evidence law or policy.[63] The Supreme Court's hesitance can trickle down.[64]

The result is that lower courts that implement the Court's timid rules for enforcing defense rights can exercise their own discretion to water down rights even further.

A review of two rules of evidence in particular demonstrates this issue.[65] Those rules, Federal Rules of Evidence 702 and 606, often conflict with defendants' constitutional rights when applied in the criminal context. I begin by discussing how Rule 702's emphasis on the reliability of expert evidence is in tension with the accused's right to present a meaningful defense. Second, Rule 606's ban on juror testimony to impeach a verdict prevents defendants from vindicating their right to an impartial jury.

A. Rule 702's Supremacy

Because trial judges defer to Rule 702's framework to determine expert opinion admissibility—rather than engaging with how the rule often conflicts with the accused's constitutional right to present a defense—the rule tends to displace the Constitution's demand for asymmetry. Federal Rule of Evidence 702 provides that expert testimony must be sufficiently reliable to be admitted in civil or criminal trials.[66] The rule reads:

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supra note 36, at 87 ("Rather than viewing constitutional law as an occasional trump over extreme unfairness in application of evidence law, constitutional law, I argue, is more often than appreciated, necessarily entwined with evidence law."). Of course, Federal Rule of Evidence 402 expressly provides that the Rules admit relevant evidence unless the Constitution "provides otherwise." FED. R. EVID. 402. This Note argues that several Rules are nonetheless applied in manners inconsistent with certain constitutional rights.

62. *See* discussion *infra* Part II.B, D.

63. *Id.*

64. *See* Doni Gewirtzmann, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 476 (2012) ("[T]he Court's recent habit of 'stealth overruling'—failing to extend a precedent . . . without explicitly overturning the case—shifts interpretive power to lower courts . . . to exercise discretion by undermining the continued authority of older precedent . . . ."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 848 (1993) ("The oath of constitutional fidelity, required of every public official by Article VI of the Constitution, is transformed, for the 'inferior' judge, into a duty to obey the Supreme Court.").

65. Although Rules 702 and 606 are the focus of this Note, these are not the only rules whose regulatory framework has tended to preempt the rights of the accused. *See, e.g.*, Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1008 (2018) (explaining that Rule 609's admission of prior convictions to impeach testifying witnesses conflicts with the defendant's right to testify in her own defense). Although beyond the scope of this Note, the application of Rule 104(b)'s standard of proof for admitting prior acts evidence under Rule 404(b) is also arguably in tension with the *Winship* mandate for proof beyond a reasonable doubt in criminal trials. *But see* Huddleston v. United States, 485 U.S. 681 (1988) (rejecting a higher standard of proof for admitting prior acts evidence based on the text and legislative history of Rules 404(b) and 104, without mentioning the *Winship* right).

66. FED. R. EVID. 702.

> Rule 702. Testimony by Expert Witnesses
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> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[67]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court first interpreted Rule 702 in its original state.[68] The *Daubert* Court found the rule was a rejection of the common law *Frye* test.[69] *Frye* only admitted expert testimony if the expert's method was generally accepted in the relevant field.[70] But the Court reasoned that test would have conflicted with the Federal Rules' "liberal thrust" toward "relaxing the traditional barriers to 'opinion' testimony."[71]

Rule 702 grants considerable discretion to trial judges. In addition to deciding whether an expert's testimony is sufficiently reliable to be admitted, judges also decide which factors apply to assess reliability.[72] And, after judges have decided whether or not to admit an expert's testimony, appellate courts review that decision for an abuse of discretion rather than *de novo*.[73]

The rule applies the same for assessing expert witnesses in civil and criminal trials.[74] In the civil context, "Rule 702 has largely fulfilled [its] intended goal."[75] When applied equally to civil plaintiffs and defendants, Rule 702 can act as a "quality-control filter" for expert evidence.[76] Scholars have observed that, in civil cases, there is more commonly a true "battle of the experts."[77] External factors likely contribute to Rule 702's greater success in civil litigation: "[P]laintiffs' attorneys hire scientific experts because they stand to share in any settlement or

67. *Id.*

68. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588–89 (1993).

69. *Id.* at 586–87.

70. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

71. *Daubert*, 509 U.S. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

72. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141–42 (1999) ("[T]he test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.").

73. General Electric Co. v. Joiner, 522 U.S. 136, 141–42 (1997).

74. FED. R. EVID. 702; 1101.

75. Eric S. Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 FORDHAM L. REV. 1661, 1662 (2018).

76. *Id.*

77. *See* Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1562 (2018).

award," and corporate defendants can afford to "secure the services of equally well-regarded experts."[78]

However, in its application to the criminal context, Rule 702 has been heavily criticized for its disparate impact on the accused.[79] Scholars and commentators have pointed out how, unlike in the civil context, Rule 702's criminal application tends to look favorably at prosecution experts while excluding criminal defense experts much more frequently.[80] For example, one study showed that trial judges approved prosecution experts' reliability under Rule 702 at a much higher rate than defense experts.[81] Courts also tended to scrutinize criminal defendants' experts more closely than civil defendants' and to approve of prosecution experts more frequently than plaintiffs'.[82] The result is that, despite being even-handed on its face, Rule 702's application may be asymmetrical in favor of the prosecution.[83]

Given their significant discretion over Rule 702's application, it is somewhat unsurprising that trial judges do not evenly admit or exclude expert testimony offered by prosecutors and criminal defendants.[84] After all, even a flawed application of Rule 702 can pass "abuse of discretion" muster.[85] Much of the asymmetry may also be due to courts' continued acceptance of forensic science methods which have since been discredited or whose accuracy has been exaggerated.[86] But that is not the only cause. In contrast to civil litigants or prosecutors, criminal defendants have significantly less opportunity to hire quality expert witnesses to

78. Peter J. Neufeld, *The (Near) Irrelevance of* Daubert *to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S110 (2005).

79. *See* Lander, *supra* note 75, at 1662; Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 SETON HALL L. REV. 1071, 1072, 1076 (2003).

80. *See, e.g.*, Garrett & Fabricant, *supra* note 77, at 1561–62.

81. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 151 (2000).

82. *See, e.g.*, *id.* at 108, 110.

83. Although there is evidence that Rule 702 is applied more stringently against criminal defendants and more flexibly against government evidence, it should be noted that it is incredibly difficult to empirically study evidence decisions on the ground. For example, decisions admitting defense evidence are not appealed post acquittal (due to Double Jeopardy), and generally also won't be appealed post-conviction. This prevents the development of published caselaw admitting defense expertise. At the same time, this may also prevent defendants from finding authorities to cite in favor of defense experts.

84. Risinger, *supra* note 81, at 151.

85. *See, e.g.*, United States v. Foust, 989 F.3d 842, 846–47 (10th Cir. 2021) ("On balance, our review of the *Daubert* factors provided mixed results . . . . We recognize that there has been criticism of handwriting expertise in both the courts and academic literature. However, given our standard of review, the district court did not abuse its discretion in finding [the expert's] methodology reliable.") (citation omitted).

86. *See* Lander, *supra* note 75, at 1676. Scholars and other research scientists have also pointed to the prevalent issue of law enforcement bias in forensic science. *See, e.g.*, Jonathan J. Koehler, Jennifer L. Mnookin & Michael J. Saks, *The Scientific Reinvention of Forensic Science*, 120 PNAS 1, 4 (2023) ("[T]he scientific status of the forensic sciences is compromised by its close association with [law enforcement]. If crime laboratories are beholden to the needs of law enforcement, they might be discouraged from pursuing scientific investigations that are not aligned with the interests of law enforcement.") (citations omitted).

testify in their defense.[87] On the other hand, prosecutors can draw on a cottage industry of forensic "experts" that are directly associated with law enforcement.[88]

The consequences of systemic inequality in the application of Rule 702 to criminal defendants are steep. By admitting expert witnesses, judges place "a stamp of reliability" on their testimony, to which the jury may choose to defer.[89] Rule 702 is meant to act as a gatekeeper for unreliable expert evidence because of the danger that jurors will take "expert conclusions . . . at face value."[90] Juror reliance on government witnesses' potentially faulty forensic science methods may thereby contribute directly to wrongful convictions.[91]

Setting aside the fact that an asymmetrically applied Rule 702 defeats its asserted purpose—that is, maximizing the admission of reliable expert testimony in order to guide the jury toward an accurate result—it has also displaced the crucial constitutional norm that criminal defendants be afforded greater evidentiary leeway to present a meaningful defense.[92] As Professor Jessica Cino has argued, "[i]t should be criminal defendants—whose liberties are on the line—who receive the benefit of *Daubert*'s rigor."[93]

B. The Right to Present an Expert Defense

The Due Process, Compulsory Process, and Confrontation Clauses[94] together guarantee criminal defendants "a meaningful opportunity to present a complete defense."[95] As a result, arbitrary evidence rules that are "applied mechanistically" to exclude important defense evidence may be unconstitutional.[96] This right allows

87. *See* Craig Bowman, Note, *Indigent's Right to an Adequate Defense Expert in Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 632 (1970).

88. Lander, *supra* note 75, at 1662 ("Various explanation have been suggested for the failure [of Rule 702 in the criminal context], including that the vast majority of forensic science laboratories serve only one side, the prosecution; most defendants lack the resources to mount serious challenges; and judges are reluctant to question practices that have long been used and admitted in court."); *see also* Erin Murphy, *No Room for Error: Clear-Eyed Justice in Forensic Science Oversight*, 130 HARV. L. REV. F. 145, 149 (2017) ("Indigent defense lawyers are notoriously overworked and underpaid, and many lack basic competencies, much less sophisticated scientific expertise.").

89. Lander, *supra* note 75, at 1662; Jessica G. Cino, *An Uncivil Action: Criminalizing Daubert in Procedure and Practice to Avoid Wrongful Convictions*, 119 W. VA. L. REV. 651, 698 (2016).

90. Lander, *supra* note 75, at 1661.

91. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305 (2021).

92. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

93. Cino, *supra* note 89, at 704.

94. The Supreme Court has not clearly identified from which clause the right to present a defense stems. *See* Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'") (citations omitted).

95. Holmes v. South Carolina, 547 U.S. 319, 319 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

96. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

criminal defendants more latitude to admit evidence in their defense than prosecutors have to admit evidence of culpability. It also limits the wide discretion a trial judge would otherwise have to exclude based on unreliability.[97] The right to present a defense necessarily includes the right to present an *expert* defense—meaning criminal defendants ought to have more flexibility to admit experts than prosecutors do.

The Supreme Court first formally recognized the right to present a defense and its application over fifty years ago in *Chambers v. Mississippi*.[98] In that case, a state "voucher" rule prohibiting parties from impeaching their own witness was found unconstitutional as applied to a criminal defendant who sought to impeach a witness using that witness's prior confession to the crime at issue.[99] Following *Chambers*, the right to present a defense had some success in overruling unconstitutionally applied evidence rules.[100] For example, it permitted defendants to admit evidence that would otherwise be excluded by hearsay or privilege rules.[101]

Given the right to present a defense, Rule 702's prosecution-friendly "gatekeeping" of expert evidence is constitutionally problematic. If judges are admitting faulty government experts while excluding equally unreliable defense experts, defendants are, at a minimum, deprived of an opportunity to respond to unreliable scientific evidence used against them. Even worse, judges tend to scrutinize defense experts more stringently than they do other parties' experts.[102] A consequence is that defendants are prevented from shedding light on some of the major causes of false convictions through expert testimony—in violation of their right to present a meaningful defense.

Take, for example, psychological experts on factors contributing to mistaken eyewitness identifications. Several of the U.S. Circuit Courts of Appeals have repeatedly affirmed trial courts' exclusions of these defense experts without discussion of the defendant's constitutional rights.[103] Because appellate courts review district courts' application of Rule 702 for abuse of discretion, trial judges are given significant leeway to encroach on defense rights without oversight.[104] Defense attorneys may also fail to argue that an application of Rule 702 would

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97. *Id.* For greater background on the birth of the right to present a defense and the opinion in *Chambers*, see Daniel S. Medwed, *Secrets of* Chambers*: The Constitutional Right to Present a Defense at Middle Age*, 66 ARIZ. L. REV. 571, 576–88 (2024).

98. *Chambers*, 410 U.S. at 294–95 (1973). It should be noted that six years prior to *Chambers*, in *Washington v. Texas*, 388 U.S. 14 (1967), the Court reversed a defendant's conviction because an evidence rule excluding testimony from co-defendants—which prevented the defendant from introducing exculpatory evidence indicating a co-defendant would have admitted they were the murderer—was unconstitutional.

99. *Chambers*, 410 U.S at 296–98.

100. *See* Medwed, *supra* note 97, at 575.

101. *See Chambers*, 410 U.S. at 302; Morales v. Portuondo, 154 F. Supp. 2d 706, 730, 732 (S.D.N.Y. 2001).

102. *See* sources cited and related text *supra* notes 81–85.

103. *See, e.g.*, United States v. Kime, 99 F.3d 870, 883–85 (8th Cir. 1996); United States v. Rincon, 29 F.3d 921, 925 (9th Cir. 1994); United States v. Brien, 59 F.3d 274, 277–78 (1st Cir. 1995).

104. *See Kime*, 99 F.3d at 883 ("The exclusion of expert testimony is a matter committed to the sound judicial discretion of the trial judge, and we will reverse only for an abuse of that discretion.").

violate their client's right to present a defense whatsoever.[105] Courts are thus free to simply rely on the evidence rules' regulatory framework, without regard to the Constitution's demand for asymmetrical treatment of defense evidence.[106] Without any assertion of the constitutional right that conflicts with Rule 702's exclusion of defense experts, appellate courts are more or less forced to affirm most trial judges' decisions under the abuse of discretion standard.

Illustrating the extent of judicial deference to evidence rules as supreme over constitutional rights, at least one court has gone so far as to suggest that, as long as a judge applies Rule 702 without legal error, it is impossible to violate the right to present a defense.[107] For example, in *Michigan v. Kowalski*, the Michigan Supreme Court considered whether a trial judge's application of Michigan Rule of Evidence 702[108] to exclude an expert's testimony on the psychological factors behind false confessions violated the defendant's rights.[109] The court reasoned that:

> The very act of conducting a *Daubert* hearing establishes that a [trial] court's gatekeeping role under MRE 702 is neither 'arbitrary' nor 'disproportionate to the ends [it is] asserted to promote' because 'the Constitution permits judges to exclude evidence that is . . . marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues' and evidence that fails to meet the requirements of MRE 702 will *always* be only marginally relevant or risk confusing the trier of fact.[110]

The view that judges cannot possibly violate the Constitution so long as they engage in a Rule 702 inquiry regarding defense evidence is misguided. For one thing, judges wield immense discretion in applying Rule 702 and are only checked for abuses of that discretion.[111] This creates constitutional problems. First, whether the accused may introduce scientific evidence in their defense may very well depend on the courtroom in which they happen to be tried. If defendants in Courtroom A can defend

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105. *See, e.g.*, Michael D. Cicchini, *Daubert Strategies for the Criminal Defense Bar*, 2021 U. ILL. L. REV. ONLINE 97 (2021) (outlining techniques for criminal defense attorneys when facing *Daubert* challenges without mentioning arguments based on the defendant's right to present a defense).

106. Supreme Court guidance on this question has been confusing at best. *See, e.g.*, Elizabeth Aileen Smith, *Did They Forget to Zero the Scales: To Ease Jury Deliberations, the Supreme Court Cuts Protection for the Mentally Ill in* Clark v. Arizona, 26 LAW & INEQ. 203 (2008) (explaining why the Court's decision in *Clark* that a state rule excluding expert testimony describing the symptoms of the defendant's schizophrenia was constitutional "violates the Constitution and should be reversed").

107. *See, e.g.*, People v. Kowalski, 821 N.W.2d 14 (Mich. 2012).

108. MICH. R. EVID. 702 is identical to FED. R. EVID. 702.

109. *Kowalski*, 821 N.W.2d at 18.

110. *Id.* at 35–36 (citations omitted).

111. *See* George Horvath, *Federal District Court Decisions on the Admissibility of Expert Witness Testimony: An Empirical Study and a Revision of the Conventional Narrative in the Toxic Tort Context*, 88 U. CIN. L. REV. 515, 534, 550–51 (2020) (noting that the abuse of discretion standard practically affords parties only one chance to admit expert testimony and finding, in an empirical study of trial judges' admissibility rulings on expert witnesses in toxic tort litigation, that trial judges' behavior frequently seems to be based on a "results-oriented" approach that seemed to rely more on unstated, external factors than on the actual evidentiary framework); General Electric Co. v. Joiner, 522 U.S. 136, 141–42 (1997).

themselves with experts on false confessions, but defendants in Courtroom B cannot, the result is an arbitrary rule, undermining any state interest in reliability.

Second, not all Rule 702 applications are the same. Appellate courts might come out differently on the reliability issue than the trial courts they review. Yet appellate judges are bound to respect trial judges' decisions as to admissibility so long as they remain within their discretion. If the constitutional question—whether the exclusion of a defense expert violated the defendant's rights—is redundant with the evidentiary issue—whether the expert satisfied Rule 702—does the abuse of discretion standard of review still apply? Under the Michigan Supreme Court's view, it is unclear whether an appellate court's disagreement with a trial judge's application of Rule 702—without actually finding abuse of discretion—still absolves the state of any constitutional wrongdoing.[112]

Lastly, if criminal defendants are being subjected to a higher standard of reliability, as studies have shown,[113] then Rule 702 is unconstitutionally arbitrary in its application. A rule that, in practice, privileges prosecution experts and contributes to false convictions does not maximize accuracy or prevent juror confusion. And arbitrary rules that fail to serve the state's asserted interest are unconstitutional.[114]

Caselaw applying *Kowalski* demonstrates these constitutional concerns. Consider one such difficulty: the abuse of discretion standard of review allows appellate courts to convey the false impression that certain types of scientific evidence are categorically unreliable under Rule 702. For example, in July 2024, the Michigan Supreme Court was forced to clarify to lower courts that its decision in *Kowalski* was *not* a categorical ban on false-confession testimony.[115] The prosecution and the trial court had assumed otherwise, despite defense counsel's objections.[116] But the court's mistake is hardly surprising—busy lower courts frequently rely on higher courts' opinions to supplant their decision-making and avoid reversal.[117] Appellate court decisions affirming constitutionally problematic applications of Rule 702 are thus reinforced. It is impossible to know how many Michigan defendants did not bother introducing false-confession testimony because trial judges had taken *Kowalski* as a categorical exclusion. Constitutional violations may thus proceed unnoticed under the Rule 702 regime.

In sum, courts' reliance on Rule 702 has eroded the accused's right to present expert evidence in their defense. Rather than avoiding constitutional issues in their application of Rule 702 by admitting criminal defense experts, courts may be

112. *Kowalski*, 821 N.W.2d at 35–36.

113. *See* sources cited and related text *supra* notes 81–85.

114. *E.g.*, Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Holmes v. South Carolina, 547 U.S. 319, 331 (2006).

115. *See* People v. Warner, 22 N.W.3d 1, 8–9 (Mich. 2024).

116. *Id.* at 9 n.8 ("[O]nce the prosecution interjected its misunderstanding that *Kowalski* stood for a categorical bar on false-confession testimony . . . the trial court agreed and conducted no further inquiry.").

117. *See* David Klein & Neal Devins, *Dicta Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2044–45 (2013).

scrutinizing defense evidence while preferencing the government's expertise as more reliable.

C. Rule 606(b)'s Supremacy

The problem of evidence rules occupying the field and crowding out defendants' constitutional rights is not limited to rules that are justified by reliability concerns. Federal Rule of Evidence 606(b) prevents criminal defendants from using jurors' testimony about misconduct or bias revealed during deliberations to impeach a verdict against them. Rule 606(b) provides:

> Rule 606. Juror's Competency as a Witness.
>
> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> (1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about 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. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) *Exceptions*. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.[118]

Rule 606(b)(1) is an ancient exclusionary rule. It incorporated the common law no-impeachment rule, which traces its origins to a 1785 case in which two jurors admitted to flipping a coin to reach their verdict.[119] Lord Mansfield refused to hear the jurors' testimony about their improper conduct, arguing that jurors could not impeach their own verdict because "a person testifying to his own wrongdoing was, by definition, an unreliable witness."[120]

Congress codified the common law rule into Rule 606 in an attempt to balance "the competing interests of freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment on the one hand and preventing irregularity and injustice . . . on the other hand."[121] Without a prohibition

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118. FED. R. EVID. 606(b).

119. *Vaise v. Deval* (1785) 99 Eng. Rep. 944 (KB); *see also* Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121, 2127 (2021).

120. Harawa, *supra* note 119, at 2127 (quoting Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 881 (2009)).

121. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 269 (2012); *see also* FED. R. EVID. 606 advisory committee's notes on proposed rules ("The rule offers an accommodation between these competing considerations." (citation omitted)).

on jurors' testimony to impeach their verdict, open deliberation in the jury room might be chilled for fear of future scrutiny in court.[122] Unending impeachment by jurors of their verdict might also threaten the verdict's finality, encouraging post-hoc questioning of jury room behavior or statements.[123] And lastly, without serious limits on jurors' testimony about their deliberations, parties attempting to overturn verdicts might seek to harass or embarrass jurors.[124]

Rule 606 is, by its terms, applied the same to prosecutors seeking to impeach a verdict as to defendants.[125] The values justifying the rule apply equally regardless of the party asserting it. But the rule's effect is anything but equal. The Sixth Amendment guarantees criminal defendants a right to an impartial jury.[126] The prosecution has no such right: the Amendment specifies that the right applies "[i]n all criminal prosecutions" and that it is enjoyed by "the accused."[127]

Yet, if a juror reveals themselves to be partial to the prosecution during deliberations, Rule 606(b)'s ban on juror testimony prevents criminal defendants from impeaching the tainted verdict.[128] An exclusionary rule that bars evidence of juror misconduct during deliberations is therefore likely to conflict with the constitutional right to an impartial jury. Despite this likelihood, Rule 606 and its accompanying Advisory Committee Note make no mention of the constitutional right to an impartial jury.[129] As a result, courts have applied Rule 606(b) to prevent defendants from impeaching a verdict, despite jurors' own admissions that they had engaged in misconduct or lied about their biases during *voir dire*.[130] A review of the Supreme Court's application of Rule 606(b) against the right to an impartial jury illustrates this problem.

D. The Right to Impeach a Biased Jury

The Supreme Court first confronted Rule 606(b)'s clash with the jury right in *Tanner v. United States*.[131] In *Tanner*, two jurors came forward following a guilty verdict and admitted to defense counsel that several of the jurors had been intoxicated or

122. *See* Wolin, *supra* note 121, at 269–70; McDonald v. Pless, 238 U.S. 264, 267–68 (1915).

123. *See* Wolin, *supra* note 121, at 269–70.

124. *Id.*

125. *See* FED. R. EVID. 606. However, Double Jeopardy limits the prosecution's ability to challenge acquittals. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

126. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."). Ironically, despite the Sixth Amendment's fairly straightforward phrasing, the Court at one point misinterpreted it as granting *the prosecution* a right to an impartial jury. *See* Goldwasser, *Peremptory Challenges, supra* note 20, at 823–24.

127. U.S. CONST. amend. VI. The Constitution also demands that criminal defendants have greater leeway to challenge guilty verdicts than the prosecution through the Double Jeopardy clause. *See id.*

128. *See* Wolin, *supra* note 121, at 299–300.

129. *See* FED. R. EVID. 606 advisory committee's notes on proposed rule.

130. *See* Warger v. Shauers, 574 U.S. 40, 43–44 (2014).

131. Tanner v. United States, 483 U.S. 107 (1987).

asleep throughout much of the trial.[132] One juror informed Tanner's attorney that jurors had "consumed alcohol during the lunch breaks . . . causing them to sleep through the afternoons."[133] A second juror further stated "that he and three other jurors smoked marijuana quite regularly during the trial" and that "he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times."[134]

Corroborating the jurors' statements, an exchange had occurred on the record during the trial in which Tanner's attorney complained that he had "noticed over a period of several days that a couple of jurors in particular have been taking long naps[.]"[135] The trial judge responded that, in the past, he had asked jurors to "stand up and stretch" when it got "a little sleepy," but he refused to do so in this case because "that doesn't sound good in the record."[136]

Despite this evidence, the Court affirmed the trial judge's exclusion of the jurors' testimony, preventing the defendant from using it to impeach the verdict.[137] First, the Court clarified that the evidence was correctly excluded under the Federal Rules of Evidence because it was not admissible under any of Rule 606 (b)'s exceptions.[138] Next, the Court addressed whether Rule 606(b)'s application in *Tanner* violated the defendant's right to an impartial jury, and found it did not.[139] Although defendants have "Sixth Amendment interests in an unimpaired jury," they "are protected by several aspects of the trial process[,]" such as *voir dire* and "observ[ation] by the court, by counsel, and by court personnel."[140]

In his dissenting opinion in *Tanner*, Justice Marshall asserted the supremacy of the defendant's jury right.[141] Marshall argued that, "[i]f [Rule 606(b)'s] policy considerations seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way."[142] Additionally, Marshall reasoned that the right was not adequately protected by existing procedural safeguards: "[*v*]*oir dire* cannot disclose whether a juror will choose to abuse drugs and alcohol during the trial."[143]

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132. *Id.* at 113–15.
133. *Id.* at 113.
134. *Id.* at 115–16.
135. *Id.* at 113.
136. *Id.* at 114.
137. *Id.* at 127.
138. *Id.* at 118.
139. *Id.* at 127.
140. *Id.*
141. *See id.* at 134 (Marshall, J., concurring in part and dissenting in part).
142. *Id.* at 137. Ultimately, Justice Marshall did not reach the constitutional question in his analysis as the evidence of jurors' intoxication could be admitted under Rule 606(b)'s exceptions for "extraneous prejudicial information . . . improperly brought to the jury's attention" or "outside influence . . . improperly brought to bear on any juror." FED. R. EVID. 606(b)(A)—(B); *see Tanner*, 483 U.S. at 138–42 (Marshall, J., concurring in part and dissenting in part).
143. *Tanner*, 483 U.S. at 142 (Marshall, J., concurring in part and dissenting in part).

Although *Tanner* technically considered the right to a *competent* jury rather than an impartial one,[144] *Tanner*'s broad interpretation of Rule 606(b) has also been applied to exclude evidence of jurors' biased statements in the jury room.[145] In *Warger v. Shauers*, for example, the Court refused to admit juror testimony that one juror in a civil trial had stated, "I don't think I could be a fair and impartial juror in this kind of case" during deliberations.[146] The Court, troublingly, did not clarify whether this holding would also apply in the criminal context.[147] Notably, while the Sixth Amendment specifies the accused has a right to an "impartial jury," the Seventh Amendment merely states that, in civil trials, the "right of trial by jury shall be preserved."[148]

However, at least one U.S. Circuit Court of Appeals has applied the rule from *Warger* in the criminal context.[149] For example, the Sixth Circuit relied on *Warger* to exclude evidence of juror prejudice in a criminal trial.[150] In *United States v. Ewing*, the defendant was convicted of distributing a mixture of heroin and fentanyl that resulted in a victim's death and received a mandatory life sentence.[151] The jury's foreperson sent a letter to the court shortly after returning their verdict.[152] In her letter, she "claimed that the jury's verdict was based on personal bias rather than evidence."[153] To support this assertion, she alleged that:

> Another juror stated he had been married to an addict for 12 years but failed to disclose this fact during voir dire[,] . . . a juror stated that the Government's burden of proof was a preponderance of the evidence, and the other jurors agreed . . .[,] and [] a juror stated that the fact that the Government prosecuted the case in federal court meant that the defendant was guilty.[154]

Despite evidence that at least one juror expressed personal bias that *voir dire* failed to uncover, the Sixth Circuit essentially found the case was decided by *Warger*.[155] The court did not make any note of the crucial distinction between the civil trial in *Warger* and *Ewing's* criminal trial.[156] Nor did the court consider that a criminal defendant's jury rights are unique, as evidenced by the text of the Sixth Amendment in addition to the

144. *See* Harawa, *supra* note 119, at 2128.
145. *See, e.g.*, Warger v. Shauers, 574 U.S. 40, 48 (2014).
146. *Id.* at 43.
147. *See id.* at 44–45.
148. *Compare* U.S. CONST. amend. VI, *with* U.S. CONST. amend. VII.
149. United States v. Ewing, 749 Fed. App'x 317, 323–24 (6th Cir. 2018).
150. *Id.*
151. *Id.* at 318–19.
152. *Id.* at 321.
153. *Id.*
154. *Id.*
155. *Id.* at 326 (reasoning that, after providing an overview of the decision in *Warger*, "[c]onsidering the limitations of binding precedent . . . application of Rule 606(b) to Ewing's case is not unconstitutional").
156. *See generally id.*

Constitution's generally asymmetrical treatment of the accused.[157] Instead, the court applied Rule 606(b) and excluded the evidence.[158]

Since *Warger*, the Supreme Court has carved out one narrow exception in which Rule 606(b) may give way to constitutional concerns.[159] If "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," then evidence of that statement can be admitted despite Rule 606(b).[160] In *Peña-Rodriguez v. Colorado*, for example, a criminal defendant was allowed to circumvent Rule 606(b)'s ban on juror testimony to admit evidence that a juror had relied on racial animus to convict him.[161]

Although the holding in *Peña-Rodriguez* may seem at first glance to have resolved some of the tension between Rule 606(b) and the jury right, commentators have argued it "is little more than table scraps dressed up as a meal."[162] First, *Peña-Rodriguez* set an implausibly high standard for defendants seeking to admit evidence of racial animus to impeach a verdict.[163] As Professor Daniel Harawa explains, "not only does racial bias have to be explicit to satisfy *Peña-Rodriguez*, the bias must also bear directly on a juror's vote to convict the defendant."[164] This standard is implausible because it "ignores the reality that most racism today is subtle."[165]

Second, it is unclear why criminal defendants should bear the burden of showing that statements of racial bias were directly tied to a juror's vote. Expressions of racial prejudice in the jury room would seem to undermine public confidence in the criminal justice system regardless of whether the juror explicitly asserted their bias as a motivating factor for their vote.[166] An overly strict standard for admitting statements of racial animus is even more troubling when one considers the fact that, even if a defendant succeeds in satisfying the *Peña-Rodriguez* rule, it still does not guarantee a new trial.[167]

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157. *See id.*; U.S. Const. amend. VI; *supra* Part II.A.

158. *Ewing*, 49 Fed. App'x at 326.

159. Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017).

160. *Id.*

161. *Id.* at 212–13 ("The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, 'I think he did it because he's Mexican and Mexican men take whatever they want.'").

162. Harawa, *supra* note 119, at 2133; *see also* Kristian B. Garibay, *Setting the Standard: A Closer Look at* Peña-Rodriguez v. Colorado, 61 ARIZ. L. REV. 425, 443–44 (2019).

163. *See* Harawa, *supra* note 119, at 2133–34.

164. *Id.* at 2134.

165. *Id.*

166. *Id.* at 2135 ("Any bias, and especially 'overt' bias, expressed during deliberations undermines 'the fact and perception' of fairness, regardless of whether the juror who expressed the bias tied it directly to the defendant's guilt. A fellow juror who hears the biased statement will wonder if the decision reached by that that juror was fair. When the public learns that racial bias was expressed in the jury room, it will likely question whether justice was truly served.").

167. *Id.* at 2133 ("First, a defendant must overcome the no-impeachment rule in order to introduce evidence of what was allegedly said during deliberations. Then, the defendant still must satisfy the standard necessary to grant a new trial, which varies by jurisdiction.").

These lingering constitutional problems have been borne out by courts applying the *Peña-Rodriguez* standard.[168] Professor Harawa's research has shown that lower courts have "rejected juror-bias claims even when faced with the obvious and 'overt' racism that *Peña-Rodriguez* requires because the racism was not directed at the defendant or because the comment was not clearly tied to the juror's vote for guilt."[169] For example, one district court refused to admit evidence of racial bias under *Peña-Rodriguez* because, although a juror had used a racial slur during deliberations, it had been directed at another juror for sympathizing with the defendant, not at the defendant himself.[170]

To summarize, ambiguity in the Court's decisions in *Warger* and *Peña-Rodriguez* has led lower courts to rely on Rule 606(b)'s regulatory framework rather than enforce the right to an impartial jury. First, the Court failed to clarify whether the *Warger* rule—that Rule 606(b)'s exclusion of explicit statements of juror bias during deliberations does not violate the *civil* jury right—equally applies to *criminal* defendants.[171] As a result, lower courts have deferred to Rule 606(b) in criminal trials to prevent criminal defendants from merely introducing testimony of jurors' clear statements of prejudice during deliberations.[172] This poses a major constitutional problem. After all, what good is a right to an impartial jury if the accused, upon receiving evidence that their jury was biased against them, is prevented from even trying to admit testimony to that effect? [173]

Second, *Peña-Rodriguez*'s narrow carve-out for overt racial animus still fails to affirm the jury right's supremacy against Rule 606(b). It imposes a standard that is implausibly difficult for defendants to satisfy.[174] And lower courts still prefer to apply Rule 606(b) rather than risk reversal and admit less-than-overt statements of racial prejudice.[175]

The Constitution guarantees that the "accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."[176] Criminal defendants may have signed affidavits in which jurors admit their deliberation was not impartial, but courts rely on Rule 606 (b) to prevent the mere introduction of this evidence. Just as courts' deference to Rule 702 prevents the accused from enforcing the right to present a defense using expert testimony, courts' adherence to Rule 606(b) prohibits defendants from

168. *Id*. at 2146 (describing cases).

169. *Id*.

170. *Id*. at 2147.

171. *See generally* Warger v. Shauers, 574 U.S. 40 (2014) (applying Rule 606(b) in civil context without addressing if it equally applies in a criminal jury context).

172. *See* United States v. Ewing, 749 Fed. App'x 317, 323–24 (6th Cir. 2018).

173. For a comprehensive discussion of why courts should not prohibit juror testimony after a verdict that another juror was biased, see Wolin, *supra* note 121, at 289–300. As Wolin argues, "[v]erdicts reached based on bias or prejudice, however, should not go unchallenged simply to preserve the jury system. If juries are making their decisions based on consideration of bias or prejudice and those decisions are unchallengeable, then the institution of trial by an impartial jury may no longer be viable." *Id*. at 294.

174. *See* Harawa, *supra* note 119, at 2133.

175. *See id*. at 2145–47.

176. U.S. CONST. amend. VI.

attempting to enforce their right to an impartial jury by introducing evidence that jurors were biased during deliberations.

III. THE ASYMMETRICAL WAY FORWARD

If it is true that defendants' constitutional rights are being under-enforced due to judges' mechanistic adherence to evidence rules, then a change in law or practice is warranted. Allowing for greater asymmetry in the Federal Rules of Evidence would better effectuate the constitutional values that have gone under-enforced. Particularly for rules like Rule 702, which have been distorted to favor the prosecution, asymmetry is not just a proactive means of enforcing defendants' rights; it is a necessary remedy to prevent ongoing constitutional violations. Increasing the asymmetry in the evidence rules to protect defendants can be implemented in several ways.

One approach would be for the Federal Rules of Evidence to simply stop applying some exclusionary rules to defense evidence entirely. On the other hand, certain evidence rules could be amended to require greater checks and balances on defendants' rights, such as a balancing test that places a greater burden on the prosecution. Part III addresses the advantages and disadvantages of each approach, and ultimately recommends asymmetrical amendments as the most effective path forward.

A. Admitting Unreliable Defense Evidence

Addressing the issue of asymmetrical treatment of criminal defendants in the application of evidence rules, Professor Goldwasser argued in 1998 that "[w]e ought to stop excluding defense evidence for unreliability, or at least do it less often."[177] One way to address the asymmetry problem in federal evidence law is to apply rules that exclude purely based on reliability concerns only to the prosecution.

Professor Goldwasser refers to these rules as "unreliability-based" rules and defines them as "exclusions made solely to prevent jurors from considering evidence that courts or legislatures deem not sufficiently reliable to be taken into account . . . ."[178] In this group, Professor Goldwasser would include Rule 702 (expert evidence), Rules 801–07 (the hearsay ban and its exceptions), and Rules 1001–08 (the "best evidence rule" and its exceptions).[179]

As Professor Goldwasser points out, these rules' emphasis on reliability is "directly at odds with values embodied in the right to trial by jury and the requirement of proof beyond a reasonable doubt."[180] If the goal of evidence law is an accurate outcome, then the current means employed is symmetrical application. To reduce the risk of an incorrect result, the thinking goes, evidence rules should limit unreliable evidence

177. Goldwasser, *supra* note 5, at 642.
178. *Id.* at 643.
179. *Id.*; *see* FED. R. EVID. 702, 801–08, 1001–08.
180. Goldwasser, *supra* note 5, at 643.

from both parties, equally preventing false acquittals and false convictions.[181] But this equalizing approach is at odds with the Constitution's defense-specific protections because it assumes that convicting an innocent person is as bad as acquitting a guilty one—whereas the Constitution has the opposite premise in mind.[182]

The advantage of Professor Goldwasser's suggestion is that it allows the jury to decide for themselves how much weight to give the defendant's evidence—rather than leaving questions about reliability up to the discretion of each trial judge. Professor Goldwasser grounds her argument not only in the *Winship* demand for proof beyond a reasonable doubt, but also in the accused's right to trial by jury.[183]

However, no longer excluding unreliable defense evidence would pose some practical issues. For one thing, it would upend much of the current framework for regulating evidence in criminal trials and, in doing so, run into significant resistance. Judicial time and resources would likely be stretched thin without some limit on the defendant's presentation. Any limit introduced, however, may raise the same sorts of issues implicated in reliability rules like discretion, defense, and inconsistency. It is also unclear how such a fundamental change in the admissibility regime would be implemented, or what its effects would be.

One way to mitigate against the practical difficulties of this approach would be to prevent unreliability rules from being applied to defendants by encouraging greater constitutional avoidance by judges. If judges refuse to apply exclusionary rules to defendants whenever they raise possible constitutional conflicts, Professor Goldwasser's goal may be partially achieved. At the same time, relying on constitutional avoidance would continue to leave defense rights' enforcement up to the discretion of trial judges. Even if defense counsel raise constitutional avoidance as a reason why rules should not be applied to defendants in certain circumstances, it is still up to the trial judge to decide whether to agree. Still, encouraging avoidance by raising constitutional issues at the trial-level would at least force appellate courts to take a closer look at the issue.

Another problem with Professor Goldwasser's approach is that the Federal Rules of Evidence do not only conflict with constitutional values when they preference reliability.[184] Cabining reform to exclusionary rules based on "unreliability" is a step in the right direction, but it would overlook rules like Rule 606(b), which are not based on reliability concerns but still undermine criminal defendants' right to an impartial jury.[185] I turn now to the possibility of targeted amendments to the Federal Rules of Evidence as a more effective solution.

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181. *Id.* at 633.

182. *Id.* ("[F]rom the perspective of the beyond a reasonable doubt requirement, a wrong conviction is far less acceptable than a wrong acquittal."); *see also supra* Part I.

183. Goldwasser, *supra* note 5, at 632.

184. Not all evidence rules exclude defense evidence based on a reliability rationale. *See, e.g.*, FED. R. EVID. 501, 606.

185. *See supra* Part II.C–D. Another example of evidence regulation which limits the defendants' rights but is not based on reliability rationales is FED. R. EVID. 501, or the privilege rule. For example, strict application of the

B. Amending the Federal Rules of Evidence

Another, perhaps less drastic, approach to the evidentiary supremacy problem is through defendant-friendly amendment of the Federal Rules of Evidence. Amendments could target specific rules of evidence that under-enforce defendants' constitutional rights—like Rules 702 and 606(b). Although the exact content of those amendments is beyond the scope of this Note, some suggestions are offered below.

First, there are some lessons to be learned from the rules that already treat criminal defendants asymmetrically. Rule 404, the evidence rules' ban on character propensity evidence, makes several specific exceptions for defendants that help protect their right to present a defense.[186] Defendants in criminal cases may "offer evidence of the defendant's pertinent trait" or, "subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait."[187] Rule 404's special treatment of defendants is markedly different from other reliability-based exclusionary rules like Rule 702.[188] In its Note on the 2006 Amendment to Rule 404, the Advisory Committee clarifies that an exception is made for the accused because their "liberty is at stake," and they "may need 'a counterweight against the strong investigative and prosecutorial resources of the government.'"[189] Rule 404 is therefore a rare acknowledgement of the constitutional demand for asymmetrical treatment of defendants in the Federal Rules of Evidence.

Taking inspiration from Rule 404, one option could be to amend other evidence rules so that they too have specific carve-outs that afford criminal defendants more latitude in the evidence they choose to introduce. For example, Rule 702 could be amended so that some of its factors do not apply to criminal defendants.[190]

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therapist-patient privilege might prevent defendants from introducing evidence of a third party's confession in violation of the right to present a defense. *See* Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996).

186. FED. R. EVID. 404 ("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."); *see also* H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 853–57 (1982) (noting that a criminal defendant may introduce propensity evidence as to their own character and pertinent traits of the victim's character).

187. FED. R. EVID. 404(a)(2)(A)–(B).

188. Rule 704(b) contains a provision that distinguishes based on whether expert testimony is employed in a criminal or civil context. FED. R. EVID. 704(b). Rule 704(b) forbids expert witnesses from giving an opinion on an ultimate issue when that issue is whether a defendant had the requisite mental state to have committed the crime for which they are on trial. *Id.* In fact, Rule 704(b)'s distinction serves to further asymmetry *against* criminal defendants and *in favor of* the prosecution by making it more difficult for mentally disabled defendants to prove insanity defenses through expert testimony. *See generally* David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 561 (1988) (arguing that Rule 704(b) unfairly prejudices the criminal defendant by "mandat[ing] the exclusion of relevant, probative testimony for fear that it may be too persuasive.").

189. FED. R. EVID. 404 advisory committee's note (quoting C. Mueller & L. Kirkpatrick, EVIDENCE: PRACTICE UNDER THE RULES 264–65 (2d ed. 1999)).

190. An asymmetrical amendment might refuse to apply any one of the 702 factors to defense experts. This approach may be met with resistance due to concerns regarding the reliability of expert testimony. One might argue that, if defense experts are admitted even when they would otherwise not be admissible under 702, then it

Alternatively, one of the Rule 702 factors could offer a lower threshold of reliability for defendants in criminal cases.

For example, Rule 702(a) may be a good candidate for an asymmetrical amendment, as it is frequently cited as a basis for excluding defense experts.[191] Factor (a) asks trial judges to determine whether an expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[192] Prosecutors and courts have emphasized this factor as a reason why defense experts in false confessions or eyewitness identification accuracy should be excluded.[193] These experts are argued to be unhelpful to the jury because they intrude on the jury's role as fact-finder.[194] But, in fact, these experts are crucial to dispel common-sense misconceptions about confessions and eyewitness identifications.[195] Further, courts worried about usurping the jury's role may limit an expert's testimony while stopping short of excluding defense experts entirely and risking a constitutional violation.[196] And, of course, Rules 401, 402, and 403 are always a check on whether the expert is relevant in the absence of a Rule 702(a) inquiry.[197]

Carve-outs for criminal defendants might also be an effective approach in the Rule 606(b) context. Rule 606(b) already contains exceptions to its exclusionary ban.[198] Amenders could simply add a fourth exception, say, for statements of bias against a defendant in a criminal case. This exception would not solve all of Rule 606(b)'s issues. For instance, the issue of statements indicating racial bias but directed against individuals other than the defendant, such as the defendant's alibi

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is likely that jurors will be confused or misled by unreliable expertise, leading to false acquittals. The response to these critics is that jurors remain capable of assessing experts' credibility on their own through common sense reasoning. Although there remains a risk that jurors defer automatically to expertise, a system which allows greater leeway in expert witness admissibility might encourage a more adversarial model of expert testimony in which both parties present experts and jurors must decide which expert is more credible, incentivizing greater rational engagement by jurors. *See* Ronald J. Allen, *Expertise and the* Daubert *Decision*, 84 J. CRIM. L. & CRIMINOLOGY 1157, 1174–75 (1994). Ultimately, the extent to which Rule 702 is symmetrically applied is on some level a balancing as to how much we value defendants' right to present a defense versus the potential that jurors are misled. The problem with a completely symmetrical 702 is that the constitutional demand for due process requires that a false conviction be judged more costly than a false acquittal.

191. *See, e.g.*, United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999); United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996).

192. FED. R. EVID. 702(a).

193. *See, e.g.*, *Lumpkin*, 192 F.3d at 289 (finding a defense expert in eyewitness identification would have "usurp[ed] [the jury's] role" to assess eyewitness credibility themselves); *Kime*, 99 F.3d at 884 ("Here the district court properly recognized the very real danger that the proffered expert testimony could either confuse the jury or cause it to substitute the expert's credibility assessment for its own.").

194. *See, e.g.*, *Lumpkin*, 192 F.3d at 289; *Kime*, 99 F.3d at 884.

195. *See* United States v. Mathis, 264 F.3d 321, 340 (3d Cir. 2001) ("Similar to other types of expert witnesses, who might testify about the flaws of a computerized filing system or the proper interpretation of satellite photographs, experts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away.").

196. *See* FED. R. EVID. 702, 705.

197. *See* FED. R. EVID. 401–03 (regulating admission of evidence based on relevance and probative value).

198. *See* FED. R. EVID. 606(b)(2).

witness or other jurors, would persist.[199] However, a criminal defendant exception to Rule 606(b) would go a long way toward ensuring the accused's right to an impartial jury in criminal trials is enforced.

Another option is to amend certain rules to impose greater scrutiny on prosecution evidence. An advantage of this approach is that it corrects any asymmetrically harsh applications of a rule toward defendants by ensuring the trial court's gatekeeping of prosecution evidence is also stringent. It also avoids the objections some may have to defense carve-outs that risk allowing unreliable defense evidence to confuse the jury.[200] This approach could be modeled after Rule 609, which enforces a more stringent balancing test to decide whether to admit certain prior convictions.[201]

Rule 609 allows the admission of a witness's prior convictions to impeach them for lack of character for truthfulness.[202] However, the admission of felony convictions depends on whether the witness is a criminal defendant or not.[203] For most witnesses, the Federal Rules' typical balancing test[204] is applied to decide whether admission would be substantially more prejudicial than probative.[205] But for criminal defendants who are testifying, courts may only admit prior convictions "if the probative value of the evidence outweighs its prejudicial effect to that defendant."[206] This "reverse 403" balancing test thus helps to enforce the defendant's right to testify in their own defense—albeit imperfectly.[207] Furthermore, Rule 609 mandates that prior convictions that are more than ten years old are inadmissible unless their "probative value, supported by specific facts and circumstances, substantially outweighs [their] prejudicial effect."[208] This approach—call it a "substantial reverse 403"—thus further helps to disfavor certain evidence that is potentially prejudicial.

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199. *See supra* Part II.D.

200. Although, FED. R. EVID. 403 is a check on this objection. In fact, an amendment to Rule 403 that more explicitly encourages greater care when considering defense objections might also help to alleviate some of the issues raised in this Note.

201. FED. R. EVID. 609(a)(1)(B), (b).

202. FED. R. EVID. 609(a). It must be noted that Rule 609 itself has also been heavily criticized for interfering with constitutional rights such as the right to testify in one's own defense. *See* Nat'l Ass'n of Crim. Def. Laws., *Letter to the Advisory Committee on Evidence Rules Regarding Proposed Amendment to Rule 609(a)(1)* (June 18, 2024), https://www.uscourts.gov/sites/default/files/24-ev-h_suggestion_national_association_of_criminal_defense_lawyers_-_rule_609.pdf [https://perma.cc/5JGS-B5FL]; Jeffrey Bellin, *Eliminating Rule 609 to Provide a Fair Opportunity to Defend against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence*, 92 FORDHAM L. REV. 2471, 2472–74 (2024) [hereinafter *Eliminating Rule 609*]; Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 840 (2016).

203. *See* FED. R. EVID. 609(a)(1)(B).

204. *See* FED. R. EVID. 403.

205. FED. R. EVID. 609(a)(1)(A) (explaining that admission of prior felony convictions for witnesses "in a civil case or in a criminal case in which the witness is not a defendant" is "subject to Rule 403").

206. FED. R. EVID. 609(a)(1)(B).

207. *See Eliminating Rule 609*, *supra* note 202, at 2472–73 (explaining how Rule 609's link between the defendant's decision to testify and the admission of prior crimes evidence places a burden on the right to testify in one's own defense).

208. FED. R. EVID. 609(b).

A reverse 403 approach would be particularly effective at curbing the asymmetry problems identified with Rule 702's application to prosecution and defense evidence. Interestingly, most research that has identified the prosecution bias in trial judges' application of Rule 702 has recommended increasing the rigor of forensic science disciplines as a primary approach for reform.[209] But a direct amendment to Rule 702 could specify that forensic evidence introduced against a criminal defendant should be subjected to a reverse 403 balancing test.

Take, for instance, expert testimony based on Analyze, Compare, Evaluate, and Verify (ACE-V) analysis, the highly criticized methodology used to make fingerprint and handwriting identifications or matches.[210] Courts have increasingly criticized expert testimony based on ACE-V.[211] In fact, some courts have expressed hesitance even while admitting the evidence due to concerns about a lack of empirical evidence corroborating ACE-V methods.[212] An amendment to Rule 702 that forces judges to conduct a reverse 403 balancing test when forensic evidence is admitted against criminal defendants may prevent particularly faulty fingerprint evidence from being admitted.[213] After all, a lack of empirical support for a methodology would reduce the probative value of the evidence it produces. As a result, forensic evidence that is a close call under *Daubert* might not succeed a reverse 403 balancing. Applying this extra step to evidence admitted *against* defendants would heighten the scrutiny on prosecution evidence while preserving defendants' right to present an expert defense. Although any amendment will rely on trial judges' willingness to resist deference to forensic evidence, an amendment that encourages judges to resolve close calls against prosecution experts would be a substantial step toward the asymmetry required by the Constitution.

In recent years, amendments to Rule 702 have made important steps in this direction.[214] For example, the Advisory Committee's Note to Rule 702's 2023 Amendment added that:

> Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to

209. *See, e.g.*, Neufeld, *supra* note 78, at S113; Lander, *supra* note 75, at 1676–77.

210. *See* COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 137140 (2009) [hereinafter NAS Report], https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf [https://perma.cc/MG2T-2429].

211. *See* United States v. Foust, 989 F.3d 842, 846–47 (10th Cir. 2021).

212. *See, e.g.*, United States v. Crisp, 324 F.3d 261, 270 (4th Cir. 2003) ("Ultimately, we conclude that while further research into fingerprint analysis would be welcome, 'to postpone present in-court utilization of this bedrock forensic identifier pending such research would be to make the best the enemy of the good.'") (quoting United States v. Llera Plaza, 188 F. Supp. 2d 549, 573 (E.D. Pa. 2002)).

213. This would, in turn, potentially prevent false convictions based on faulty fingerprint evidence. For an example of a false conviction based on faulty fingerprint evidence, see Mayfield v. United States, 504 F. Supp. 2d 1023, 1028–30 (D. Or. 2007).

214. *See* FED. R. EVID. 702 advisory committee's note to 2023 amendment.

> admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results . . . . This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.[215]

However, this addition is only a note to Rule 702 and, by its terms, does not "impose[] any new, specific procedures."[216] Encouraging judges to restrict forensic experts from exaggerating the accuracy of their methods is necessary but not sufficient for adequate enforcement of the right to present a defense. Without substantive changes to the Federal Rules of Evidence, any possibility for change is still left up to trial judges' discretion. Thus, directly amending the rules would be a more effective path forward.

CONCLUSION

In a criminal trial, the parties are not equally situated.[217] This is by design: the Constitution grants criminal defendants unique liberties not afforded to other litigants.[218] These rights reflect the values that undergird the American criminal justice system: the presumption of innocence, the accused's liberty interest, and the prosecution's burden to show guilt beyond a reasonable doubt.[219] But evidence law's default toward treating parties equally interferes with these constitutional principles.

Fortunately, we need "not let the superficial appeal of symmetry . . . eviscerate the redistributive potential of asymmetrical legal rules."[220] Rules like 702 and 606(b) can be amended to better enforce the constitutional demand for asymmetry. Through amendment, we can push for more just rules of evidence—rules that prioritize the protection of defendants' fundamental liberties instead of obscuring them.

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215. *Id.*

216. *Id.*

217. United States v. Turkish, 623 F.2d 769, 774–75 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) ("A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding . . . . [I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle . . . .").

218. *E.g.*, U.S. CONST. amends. IV, V, VI.

219. *See* discussion *supra* Part I.A.

220. Flagg & Goldwasser, *supra* note 18, at 112.