ARTICLE

THE LIVING RULES OF EVIDENCE

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The jurisprudential evolution of evidence law is dead. At least, that’s what we’re expected to believe. After all, it’s been forty-seven years since the common law pedigree of evidence law came to an end in the United States.¹

Ushered in on the wings of a growing positivist movement,² the enactment of the Federal Rules of Evidence purported to quell judicial authority over evidence law.³ Instead, committees, conferences, and members of Congress assumed responsibility for regulating our evidentiary regime, thereby capturing the evolution of evidence law in a single, transparent code.⁴ And as with other transitions to positive law, perhaps that shift inherently suggested that the Federal Rules of Evidence are “not a living organism” but simply a “legal document” that “says what it says and doesn’t say what it doesn’t say.”⁵

Of course, a dead evidentiary regime is not inherently anathema. Indeed, there are compelling arguments in favor of taking the lifeforce out of written law. By channeling all legal change through rulemakers and elected officials, controlling evidence law becomes clear and uniform across jurisdictions.⁶ Litigants can more readily predict which evidence is admissible and which

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evidence will be thrown out well before their trial date. Moreover, as a matter of political theory, the effort to codify evidence law ensures that rules regulating the flow of information in the courtroom are the product of careful, deliberate, and politically accountable actors. In the abstract, then, the turn to a codified evidentiary regime seems rather beneficial.

But reality is often unkind to abstract ideals. Frameworks that seem normatively desirable in vacuo often see problems emerge in application. And the Federal Rules of Evidence are no exception.

The inherent difficulty accompanying evidence law’s transition to an unflinching code stems from the historic turbulence of evidence law itself. Since its relatively recent emergence in the late eighteenth century, evidence law has not been particularly stable. Indeed, for much of its history, evidence law was rather shallow in substance. In 1806, for example, a judge made the somewhat hyperbolic assertion that “[t]here is but one decided rule in relation to evidence, and that is, that the law requires the best evidence.” Hyperbole aside, early evidence law was certainly a different creature than its modern descendant. In the early era, there was no firm exclusionary rule barring hearsay from the courtroom. Character evidence was fair game. Judges frequently advised juries on the merits of cases. Fearing perjury, many states still did not allow defendants to offer sworn testimony in the courtroom as late as 1890—just eighty-five years before the codification of the Federal Rules

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8 See Imwinkelried, supra note 3, at 418-19 (describing the rigorous legislative process and “evident care” with which the Federal Rules of Evidence were drafted).
10 John Henry Wigmore and John Langbein dispute the actual emergence of evidence law. See id. at 1171-72. Wigmore contends that evidence law emerged during the sixteenth and seventeenth centuries, and attributes a lack of sources defending that position to poor historical recordkeeping. See id. at 1171-72. John Langbein, conversely, sees the lack of sources as demonstrative of an absence of a robust evidentiary regime. Id. at 1172. Langbein places the emergence of evidence law in the end of the eighteenth century. Id.
11 2 ROBERT J. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 129 (William David Evans trans., Philadelphia 1826); Langbein, supra note 9, at 1173-74 (describing the source of the quotation as a North Carolina court in 1806).
12 Langbein, supra note 9, at 1189 (“On the state of the sources, it is hard to believe that the courts of the mid-eighteenth century enforced the hearsay rule or any of the other modern exclusionary rules that balance the potential prejudiciality of witness testimony against the supposed probative value.”).
13 See Julius Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 HARV. L. REV. 988, 993 (1938) (noting that the early rule against character and propensity evidence “did not exclude all similar bad acts, but only acts relevant merely through disposition”).
14 See Langbein, supra note 9, at 1181 (“[S]ome judges] exercised astonishing powers of judicial comment and instruction, a dimension of the mid-eighteenth-century trial that helps explain why the modern law of evidence could remain as yet so primitive.”).
of Evidence. As late as 1881, civil parties, too, were disallowed from offering sworn testimony in the courtroom.

Taken as a whole, then, stability in our evidentiary regime has been the exception, not the rule. The changes made to evidence law in just the century or two prior to the codification movement were fundamental in nature. Rather than fine-tuning a relatively stable machine, judges and state legislatures introduced massive reforms that sought to both align evidence law with evolving cultural norms and better ensure that trials achieve their ultimate goal of accurate, legitimate verdicts.

But the codification movement froze evidence law in time. The enactment of the Federal Rules of Evidence in 1975 took the then-existing culmination of a rapidly developing legal doctrine and suspended it at a rather arbitrary point in history.

Of course, evidence law's civil turn need not necessarily have led to substantive torpidity. Rulemakers are certainly capable of evaluating whether evidence law is achieving its normative aims and amending the regime when it's seen to be falling short. Indeed, there are now committees and conferences tasked with assuming the role of the common law judge by proposing beneficial changes. If the codification effort simply transmuted the evolution of evidence law from judicial caselaw to administrative and legislative channels, the effort would rightly be seen as benign—perhaps even desirable.

Codification, though, has bred entrenchment. The arrival of the Federal Rules of Evidence ushered in an anomalous era in evidence law, an era marked by relative stagnation in the doctrinal space. That's not to say that rulemakers have been lazy. Far from it. In the last half century, they have introduced no less than thirty substantive amendments to the Federal Rules and have

15 See Robert Popper, History and Development of the Accused's Right to Testify, 1962 WASH. U. L.Q. 454, 464 n.49 (listing several states that did not pass defendant testimony laws until after 1890).
16 Id. at 669 tbl.2 (detailing how it took Delaware until 1881 to enact a statute permitting testimony by civil parties—the last recorded state to do so).
17 See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 5-6 (1997) (“As is well known, the institutional context that prevailed in the formative period of common law evidence has undergone great changes in this century: the importance of the jury has dramatically declined, trial-centeredness has largely been abandoned, and even party control over the proceedings . . . has not been spared a challenge.”).
20 See Teter, supra note 4, at 155.
entertained scores more. But the approved changes have been modest. Unlike the fundamental transformations in evidence law in the era leading up to codification, most of the amendments since the enactment of the Federal Rules of Evidence make only minimal alterations. A 2020 amendment modified the notice requirements for the introduction of prior acts under Rule 404(b). A 2019 amendment clarified the application of the residual hearsay exception under Rule 807. A 2017 amendment provided an easier means of authenticating electronic documents under Rule 902. Missing, though, are the broad structural changes and continual systematic introspection that have historically dominated evidence law.

One might fairly suggest that there’s a simple explanation for the relative stability of evidence law under the Federal Rules—perhaps evidence law has reached its optimum. Perhaps the centuries preceding the codification effort were so fundamentally turbulent precisely because evidence law was in its infancy. Structural issues in our evidentiary regime have since been hammered out and, now, only modest fine-tuning is necessary. Thus, rulemakers’ avoidance of significant evidentiary reform is merely the product of an absence of calls for any further change.

Were only it so. Although evidence law has stagnated over the last half century, the world around it has continued to evolve. In particular, developments in both the empirical and normative literatures testify to the continuing necessity of broad-scale evidentiary reform.

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23 FED. R. EVID. 807 advisory committee’s note to 2019 amendment; see also Memorandum from Hon. Debra A. Livingston, Chair, Advisory Comm. on Evidence Rules, to Hon. David G. Campbell, Chair, Standing Comm. on Rules of Prac. & Proc., at 2-4 (May 14, 2018) (specifying details of the 2019 amendment).
front, studies demonstrate that so-called “folk psychology” pervades the Federal Rules of Evidence. For example, the psychology-based claims underlying Rule 803(1)’s present sense impression exception, Rule 803(2)’s excited utterance exception, and Rule 804(b)(2)’s dying declaration exception face withering empirical challenges. Indeed, modern social science experiments have so thoroughly vitiated the rationales for many rules that prominent judges have implored rulemakers to “beg[ ] in paying attention to such studies.” On the normative front, evolving cultural and moral norms have rendered other Rules deeply problematic. Take Rule 609, which rests on the normative assertion that criminal offenders are inherently untrustworthy. Rule 609’s status-based claim about the veracity of those with previous criminal convictions is offensive, to say the least. Rule 606(b), too, demands reform. By forbidding testimony about the jury’s decisionmaking process, Rule 606(b)’s no-impeachment rule continues to act as a shield for prejudice in the deliberation room. Few today would suggest that simply masking animus is an acceptable practice, yet the rule stands strong. Nevertheless, in the face of these (and more) pressing issues, rulemakers have been silent. There has been no effort—nor even a suggestion—to fundamentally reshape evidence law to account for modern 

References:

27 Lust v. Sealy, Inc., 383 F.3d 580, 588 (7th Cir. 2004) (describing “the folk psychology of evidence”).


29 Lust, 383 F.3d at 588.

30 See Teres E. Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 FORDHAM L. REV. 1, 5 (1988) (“Rule 609 is the product of the law’s long-standing and dogmatic assumptions that criminal convictions reflect character, and that character determines veracity.”).


understandings. To borrow the words of fellow commentators, rulemakers have instead chosen an “inherently conservative” approach, expressing a simple affinity for the general status quo.33

So, then, is evidence law dead? Are we resigned to a frozen regime that exclusively sees amending authority placed in the hands of rulemakers unable or unwilling to employ it?

Perhaps not. There’s nothing new under the sun, and that applies, too, to positive law. Evidence law is not unique in having to navigate a stubborn positivist regime. Rather, the successes (and failures) of reform measures in cognate contexts point the path ahead for evidence law. That path begins with a turn toward jurisprudential theory.

Where a doctrinal space concurrently faces a pressing need for both positivist compliance and substantive evolution, reformers can strike an ideal balance by encouraging judicial adoption of a loosely-Dworkinian interpretive model that comparatively weighs two variables: “fidelity” and “justifiability.”34 That is, judges can achieve desirable change by pinpointing an application of the law that expresses sufficient fidelity to existing legal source material while also constituting the most normatively or empirically justifiable outcome within that permissible range. Legal outcomes remain constrained due to the requirement that judges remain adequately faithful to controlling law, but within that often-broad boundary, judges have significant latitude to best shape the law in light of external realities.

Though facially amorphous, bespoke fashioning of “fidelity” and “justifiability” underlies immense reform efforts in frozen doctrinal spaces akin to evidence law. For example, in the burgeoning interpretive approach of “living constitutionalism,” we see reformers uniquely molding elements of the bivariant model to revivify constitutional law.35 Undaunted by Article V’s functionally inoperable amendment process, living constitutionalists see progressive judicial interpretation as a primary mechanism for effecting

33 Teter, supra note 4, at 160.
34 Notably, this Article’s employment of “fidelity” and “justifiability” most closely echoes Ronald Dworkin’s “law as integrity” interpretive approach, which employs “fit” and “justification” to pinpoint (what Dworkin believes to be) correct outcomes in common law settings. RONALD DWORIN, LAW’S EMPIRE 139, 230-32 (1987). Though Dworkin’s model helps inform this Article’s model, the trained eye will spot many differences between “law as integrity” and living evidentiary theory. Id. at 225; see infra Part I.
constitutional change. In technical terms, living constitutionalism recognizes that any interpretation of the nation’s founding document must express sufficient fidelity to its text or purpose, but that fidelity assessment is coupled with an equal (or perhaps even primary) desire to modernize the Constitution’s substance. Through idiosyncratic application of the bivariant model, then, constitutional law is made new. So too are “fidelity” and “justifiability” implicit in Judge Guido Calabresi’s seminal framework for the renewal of frozen statutory regimes. When facing dilapidated positivist landscapes, the former Yale Law School dean’s influential theory encourages judges to invalidate obsolete statutes rather than give rote application to outmoded or problematic provisions. The thesis calls for judicial intervention where no sufficiently faithful interpretation of an anachronistic statutory regime remains normatively justifiable. And again, through judicial intercession, change comes to lethargic doctrinal spaces.

The circumstances that led to the initial emergence of both living constitutionalism and statutory invalidation theory now echo in evidence law. The positivist turn that culminated in the codification of the Federal Rules of Evidence has led evidence law into a period of stagnancy; broad, structural evidentiary reform seems all but impossible. But courts have long recognized that our “federal system of evidence . . . is not to remain in straitjacket, static and unchangeable.” Perhaps evidence law’s solution, therefore, is to follow in the footsteps of kindred reform efforts.

This Article thus advocates in favor of a novel jurisprudential posture toward the Federal Rules of Evidence—one that seeks to awaken evidence law from its judicially-monikered “dogmatic slumber.” Running parallel to aspects of both living constitutionalism and statutory invalidation theory, living evidentiary theory uniquely contours “fidelity” and “justifiability” to evidence law. It operationalizes the theoretical variables in a manner that promises tangible, material rejuvenation of evidence law’s substantive

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36 STRAUSS, THE LIVING CONSTITUTION, supra note 35, at 116 ("[T]he Constitution has more resources, besides Article V, to renew and adapt itself, resources that include the precedents and traditions of the living Constitution.").


39 Id.

40 See id. at 164 (“It is the judgmental function . . . of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it.”).

41 United States v. 60.14 Acres of Land, 362 F.3d 660, 666 (3d Cir. 1966).

42 United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring).
evolution. Namely, in making evidentiary determinations, living evidentiary theory encourages a judge to couple her reliance on the text and purpose of the Federal Rules of Evidence with equally forceful appreciation for external realities discerned from modern cultural sentiments and the leading edge of the scientific and empirical literatures. The model therefore pushes judges to move beyond a singular obsession with “fidelity”—a limited interpretive approach that has stymied evidence law for the past half century—and instead couple that fidelity assessment with deep appreciation of how to apply the Federal Rules of Evidence in the most normatively justifiable fashion.

Representative examples help illustrate living evidentiary theory’s substantial reform potential. Turning first to scientific and empirical reform, consider how a judge employing living evidentiary theory might reconsider interpretation and application of Federal Rule of Evidence 803(2). Introduced above, the excited utterance exception allows hearsay into the courtroom if, inter alia, the statement was made when the declarant was under the shock of a startling event.43 Legislative history makes clear that the prevailing rationale for the excited utterance exception at the time of its enactment was a psychology-based belief that statements made under stressful, even panicked, conditions are inherently trustworthy; declarants in that state will be unable to fabricate effectively.44 But modern scientific literature demonstrates that statements made under duress are often less reliable, not more.45 Nevertheless, in applying 803(2), courts—prioritizing “fidelity”—have narrowly looked to the language of the rule when determining whether to admit or exclude an exclamation;46 there has been little judicial inspection of the withering scientific and empirical support for the exception. Living evidentiary theory, though, calls on a judge to dive deeper. Since text and purpose—the notion of “fidelity”—no longer exhaust the requisite interpretive analysis, the model also calls for a judge to turn her

43 FED. R. EVID. 803(2).
44 FED. R. EVID. 803(2) advisory committee’s note to 1975 proposed rules (“The theory of 803(2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”); United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) (“The rationale for 803(2) is that the excitement of the event limits the declarant’s capacity to fabricate a statement and thereby offers some guarantee of its reliability.”).
45 See 2 MCCORMICK ON EVIDENCE, supra note 28, § 272, at 366 (“While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant’s statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant’s observation and judgement.”); see also Steven Baicker-McKee, The Excited Utterance Paradox, 41 SEATTLE U. L. REV. 111, 131-75 (2017) (explaining that statements made under excitement may still be unreliable).
attention to the scientific and empirical literature to determine the most “justifiable” application of the excited utterance exception. And there, a weighing of both fidelity and justifiability reveals a number of superior approaches for administration of the excited utterance exception. For instance, one improved method of applying the excited utterance exception is to require that proponents offer proof not only satisfying the Rule’s enshrined elements but also affirmatively demonstrating reliability, perhaps by directly addressing the contrary scientific consensus. This “living” approach still expresses fidelity to Rule 803(2). It still is faithful to the existing code, albeit in a purposivist sense. But, when sifting among the competing approaches to interpreting and applying Rule 803(2), the living model is most defensible given its ability to align evidence law with best empirical understandings. Rather than turning a blind eye to folk psychology in our evidentiary regime, living evidentiary theory channels evidence law to a better form.

As suggested above, though, living evidentiary theory does not solely premise reform on improved empirical and scientific understandings; rather, it also seeks to align evidence law with modern cultural sentiments and evolving standards of decency. Consider, as one of many potential examples, how this Article’s interpretive model can improve application of Federal Rule of Evidence 606(b) in the courtroom, particularly in light of an urgent national awakening to the invidious ills of structural and systematic discrimination. Generally stated, Rule 606(b) prevents a juror from testifying about the validity of the jury’s decision making process.\footnote{See, e.g., United States v. Ewing, 749 F. App’x 317, 322 (6th Cir. 2018) (“A juror’s statement suggesting that the jury misunderstood or misapplied instructions or the law is also typically considered internal and therefore subject to Rule 606(b)’s bar.”).} Predictably, staunch protection of the deliberation room has had deleterious effects. For instance, a recalcitrant juror cannot testify that a jury completely ignored the judge’s instructions, or that it otherwise convicted a defendant on some legally irrelevant basis.\footnote{See Tanner v. United States, 483 U.S. 107, 120-22 (1987) (holding that a juror is barred from testifying to drug or alcohol use among jurors by 606(b)).} She can’t testify that the jury spent the entirety of a trial intoxicated.\footnote{Notably, Peña-Rodriguez v. Colorado created a small exception to the no-impeachment rule, allowing jurors to testify that racial animus infected the deliberation room. 137 S. Ct. 855, 869 (2017). But, after giving Rule 606(b) a narrow reading, the Supreme Court had to turn to constitutional reasoning to establish the narrow exception. Id. at 867-68. Rule 606(b) itself thus offers little protection against jury animus and prejudice.} As far as Rule 606(b) is concerned, she can’t even testify that discriminatory prejudice served as the basis of a jury’s verdict.\footnote{Id. at 867-68.} In application, then, Rule 606(b) has proven immensely problematic. In addressing animus, it aims to simply conceal rather than confront it. Without question, that approach is far afield of prevailing moral and cultural norms. But, again, living
evidentiary theory promises change. Given the Rules’ substantive stagnation, an interpreter should couple “fidelity” with “justifiability” to pinpoint which application of Rule 606(b) is sufficiently faithful to the rule and most normatively defensible. When viewed through that holistic prism, there can be little question that Rule 606(b)’s exceptions should be read expansively to combat prejudice and misconduct in the deliberation room. Far from usurping Rule 606(b), then, living evidentiary theory gives the rule its best form. It enables a pathway for substantive improvement in our evidence code—improvement currently foreclosed by rulemakers’ silence.

It’s not difficult to imagine the analysis visible in the preceding two examples inspiring widespread change across the existing evidentiary regime. In addition to the excited utterance exception, the present sense impression exception and the dying declaration exception immediately come under scrutiny given their own questionable psychological underpinnings. So, too, does Rule 609—perhaps the most controversial rule of all—face immediate reform potential given concordant evolving cultural perceptions regarding the veracity of criminal offenders. Rule 404(b)’s backdoor for propensity evidence could be significantly narrowed; Rules 401 and 403’s relevance framework, which can work to exclude evidence of generalized structural discrimination, could be significantly broadened. In a dead evidentiary regime, these reforms seem impractical; through living evidentiary theory, they become inevitable.

Thus, this Article’s framework kicks evidence law back into life. It ameliorates the stagnation brought on by the enactment of the Federal Rules and restores the natural progression and evolution of evidence doctrine. Handing judges the spearhead of transformational evidentiary change recalibrates institutional incentives. It enables judges to optimize evidentiary practices in their courtrooms, while also retaining rulemakers’ ultimate

51 See McFarland, supra note 28, at 918 (“[S]ocial science demonstrates that liars fabricate lies with amazing rapidity.”); Orenstein, supra note 28, at 1413 (describing Rule 804(b)(2)’s dying declaration exception as the “laughing stock of hearsay exceptions”).

52 See Carodine, supra note 31, at 527 (“Rule 609 is indeed problematic for defendants . . . recent empirical study establishing that a substantial number of convicted felons, later determined to have been actually innocent, decided not to testify at their trials for fear that they would be impeached with their prior convictions.”).

53 See Paul S. Milich, The Degrading Character Rule in American Criminal Trials, 47 GA. L. REV. 775, 777 (2013) (“[T]he most critical and problematic part of the character rule [has been] the admission of the criminal defendant’s past crimes and other acts under rule 404(b).”); see also Rachel Moran, Contesting Police Credibility, 93 WASH. L. REV. 1339, 1359 (2018) (explaining how the res gestae doctrine, which is theoretically intended to “serve as a narrow means of admitting evidence related to the charged case, . . . has too often been employed as an end-run around what little protections 404(b) may provide to defendants.”).

54 See Jasmine B. Gonzales Rose, Toward a Critical Race Theory of Evidence, 101 MIND. L. REV. 2243, 2303 (2017) (describing how critical race analytical tools can be used to evaluate the admissibility of evidence).
authority to maintain a uniform code by endorsing certain judicial innovations and drawing back others.

The pages below therefore introduce, explain, and defend living evidentiary theory.

Immediately following this Introduction, Part I seeks to set the stage. First, it traces the history of evidence law in both the United States and England. This broad survey demonstrates the inherent turbulence that pervaded evidence law prior to the codification effort. Fundamental evidentiary change affecting the very nature of adjudication itself was relatively commonplace; longevity wasn’t a hallmark of any early evidentiary regime. Yet early realignments in evidence law were, by modern standards, normatively desirable. The system wasn’t simply changing for the sake of changing; instead, history reveals evidence law’s long legacy of reinventing itself to discern truth more accurately and better conform factfinding to evolving standards of decency. Part I then introduces the Federal Rules of Evidence. It demonstrates that the positivist movement that culminated in the codification of evidence law effectively froze evidence law in time. Despite the historical doctrinal turbulence, the process for amending the Federal Rules of Evidence is cumbersome. And, indeed, evidence law has largely stagnated for the last half century.

Part II offers this Article’s major intervention. It begins by introducing and explaining living evidentiary theory, a jurisprudential framework that encourages judges to holistically consider text, purpose, and modern empirical and normative understandings when constructing, interpreting, and applying the Federal Rules of Evidence. More broadly, living evidentiary theory offers a way forward for the structural progression of evidence law. In explaining the framework, Part II also considers potential objections, including those from a political, practical, and legal process perspective. Part II then details the immense reform potential of living evidentiary theory. The framework has the potential to reinvigorate a dormant doctrinal space. Once adopted, evidence law can again resume its historic progression towards a more empirically sound, culturally accepted system of rules. Following that account, the final part offers a brief conclusion.

I. TOWARD A CODIFIED EVIDENTIARY REGIME

Despite its prominent place in the American juridical landscape today, the Federal Rules of Evidence constituted a rather anomalous intervention at the time of their enactment. This is not to say that codification is unique to

evidence law, nor even that the Federal Rules of Evidence were at the forefront of the twentieth century’s broader codification movement. Rather, it’s a recognition that the creation of an affirmative evidentiary code constituted a tectonic shift—a fundamental departure—from the centuries-old process by which courts previously regulated and improved our evidentiary regime.

Historically, evidence law was largely a creature of the judiciary. Common law jurisprudence served as the driving force behind evidentiary progression. Even as a positivist movement began to swell in the country a century ago, evidence law was initially seen as beyond the reach of codification. For instance, despite receiving the formal authority to draft a controlling evidentiary code from the Rules Enabling Act of 1934, stakeholders and the Supreme Court were initially in “no mood to tinker with the law of evidence.” Instead, the common law progression of evidence law would continue. But that sentiment, of course, did not hold for long. The initial resistance to the evidence codification movement eventually gave way to ever-increasing calls for a uniform repository of evidence rules. And, indeed, the installation of the Federal Rules of Evidence in 1975 marked the death knell of evidence law’s jurisprudential progression.

If the enactment of the Federal Rules of Evidence merely transferred the historic evolution of evidence law from judicial channels to more administrative avenues of change, there would be little reason for complaint. Capturing the progression of our evidentiary regime in a single controlling code can offer material normative gains by improving uniformity and transparency across jurisdictions.

56 Dru Stevenson, Costs of Codification, 2014 U. ILL. L. REV. 1129, 1130 (“[M]odern codes are the product of the codification movement, which came in three waves in the nineteenth and early twentieth centuries. In earlier periods, legislation appeared in chronological form in official publications.”).
58 Weissenberger, Insights from Article VI, supra note 19, at 1617 (“The exercise of inherent judicial powers that have been historically integral to the forward evolution of the common law of evidence.”).
59 David P. Leonard, Foreword: Twenty Years of the Federal Rules of Evidence, 28 Loy. L.A. L. REV. 1251, 1251 (1995) (“Prior to 1975 only a few states had codified their evidence rules; today, only a handful have not.”).
61 Imwinkelried, supra note 3, at 416 (arguing that the enactment of the Federal Rules of Evidence constituted a perpetual “challenge to [the traditional, common-law judicial hegemony over evidence law].”)
But the turn to a positivist evidentiary regime has given rise to a more insidious consequence. Rather than merely redirecting the channels of evidentiary evolution in the United States, the enactment of the Federal Rules of Evidence has seemingly foreclosed the possibility of material change to our evidentiary regime altogether. In the half century since the federal evidence code emerged, rulemakers have entertained only modest amendments to the Federal Rules, simply fine-tuning the same system installed in the 1970s. Fundamental change to our evidentiary regime, change designed to ensure that evidence law accords with best empirical understandings and evolving standards of decency, has become all but impracticable.

The pages below therefore explore the demise of evidence law. The Section begins its journey by turning back the clock and tracing the development of our evidentiary regime through the centuries. The history of evidence law reveals a once-dynamic field, one marked by numerous fundamental realignments designed to better ensure that evidence law achieves its twin normative aims of accurate verdicts and legitimate trials. In seeking continual reinvention, our evidentiary regime has thus been quite turbulent. Longstanding stability and consistency certainly have not been historic hallmarks of evidence law. That is, until the Federal Rules of Evidence emerged. This Section therefore complements its exploration of evidence law’s common law roots with an equally deep dive into the social, legal, and jurisprudential factors that led to the enshrinement of an affirmative evidence code. It details how the Federal Rules of Evidence reassigned decisionmaking authority over evidence law’s progression from judges to rulemakers. And, ultimately, it considers how the Federal Rules have stifled the traditional progressive developments that were once a hallmark of the evidence doctrinal space.

A. Evidence Law’s Origins

Somewhat surprisingly, evidence law had relatively little significance until the seventeenth and eighteenth centuries. However, given the institutional

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63 Teter, supra note 4, at 160 (“The evidentiary rulemaking process is inherently conservative.”).
65 See generally Langbein, supra note 9, at 1173 (tracing the development of evidence law in the United States); WRIGHT & GRAHAM, supra note 60, at § 5001 (detailing the historical evolution of law from 1789 to 1938).
66 Noted scholar John Henry Wigmore would disagree on this point, marking the rise of evidence law in the late-sixteenth, early-seventeenth centuries; John Langbein, however, has argued that “even into the middle of the eighteenth century, the modern law of evidence was not yet in operation.” See supra note 10 and accompanying text.
structure of the early jury, the late arrival of a robust evidentiary regime perhaps make sense. After all, in its initial form, the jury was a completely different legal entity than its modern descendant. First emerging in the twelfth century, the early jury was primarily a prosecutorial and inquisitorial body. Early juries were not expected to serve as passive evaluators of contested facts; quite the opposite. Instead, given the sociocultural landscape of Medieval England, comprised of tight-knit agrarian communities, juries were expected to have intimate pre-knowledge about the facts at issue in a case. Initially, juries were comprised of those individuals with the most background knowledge about a particular event. It is therefore not difficult to see why evidence law had little role to play in the early era. Evidence law generally seeks to control that information which comes before a factfinder. It serves a gatekeeping function so as to properly tee up the contours of a factual dispute. In the early era, in contrast, the jury’s pre-knowledge and quasi-prosecutorial function necessarily rendered any evidentiary restrictions moot. Simply stated, the system “had hardly any place for a law of evidence.”

Fundamental change occurred on the wings of a pandemic. The fifteenth century’s “Black Death” crushed the agrarian sociocultural model that thereto agriculture became nonviable and communal life within small villages faded away, the early legal system’s ability to rely on intimate local pre-knowledge

67 The first jury initially emerged after the infamous ordeal ceased to constitute a legitimate dispute resolution tool in the twelfth century. James Q. Whitman, The Origins of Reasonable Doubt 7 (2008) (“Historians have long recognized that jury trial first emerged as an alternative to the judicial ordeal.”); Matthew P. Harrington, The Economic Origins of the Seventh Amendment, 87 Iowa L. Rev. 145, 155 (2001) (“The jury was a well-established feature of the English judicial system long before the first American colonies were established. Although the earliest juries may have performed an administrative function, it is clear that by the twelfth century, juries came to operate as a dispute resolution mechanism, supplanting the older forms of trial by ordeal or battle.”).


69 See Edward K. Cheng & G. Alexander Nunn, Beyond the Witness: Bringing A Process Perspective to Modern Evidence Law, 47 Texas L. Rev. 1077, 1084 (2019) (“The early jury was a self-informed group, as jurors’ place in tight-knit agrarian communities enabled them to have intimate knowledge about relevant trial facts or, at a minimum, put jurors in the best position to uncover the necessary facts.”); see also Langbein, supra note 9, at 1170–71.

70 See Cheng & Nunn, supra note 69.

71 See Dale A. Nance, Naturalized Epistemology and the Critique of Evidence Theory, 87 Va. L. Rev. 1551, 1555–56 (2001) (explaining how evidence law seeks to prevent jury error by filtering out evidence that is likely to lead a jury astray).


to adjudicate claims largely evaporated. “Without the village, the jury, as contemporaries knew it, would have been impossible.” But institutional evolution prevented obsolescence. In the decades following the Black Death, the English adjudicatory system radically reinvented itself. For the first time, juries began to assume a familiar role not as a self-informing prosecutor but instead as a passive evaluator of factual disputes. Juror pre-knowledge became increasingly uncommon and, therefore, third-party testimony in the courtroom rose to the fore. “The jury came to resemble the panel that we recognize in modern practice, a group of citizens no longer chosen for their knowledge of the events, but rather chosen in the expectation that they would be ignorant of the events.”

As jurors began to settle into their new passive role, evidence law (slowly) began to emerge. That is, when the jury began to serve solely an evaluative function, there started to emerge an apparatus of regulations concerning what information could or should constitute the basis of the jury’s decisions. Some of these emerging regulations aimed to increase information flow to the jury. The Marian Committal Statue of 1555, for instance, afforded early prosecutors a means by which to force witnesses to court to testify. Conversely, however, a robust system of rules seeking to prohibit certain types of evidence from the courtroom was much slower in its arrival. Increasingly, though, as the jury settled into its evaluative role, “the opportunity arose for the judge to regulate the trial testimony of witnesses,” leading to some of the first formal rules of evidence.

The emergence of additional evidentiary restrictions followed and, certainly by the turn of the nineteenth century, evidence law had arrived.

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76 LANGBEIN ET AL., supra note 73, at 128.
77 Langbein, supra note 9, at 1171.
78 See id. (“Instructional jury trial made the law of evidence possible.”).
79 John H. Wigmore, A General Survey of the History of the Rules of Evidence, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 692-93 (Ass’n Am. L. Schs. ed. 1908) (“By the 1500s, the constant employment of witnesses, as the jury’s chief source of information, brings about a radical change . . . . With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises.”).
82 Langbein, supra note 9, at 1171.
83 See supra note 10 and accompanying text.
By that point, evidence scholar John Henry Wigmore noted the existence of “a general and settled acceptance of [the hearsay] rule as a fundamental part of the law.” 84 Also in place by then was an emphasis on ensuring the validity of documentary evidence—a requirement now known as the “best evidence rule.” Geoffreyy Gilbert’s eighteenth-century evidence treatise, for example, exhibits an outsized focus on the best evidence rule, seeking to ensure that claims concerning written evidence were supported by original documentation. 85 Moreover, by this point, there had also emerged evidentiary restrictions around testimony from interested witnesses. 86 Fearing that interested witnesses might perjure themselves—an outcome seen as anathema in an era of witness reliability structured around the oath—evidence law simply prevented interested witness sworn testimony altogether. 87 Ultimately, though decentralized, a tangible corpus of evidence doctrine had come to exist in English and American courts.

Perhaps the most striking feature accompanying the emergence of evidence law is the rate at which the doctrinal space fundamentally reinvented itself. In the centuries before the enactment of the Federal Rules of Evidence, for instance, radical transformations in evidence law continually reshaped adjudication in the United States.

For example, evidence law’s primary emphasis for evaluating witness credibility materially transformed in just the two centuries before the enactment of the Federal Rules of Evidence. 88 As originally constituted, evidence law relied heavily on the oath to ensure witness trustworthiness. 89 Evidentiary restrictions arose, therefore, to protect the centrality of the oath. Credibility contests, which could reveal weaknesses in an oath-based system, were disallowed. “The oath’s central role demanded that the system avoid sworn credibility conflicts, because any such conflict would reveal in a visible

84 § JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 26 (3d ed. 1940).
86 See Fisher, supra note 18, at 624-27, 630 (describing the importance of limiting rules as a means of ensuring the strength of the oath that continued well into the nineteenth century).
87 Id.
88 Id. at 580-82.
89 Id. at 580 (“In the early years of the criminal trial jury, the system sought to stake its claim to legitimacy primarily in the oath and in the perceived divine power of the oath to compel truthful testimony.”); Frederick Schauer, Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond, 95 CORNELL L. REV. 1191, 1194 (2010) (“Historically, the law relied on the oath to serve the truth-warranting function.”).
and obvious way the oath’s inadequacy to assure truthful testimony.”

Thus, until a century and a half ago, prevailing evidence doctrine restricted jurors from hearing competing sworn testimony. Instead, those deemed most likely—or most tempted—to fabricate were simply barred from testifying under oath. Civil parties could not offer sworn testimony. Accused criminals could not offer sworn testimony. Even witnesses in felony cases called on behalf of the accused could not offer sworn testimony.

In the century preceding the enactment of the Federal Rules of Evidence, however, radical change swept through evidence law, fundamentally transforming the contours of adjudication in the United States. Cross-examination, rather than the oath, increasingly earned a perception as the “greatest legal engine ever invented for the discovery of truth.” And, as empirical and cultural understandings evolved, so too did evidence law. Between 1846 and 1848, Michigan and Connecticut became the first states to allow interested parties to testify in civil trials—and in the years subsequent, many other states followed suit. In 1864, just 111 years before the enshrinement of the Federal Rules of Evidence, Maine pioneered evidentiary reform by becoming the first jurisdiction to give criminal defendants the right to offer sworn testimony on their own behalf. As with the evidentiary change in the civil context, several states followed Maine’s lead.

Momentarily stepping back to take stock, a modern criminal trial that fails to afford the defendant a right to offer sworn testimony on her own behalf, or even to call sworn witnesses in her defense, seems inconceivable. By today’s standards, those are fundamental rights that strike at the heart of due process and fair adjudication. Yet just a century before the enactment of the

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90 Fisher, supra note 18, at 580.
91 See id.
92 Salinas v. Texas, 570 U.S. 178, 192-93 (2013) (Thomas, J., concurring) (“At the time of the founding, English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so.”).
93 See Fisher, supra note 18, at 604.
94 Langbein, supra note 9, at 1194 (“The modern law of evidence, centered on the oral testimony of witnesses at trial, supplanted the older law at the end of the eighteenth century and across the nineteenth century.”).
95 WIGMORE, supra note 84, § 1367 at 29.
96 See Fisher, supra note 18, at 659 (“Michigan became the first state to permit interested witnesses to testify in 1846 and Connecticut the first to admit civil parties in 1848.”).
97 Id. at 584 (“In 1864, the unlikely state of Maine became the world’s first common law jurisdiction to take this transformative step, and a host of mainly Northern states followed.”).
98 See id. at 696-97 (“[O]f the nineteen state and territorial legislatures that acted during the 1870s to grant criminal defendants the right to testify, none belonged to the old Confederacy, and only two were border states. Not until the 1880s did the Old South begin to fall in line.”).
99 See, e.g., Rock v. Arkansas, 483 U.S. 44, 52 (1987) (“[A]n accused’s right to present his own version of events in his own words” is “[e]ven more fundamental to a personal defense than the right of self-representation.”).
Federal Rules of Evidence—just a century before evidence law was frozen in time—trial practice and procedure was fundamentally different. Advocates were not merely fine-tuning a stable regime that largely resembled what would become the Federal Rules of Evidence; rather, they were insisting that sworn testimony from defendants (again, by modern understandings, a fundamental feature of trial) would result in a “habitual spectacle of . . . wholesale perjury.” 100 Needless to say, in the century before codification, evidence law was far from static.

Of course, fundamental changes to the nature of evidence law were not confined to the context of witness credibility. Significant reforms also targeted the very epistemological structure of American trials. Until the early nineteenth century, for instance, trials embraced a much more inquisitorial approach to factfinding. 101 It was common for judges to comment on the weight of the evidence and suggest an appropriate outcome to the jury. 102 By modern standards, judicial intervention abridging the jury’s factfinding role is anathema. But it wasn’t until 1795 when North Carolina became the first jurisdiction to forbid trial judges from commenting on the merits of a case. 103 And although widespread evidentiary reform soon began to emphasize and support the familiar adversarial factfinding model, many states continued to allow judicial comment on evidence until as late as 1864. 104 Again, by modern standards, inquisitorial factfinding at trial is largely unthinkable; yet it was the norm in the century before the arrival of the Federal Rules.

Evidence law’s modern fixation on character evidence, too, constitutes a relatively recent evolution within our evidentiary regime. John Henry Wigmore wrote that “[h]istorically, the use of bad general character appears as originally allowable—fitting, as it does, a more primitive notion of human nature. In England, it was used without question down to the latter part of the 1700s . . . .” 105 In the United States, it took until the nineteenth century

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101 Langbein, supra note 9, at 1171.
102 See Quercia v. United States, 289 U.S. 466, 469 (1933) (noting that, historically, judges could offer the jury “a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen”); Emily Wheeler, The Constitutional Right to A Trial Before A Neutral Judge: Federalism Tips the Balance Against State Habeas Petitioners, 51 BROOK. L. REV. 841, 869 (1985) (“At common law, judges routinely exercised the powers of summary and comment.”).
103 Fisher, supra note 18, at 670 (“In 1795, North Carolina became the first state to forbid trial judges to comment on the weight of the evidence when charging a jury . . . .”).
104 See id. (“By 1864, every member of the Confederacy had barred judicial comment, as had three border states and twelve states of the Midwest or West. But in the entire Northeast, only Massachusetts had followed the trend.”).
105 WIGMORE, supra note 84, § 923, at 1061.
for there to exist a widespread bar on propensity and character evidence.\textsuperscript{106} And even then, common law jurisprudence continued to adjust the regulations and restrictions surrounding character evidence.\textsuperscript{107}

Ultimately, evidence law’s origin story is one marked by radical change. As empirical and cultural understandings evolved, so too did our evidentiary regime. And the ability of evidence law to react and progress over time was not seen as troublesome, but instead as normatively desirable. Just nine years before the codification of the Federal Rules of Evidence, for example, the Third Circuit declared that the “federal system of evidence . . . is not to remain in a straitjacket, static and unchangeable.”\textsuperscript{108} Rather, in evidence law, continual pursuit of the optimal system of rules is the norm. At least, it was.

B. The Federal Rules of Evidence Emerge

Despite evidence law’s common law roots, historic turbulence, and fundamental constitutive reinventions, a swelling positivist movement in the latter half of the nineteenth century brought with it the winds of change.\textsuperscript{109} The political climate of the time increasingly favored legislative and administrative aggregations of power. Commentators have noted, for example, that in “the aftermath of its Watergate battle with the Executive branch, Congress was jealous and assertive of its powers.”\textsuperscript{110} Across many substantive spaces, statutes and codes began displacing decisionmaking authority previously vested in the judiciary.\textsuperscript{111} And evidence law was no exception.

Although stakeholders initially predicted that evidence law would withstand the positivist movement’s calls for codification,\textsuperscript{112} revolution came amid the sociopolitical turmoil of the 1960s. It was in the early part of that decade when the Judicial Conference and Standing Committee on Rules of Practice and Procedure first assembled a Special Committee on Evidence to

\textsuperscript{106} David P. Leonard, In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character, 73 IND. L.J. 1161, 1170 (1998) (“By the first decade of the nineteenth century, the rule excluding character evidence to prove a person’s conduct was well settled.”).

\textsuperscript{107} See id. at 1167-72.

\textsuperscript{108} United States v. 60.14 Acres of Land, 362 F.2d 660, 666 (3d Cir. 1966).

\textsuperscript{109} See Tamanaha, supra note 2, at 615 (charting the chronology of “historical jurisprudence” including the shift from a focus on natural law to legal positivism); see also HAYMAN, supra note 2, at 76-80 (discussing prominent twentieth-century positivists and the distinguishing features of contemporary positivist theory).


\textsuperscript{111} Stevenson, supra note 56, at 1290 (“[M]odern codes are the product of the codification movement, which came in three waves in the nineteenth and early twentieth centuries.”).

\textsuperscript{112} WRIGHT & GRAHAM, supra note 60, § 5002.
expressly consider a reinvention of evidence law as a codified regime. And indeed, the Special Committee encouraged the development and adoption of a uniform code of evidence rules. Soon thereafter, Chief Justice Earl Warren established the first Advisory Committee on the Federal Rules of Evidence. The Advisory Committee, in turn, proposed its first draft evidentiary code in 1970. Following a series of revisions, the Supreme Court sent the draft Federal Rules of Evidence to Congress for approval in 1972. After two years of its own extensive share of negotiations, revisions, and substantive adjustments, Congress voted in favor of the evidence code in 1975. With a signature from President Gerald Ford in 1975, the Federal Rules of Evidence became law.

Without question, the enactment of the Federal Rules of Evidence was a positivist triumph. Contrary to centuries of practice, the code seemed to foreclose longstanding judicial authority to shape and evolve evidence law. Rather, rulemakers would hold the key to any evidentiary change. They became the new gatekeepers. And traversing their new gate is quite the endeavor.

Most (formal) amendments to the Federal Rules of Evidence now find their inception in the Advisory Committee on the Rules of Evidence. The Advisory Committee, which is composed of judges, practitioners, and academics, is charged with “carry[ing] on a continuous study of the operation and effect” of the Federal Rules. If the Advisory Committee supports a particular amendment to the evidentiary code, the game is not yet over—in fact, the labyrinth has just begun. The proposed amendment is sent

113 Id.; Teter, supra note 4, at 158 (“The first significant movement toward the adoption of the Federal Rules of Evidence came in 1961, when the Judicial Conference approved the creation of a Special Committee on Evidence to examine the desirability of developing a set of evidentiary rules for the federal courts.”).
114 WRIGHT & GRAHAM, supra note 60, § 5006.
115 Id.
116 Id.; Teter, supra note 4, at 158.
119 Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, 1 PUB. PAPERS 6 (Jan. 3, 1975); see also Weissenberger, Evidence Myopia, supra note 46, at 1569.
120 See Imwinkelried, supra note 3, at 416 (“Congress continues to challenge the traditional, common-law judicial hegemony over evidence law.”).
from the Advisory Committee to the Judicial Conference and Standing Committee on Rules of Practice and Procedure. If it passes muster with the Judicial Conference, it is then sent to the full Supreme Court. Once the Supreme Court approves of a change, the proposed amendment takes a trip across First Street to Congress, where both the House and Senate have an opportunity to review the proposed change, and only once the amendment survives scrutiny from Congress does it take effect.

With that foundational understanding of evidence law’s new constitutive form in place, it’s worthwhile to take a step back for evaluation. To be sure, in a vacuum, the transition from a common law to a codified evidentiary regime might not seem particularly material. One might fairly question whether labeling the transition “revolutionary” is accurate. And indeed, theoretically, codification of the rules of evidence might be seen not only as substantively inconsequential but also juridically beneficial. After all, a copy of the Federal Rules of Evidence in every courtroom ensures that our evidentiary regime is applied fairly and consistently across jurisdictions.

But problems have emerged in practice. Fifty years of experience has revealed that the civil turn in American evidentiary law has, functionally speaking, resulted in the death of the historic progression of our evidentiary regime. The Federal Rules’ cumbersome amendment process has largely foreclosed the possibility of the material change needed to ensure that evidence law continually accords with best empirical and normative understandings. In fact, it has had quite the opposite effect. It channels rulemakers into an “inherently conservative” approach that forgoes significant changes in favor of maintenance of the status quo. For instance, even if rulemakers did deem a particular amendment desirable, the current bureaucratic maze establishes a de facto three-year process to actualize it. Perhaps that long time horizon wouldn’t be too detrimental were rulemakers willing to traverse it, but that has not been the case. Scholars have recognized that rulemakers have proven reluctant to tinker with any material aspect of the modern evidentiary code. Instead, likely in recognition of the fact

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124 Scallen, supra note 60, at 863 n.102.
125 See id. (”[T]here are actually three judicial hurdles for the Advisory Committee . . . the Standing Committee on Rules and Practice and Procedure of the Judicial Conference, the Judicial Conference, and the Supreme Court.”).
126 Teter, supra note 4, at 160(providing a general description of the amendment process).
127 120 CONG. REC. 1413 (1974); WRIGHT & GRAHAM, supra note 60, § 5022 n.66.
128 Teter, supra note 4, at 160.
129 The Politics of (Evidence) Rulemaking, supra note 64, at 739 (describing the pursuit of amendments to the Federal Rules of Evidence as "a time consuming, very slow process").
130 Paul R. Rice, Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?, 53 HASTINGS L.J. 817, 838 (2002) ("Law by committee, particularly through the bureaucratized process under the Rules Enabling Act, is inherently less responsive and vital . . . .")
that the code is generally achieving its goal of fostering legitimate adjudication, rulemakers have steered clear of the broad-scale structural reform that previously dominated the evidence landscape in the centuries preceding the Federal Rules’ enactment.

Thus, evidence law has become frozen in time. The then-existing culmination of centuries of evidentiary evolution was enshrined in the 1975 code—a relatively arbitrary point in time, substantively speaking—and rulemakers have since demonstrated little appetite for continuing the common law’s progressive evolution of our evidentiary regime.

Importantly, recognizing rulemakers’ reluctance to broadly reform evidence law is not meant to imply that they have been inactive. Far from it. Rulemakers have pioneered no less than twenty-nine substantive amendments to the evidentiary code in the past half century.131

But what close examination of those amendments reveals is that the last half century’s changes to evidence law have been modest by historical standards. Those structural changes to our evidentiary regime made even just a century prior to the enactment of the Federal Rules of Evidence have all but disappeared. Recall that just 111 years before the Rules froze evidence law in time, the American trial was an entirely different affair. In many jurisdictions, defendants could not offer sworn testimony on their own behalf.132 The oath, not cross-examination, was the courtroom’s primary truth-seeking tool.133 Even restrictions on character or propensity bars were relative newcomers.134 It took broad structural changes to transition away from that outdated form of adjudication.

Consider, too, a modern reference point. Even within the last half century, those small pockets of evidence law still free from rulemakers’ grasp have continued to undergo radical reconstitution. Take the Confrontation Clause. Importantly for our purposes, the Confrontation Clause’s residence within the Sixth Amendment dictates that its corresponding jurisprudence was largely unaffected by the enactment of the Federal Rules of Evidence. Statutes, of course, cannot supersede constitutional provisions. So, while the codification of the Rules largely froze the majority of our evidentiary regime in place, Confrontation jurisprudence maintained the natural state of judicial

132 Fisher, supra note 18, at 668-69 (detailing how it took Delaware until 1881 to enact a statute permitting testimony by civil parties).
133 Schauer, supra note 89, at 1194 ("Historically, the law relied on the oath to serve the truth-warranting function.").
134 See, e.g., Leonard, supra note 106, at 1170 n.41 (noting that the case most often cited as the source of the rule excluding character evidence was decided in 1810).
fluidity that typifies (portions of) constitutional law. And, perhaps as expected given the historic norm, Confrontation jurisprudence has continued to fundamentally evolve while the rest of evidence law has stood still. In the 1980s, just five years after the enactment of the Federal Rules of Evidence, the Supreme Court’s decision in Ohio v. Roberts ushered in a jurisprudential era that conceived of the Confrontation Clause as provision primarily rooted in principles of reliability. That is, the Ohio v. Roberts Court considered the Confrontation Clause to be a witness-production adjudicatory tool predominantly designed to improve the reliability of evidence. Twenty-four years after Roberts, though, the Supreme Court radically reinvented the Confrontation Clause. In accordance with the historic spirit of evidence law, it fundamentally realigned doctrine to square it with what the Court perceived as improved understanding. To wit, the Supreme Court’s 2004 decision in Crawford v. Washington overruled Ohio v. Roberts. And notably, the jurisprudential transformation offered by Crawford was not a minor recalibration; instead, Crawford entirely reimagined the Confrontation Clause as a provision centered around legitimacy and fairness principles rather than reliability. Crawford dramatically expanded the exclusionary scope of the Confrontation Clause, significantly changing the playing field of criminal adjudication.

Now compare these broad structural changes to the relatively modest amendments made to the Federal Rules of Evidence. Consider, for example, recent amendments to Federal Rule of Evidence 404. Rule 404 is one of the more controversial evidentiary rules. It allows, in certain situations,
character and propensity evidence into the courtroom when that evidence is purportedly offered for a non-propensity rationale.141 But even when offered for a so-called permissible purpose, the introduction of propensity evidence requires factfinders to engage in nigh-impossible mental gymnastics; it is of course quite difficult to “unring the bell” and disregard information once it’s before you.142 Because improper use of propensity evidence has a disproportionately negative effect on defendants, scholars and activists have long called for a major structural reformation of Rule 404.143 Yet, despite those calls for material change, rulemakers have steered clear. Instead, amendments to Rule 404 have pursued minor adjustments. For instance, a 2000 amendment introduced a “tit for tat rule,”144 expanding the situations in which prosecutors can introduce character evidence against a defendant.145 A 2006 amendment clarified that general character evidence (as opposed to specific acts) is inadmissible in civil cases.146 A more recent 2020 amendment focused on notice requirements, requiring that an intention to introduce past acts is broadcast well before trial.147

The amendments outlined above are by no means unimportant. They each offer necessary improvements or clarifications. But they are also demonstrative of an affinity for the status quo. Missing from the list of amendments—and from the list of changes even considered by rulemakers—is any substantial engagement with the underlying structural issues driving evidence law. Missing is continual, persistent self-reflection as to whether our current regime is best serving the normative ideals of accuracy and legitimacy. Missing is any attempt to expressly consider evidence law’s role in falsely convicting scores of defendants exonerated by the Innocence Movement;148

141 Fed. R. Evid. 404(b).
142 Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 VA. L. REV. 1857, 1864 (2001) (“Simple admonitions that instruct the jury to disregard psychologically compelling but inadmissible testimony . . . . often fail to unring the bell.”).
144 In his classroom, Professor Edward K. Cheng coined the term “tit for tat rule” to describe the 2000 Amendment to Rule 404(a)(2)(B), which allows prosecutors to demonstrate that a defendant has the very same character trait he accuses a victim of possessing.
145 See Fed. R. Evid. 404(a) advisory committee’s note to 2000 amendment.
146 Fed. R. Evid. 404(a) advisory committee’s note to 2006 amendment.
147 Fed. R. Evid. 404(b) advisory committee’s note to 2020 amendment.
148 See Jeffrey Bellin, The Evidence Rules That Convict the Innocent, 106 CORNELL L. REV. 305, 307 (2021) (“A smattering of state laws respond to the revelations of the Innocence Movement in ways that touch on evidence rules, but these changes serve only to illustrate the absence of a more comprehensive reckoning for evidence policy.”).
or evidence law’s potential to aid victims in the #MeToo era; or evidence law’s place in an urgent national reckoning over race and the justice system.

Where does all this currently leave evidence law?

Evidence law is, by and large, frozen in time. Of course, it was by no means a foregone conclusion that the positivist turn culminating in the enactment of the Federal Rules of Evidence would put an end to evidence law’s progressive historic evolution. Indeed, one could imagine an active body of rulemakers continually sifting the empirical and normative literatures as part of a perpetual introspective effort to optimize our evidentiary regime. Instead, amendments to the Rules have been rare; structural change has been non-existent.

And so as scientific and cultural understandings evolve, evidence law remains stagnant. The status quo reigns supreme.

II. THE LIVING RULES OF EVIDENCE

Hindsight is clarifying. At the outset of any substantial legal project, unknowns exist. Problems prove invisible. Shortcomings are difficult to discern. Rather than being able to account for and remedy every flaw ex ante, necessary revisions within particular legal regimes often only become clear with the passage of time. It was true of the Constitution. It was true of many statutory regimes. And it is true of the Federal Rules of Evidence.

Evidence law’s future therefore depends on a return to its past. To bring evidence law back to life, judges must reassume their historic position at the forefront of evidentiary change. Although judicial intervention in a positivist space might seem radical, it’s far from unprecedented. In fact, the move has seen significant success in cognate contexts. So, too, can evidence law benefit from a more active judiciary.

Thus, the pages below introduce living evidentiary theory, a jurisprudential approach that encourages judges to take an external, holistic perspective when

149 Cf. Michael Conklin, #MeToo Effects on Juror Decision Making, 11 CALIF. L. REV. ONLINE 179, 179-80 (2020) (recognizing that the #MeToo movement represents a fundamental societal shift that will have tangible effects on the legal system).


interpreting and applying the Federal Rules of Evidence.\textsuperscript{153} In offering a robust foundation for the framework, the Section seeks to demonstrate that living evidentiary theory is conceptually sound and normatively desirable. Once adopted, the interpretive model would see evidence law again resume its historic progression toward a more empirically-sound, culturally accepted system of rules.

A. What Is Living Evidentiary Theory?

Gridlock is not new to positivism. Rather, it is arguably a defining feature.\textsuperscript{154} Evidence law’s present period of stasis is visible in—and maybe even typical of—other positive law regimes. Outdated constitutional provisions face no prospect of formal amendment.\textsuperscript{155} Certain statutory regimes, even unpopular ones, stand immobile due to the impracticality of congressional action.\textsuperscript{156} Even administrative regulations suffer from undue entrenchment.\textsuperscript{157} Yet, when staring down rigid provisions in these positivist contexts, would-be reformers have not resigned themselves to substantive torpidity.\textsuperscript{158} Quite the opposite, in fact. Amid frozen legal landscapes, the

\textsuperscript{153} Alongside its primary aims, living evidentiary theory also seeks to renew a once-compelling but now largely dormant academic debate at the intersection of evidence law and interpretive theory. During the zenith of those discussions in the decades immediately following codification, the leading academic proponent of a textualist reading of the Federal Rules of Evidence was Professor Ed Imwinkelried, who published many compelling and persuasive articles on the topic. See, e.g., Imwinkelried, supra note 3, at 427 (“[Stating] three premier commandments for properly interpreting legislature: ‘(1) Read the statute; (2) read the statute; [and] (3) read the statute!’”); Edward J. Imwinkelried, Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse than Myopia, 40 WM. & MARY L. REV. 1555, 1596 (1999) (discussing different textualist approaches judges have taken in construing the Federal Rules of Evidence). Conversely, Professor Eileen Scallen advanced an argument that accords well with the driving motivation of living evidentiary theory. Her compelling thesis argues that consideration of “practical reasoning” should complement evaluation of the Federal Rules of Evidence’s text, particularly because pragmatism is a “school firmly rooted in the realm of classical rhetoric and the method best suited to the philosophical perspective of pragmatism that led to the creation of the Federal Rules of Evidence.” Eileen A. Scallen, Classical Rhetoric, Practical Reasoning, and the Law of Evidence, 44 AM. U. L. REV. 1717, 1719 (1995) [hereinafter Scallen, Classical Rhetoric].


\textsuperscript{155} Cf. William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419, 499 (2001) (describing the possibility of a formal constitutional amendment as “impractical”).

\textsuperscript{156} See Heidi S. Alexander, The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws, 61 RUTGERS L. REV. 381, 389 (2009) (“[M]inimal effort is spent on repeal because it is more difficult to repeal a statute than to enact one.”); Matthew C. Stephenson, Does Separation of Powers Promote Stability and Moderation?, 42 J. LEGAL STUD. 331, 335 (2013) (“[S]eparation of powers . . . makes it more difficult to repeal or modify an enacted statute.”).

\textsuperscript{157} See Eloise Pasachoff, Administrative Rights in Institutional Perspective, 66 DUKE L.J. ONLINE 117, 123 (2007) (“Formal regulations that become entrenched are much harder to change than mere guidance.”).

\textsuperscript{158} See Eskridge, supra note 15555, at 499 (“Now that formal constitutional amendment has become impractical, constitutional change has come in other ways.”).
pursuit of change has instead shifted attention to judicial opinions for actualizing substantive evolution. That is, debates over appropriate judicial decisionmaking philosophy take on added importance when judges constitute the only practical vehicle for channeling law to a superior form. In the face of positivist immobility, for example, should a judge stand back and defer to the status quo? Or is a judge called to a more expansive role, one that sees her channeling law to a better state?

Given its relative stagnation over the last half century, evidence law has now arrived at that critical juncture. The pages above suggest that rulemakers are unlikely to break the existing mold and progressively seek structural change that will accord the Federal Rules of Evidence with modern empirical and cultural understandings. Given the unlikelihood of reform through formal channels, attention should turn to evidentiary jurisprudence. Was the historic judicial hegemony over evidence law destroyed for good with the enactment of the Federal Rules of Evidence? Or, despite that shift, is there still a meaningful opportunity for judges to reassume their historic role at the forefront of evidentiary change?

Our search for answers begins, as it must, with a concession. The Federal Rules of Evidence are here to stay. Despite the substantive critiques advanced in this Article, there’s no doubt that the code has become entrenched as a core component of the American juridical system. A copy of the Rules can be found in every federal courthouse; every litigator has deep familiarity with its contents. The optimal path forward, then, does not involve a call for wholesale judicial usurpation of the Federal Rules of Evidence. Nor should it. An unmitigated judicial rejection of the Rules would constitute an anarchical rejection of the very notion of positivism. And, as with any reform proposal, the remedy cannot be worse than the ill.

Equally, though, accepting the centrality of the Federal Rules of Evidence does not invariably demand that judges act as mere rubber stamps, blindly applying the text of rules with no consideration of how their rote evidentiary rulings accord with rulemakers’ intentions, the rule’s purported basis, or modern empirical and normative understandings. Rather, judges should be called to do just that—judge. With the Federal Rules of Evidence as her guiding light, a judge should make evidentiary

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159 See Lino A. Graglia, “Constitutional Theory”: The Attempted Justification for the Supreme Court’s Liberal Political Program, 65 Texas L. Rev. 789, 790-91 (1987) (“[T]he Court has become our primary policy-making institution with respect to issues that determine the nature of a civilization and quality of life in a society.”).

160 But see Lon L. Fuller, Positivism and Fidelity to Law - A Reply to Professor Hart, 71 Harv. L. Rev. 650, 670-71 (1958) (“[T]he basic reason why positivism fears a purposive interpretation is not that it may lead to anarchy, but that it may push us too far in the opposite direction. It sees in a purposive interpretation, carried too far, a threat to human freedom and human dignity.”).
rulings with a holistic perspective, coupling adherence to the rules with a deep appreciation for modern realities.

But, in a principled sense, how exactly would that work?

1. Fidelity, Justifiability, and the Federal Rules of Evidence

We embark in the abstract. Where a doctrinal space concurrently faces a pressing need for both positivist compliance and substantive evolution, reformers can strike an ideal balance—they can effect material change—by adopting a quasi-Dworkinian interpretive model that comparatively weighs two variables: “fidelity” and “justifiability.” That is, judges can achieve desirable reform by pinpointing an application of the law that expresses fidelity to (i.e., accords with) the boundaries of existing legal source material while also offering the most justifiable (i.e., normatively desirable) outcome within that permissible range. Legal outcomes thus remain constrained due to the requirement that judges remain sufficiently faithful to controlling law, but within that often-broad boundary, judges have significant latitude to best shape the law in light of external realities.

Living evidentiary theory contours “fidelity” and “justifiability” to evidence law. It operationalizes the theoretical (and sometimes nebulous) concepts in a manner that promises tangible, material rejuvenation of evidence law’s substantive evolution. As the pages below illustrate, the living evidentiary model encourages a judge to complement her reliance on the Federal Rules of Evidence with an equally forceful appreciation for modern scientific and cultural realities. Stated more technically, in applying an evidentiary rule, living evidentiary theory pushes judges to move beyond a singular evaluation of “fidelity”—a limited interpretive approach that has stymied evidence law for the past half century—and instead couple that “fidelity” analysis with deep consideration of which potential application of the Federal Rules of Evidence is most normatively justifiable. Analogous bespoke fashioning of “fidelity” and “justifiability” has successfully motivated immense reform in other doctrinal spaces, most notably through the eponymous framework of living constitutionalism and Judge Guido Calabresi’s

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161 For a description of this Article’s relation to Dworkin’s theory of “law as integrity,” see DWORKIN, supra note 34 and accompanying text; see also Ronald Dworkin, No Right Answer?, 53 N.Y.U. L. REV. 1 (1978) (using the Dworkinian interpretive model when rebutting arguments that questions of law do not have right answers).

162 See DWORKIN, supra note 34, at 230-32 (explaining the two dimensions of fit and justifiability using novelists as an analogy).

163 See DWORKIN, supra note 34, at 119-20 (“[L]aw as integrity . . . does not limit law to what convention finds in past decisions but directs [the judge] also to regard as law what morality would suggest to be the best justificiation of these past decisions.”); cf. Balkin, supra note 3737, at 1133 (“[Living constitutionalism] is flexible but not lawless, adaptable to circumstance yet constrained by long tradition.”).
model for reinvigorating torpid statutory spaces.\textsuperscript{164} So, too, can “fidelity” and “justifiability" revive evidence law.

Granular examination of living evidentiary theory’s unique employment of “fidelity” and “justifiability” is therefore in order. As noted above, living evidentiary theory’s “fidelity” variable asks judges to consider how well a potential application of an evidentiary rule comports with the text and intent of the Federal Rules of Evidence. Though facially intuitive, the “fidelity” analysis is deeply substantive in application—indeed, there’s likely to be wide disagreement regarding the outer boundary and reach of the “fidelity” domain. Just how faithful to a Federal Rule of Evidence must a judge be when applying it? Consider a grounding example. Broadly stated, Federal Rule of Evidence 408 renders inadmissible statements made during settlement negotiations.\textsuperscript{165} Thus, a judge’s interpretation of Rule 408 would of course express “fidelity” to the code if she read Rule 408 to exclude exactly that—statements made during settlement negotiations.\textsuperscript{166} After all, such an interpretation directly maps onto Rule 408’s text.\textsuperscript{167} Conversely, the judge would plainly violate the interpretive “fidelity” requirement if she simply ignored Rule 408 and independently declared statements made during settlement negotiations fair game for litigants at trial. Regardless of which canon of construction the judge employs, there’s no plausible way to reconcile that outcome with the text or intent of Rule 408.\textsuperscript{168} But what about the murky middle ground that lies between those two extreme occurrences? For instance, what if a judge believes that, in the context of a particular case, the best outcome is to allow a party to introduce her opponent’s settlement statements because those statements fraudulently induced the party to continue to engage in action that maximized the opponent’s claim against her?\textsuperscript{169} From a strict textualist standpoint, a limited admissibility carveout enabling the party to admit the opponent’s fraudulent settlement statements doesn’t seem to fit within the boundaries of Rule 408; there is no textual exception for

\textsuperscript{164} See STRAUSS, THE LIVING CONSTITUTION, supra note 35, at 1-3 (explaining the U.S. constitutional system leverages common law precedent to “allow room for adaptation and change, but only . . . in ways that are rooted in the past”); CALABRESI, supra note 38, at 164 (“[The common law function] is no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule.”).

\textsuperscript{165} FED. R. EVID. 408.

\textsuperscript{166} Id.; see, e.g., Am. Heartland Port, Inc. v. Am. Port Holdings, Inc., 53 F. Supp. 3d 871, 881 (N.D. W. Va. 2014) (“Federal Rule of Evidence 408 clearly provides that settlement negotiations as evidence generally are inadmissible.”).

\textsuperscript{167} FED. R. EVID. 408.

\textsuperscript{168} See id.

\textsuperscript{169} This hypothetical is a loose adaptation of the events at issue in Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477 (7th Cir. 2000).
curative admissibility. But from a purposivist or pragmatic vantage point, interpreting Rule 408 to only protect good-faith settlement negotiations comfortably comports with rulemakers intentions. After all, in creating Rule 408, rulemakers intended to make settlement negotiations more efficient; they didn't intend to offer an avenue for fraud. What this simple exercise demonstrates, then, is that the scope of the “fidelity” variable is often a point of contention. It pits canons of construction against one another to determine just how much conformity the Federal Rules of Evidence demand. And, notably for our purposes, a pragmatic or purposivist interpreter often finds herself with substantial leeway to reconcile desirable outcomes with the spirit of a commanding rule.

But “fidelity” alone is only half the battle. An over-emphasis on fidelity in interpretation will stagnate substantive law if the controlling source material is itself immobile. Indeed, a fidelity over-prioritization is the very ill that has stymied evidence law for the past half century. No, progressive reform requires a coupling of “fidelity” with a serious, and perhaps primary, emphasis on “justifiability.” That is, for substantive evolution to occur in a frozen positivist space like evidence law, judges must move beyond the “fidelity” assessment and place determinative weight on which potential interpretation and application of an evidentiary rule best “justifies” the continued preeminence of the Federal Rules of Evidence. Here, we see the evolutionary potential of the framework. Assessing justifiability, assessing which potential outcome is most normatively desirable, necessarily invokes externally facing analysis.

171 FED. R. EVID. 408. advisory committee’s notes (“The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum.”).
172 See Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750, 1759 (2010) (“Purposivists typically embrace a more flexible approach, an approach from which modified textualism’s strict interpretive hierarchy is a departure.”).
173 See Randolph N. Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 TEXAS L. REV. 745, 784 (1990) (“The plain-meaning standard will do more than just transform the evidentiary landscape; it will also freeze the new forms into unchanging shapes.”).
174 Id. (“The plain-meaning rubric . . . squelches evidence law’s historic dynamism and abolishes common-law methods of resolving evidentiary disputes.”).
175 See Scallen, Classical Rhetoric, supra note 153, at 1759 (arguing that applying the Federal Rules of Evidence is not a process in “discovering the true or correct interpretation, but that it is constructing the best interpretation possible in a particular context”).
176 Cf. Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory, 72 TEXAS L. REV. 1, 10 (1993) (“At the heart of Dworkin’s picture of justification lies the idea that to be justified, law must be validated by something beyond the confines of text, precedent, legislative purpose, and history.”).
applications of an evidentiary rule, all of which express sufficient fidelity to
the text or intent of the Federal Rules of Evidence, judges can and should
incorporate insight from scientific, empirical, and normative literatures to
determine the optimal path forward. And, as with the fidelity analysis, this
normative weighing is deeply sophisticated. It affords judges latitude to
incorporate previously inaccessible analytical frameworks into evidence law.
Critical legal studies, law and economics, and legal process theory (among
other schools) all become useful and viable reference points for discerning
which potential application of the code is most justifiable. The social
psychology, neuroscience, and criminal justice literatures all become
indispensable components of a judge’s toolkit when operationalizing the
Federal Rules. Indeed, the power of “justifiability” lies in its ability to harness
external realities to determine the best application of the Rules.

Of course, by now it will be clear that “fidelity” and “justifiability” are
often negatively correlated. All else being equal, judges will (and should)
naturally gravitate toward an interpretation of controlling law that constitutes
the best fit with the legal source material. For instance, if the most
“justifiable” outcome identified by a judge is obtainable simply by hewing
closely to the text of an evidentiary rule, there’s no reason for the judge to
depart from that comfortable interpretation—and to decrease the “fidelity” of
her interpretation—just to achieve the same normative good. Simply put, then,
where “fidelity” and “justifiability” work together, both should be maximized.

The more difficult situation is likely the more common one. When
“fidelity” and “justifiability” work not in tandem but rather in opposition,
what is to be done? Let’s return, for instance, to the Rule 408 example
introduced above. Recall that, in the difficult variant of that hypothetical, a
party seeks to introduce her opponent’s statements from settlement
negotiations because those statements fraudulently induced her to more
severely damage her opponent’s property (thereby maximizing the value of
his claim). Once again, if a judge seeks to maximize “fidelity,” the likely
application of Rule 408 is to exclude the opponent’s fraudulent statement
because it is a “statement made during compromise negotiations about the
claim” that is offered to “prove or disprove the validity or amount of a
disputed claim.” Conversely, if a judge seeks to maximize “justifiability,” the

177 See William Baude & Stephen E. Sachs, The Law of Interpretation, 130 HARV. L. REV. 1079,
1115-16 (2017) (“[T]he approaches used in our legal system should be conducted as legal argument,
based on legal materials.”).
178 See Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 484 (7th Cir. 2000).
179 FED. R. EVID. 408.
opposite result is probably the right one. The normative literature, for example, demonstrates the superiority of curative admissibility. From, say, an efficiency standpoint, the most normatively desirable way to apply Rule 408 is to refrain from protecting fraudulent statements as those statements will induce misguided (not profit-maximizing) actions. From a critical perspective, alternatively, Rule 408 should not be read to protect fraudulent statements as the likely victims of fraudulent inducement will be, and historically have been, members of marginalized groups. Under any number of external lenses, the permissive interpretation seems more justifiable.

Stepping back, then, one can see how this hypothetical gives rise to a tension between “fidelity” and “justifiability.” To maximize fidelity, a judge must forgo the optimal normative outcome. To maximize justifiability, a judge must adopt a more purposivist or pragmatic interpretive approach that fits Rule 408 less closely than a textualist methodology. One variable must take precedence, but which one?

In the face of a frozen positivist landscape, emphasizing “justifiability” over “fidelity” is the superior approach. From a structural perspective, prioritizing fidelity places the locus of substantive evolution directly with rulemakers; a fidelity emphasis necessarily sees judges refraining from an effort to channel law to a better form. In an active, fully functioning doctrinal space, perhaps such deference is warranted. If the applicable rulemakers are proactive about fostering substantive evolution and aligning evidence law with our best normative and empirical understandings of the world around us, then it makes sense for judges to defer to those rulemakers in their appointed roles. But where the system breaks down, and substantive evolution is untenable solely because of bureaucratic and administrative roadblocks, judges are right to take a more active hand in developing doctrine. That is, under such circumstances, judges are right to relatively (but not wholly) deemphasize fidelity and instead channel law to a

180 See Bankcard Am., 203 F.3d at 484 (“It would be an abuse of Rule 408 to allow one party during compromise negotiations to lead his opponent to believe that he will not enforce applicable time limitations and then object when the opponent attempts to prove the waiver of time limitations.”).

181 See Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 768 (1983) (“[I]f a large number of fraudulent bargains are enforced, the efficiencies of a strict proof system may be outweighed by its inefficiencies.”).

182 Audrey G. McFarlane, The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law, 2011 WIS. L. REV. 855, 885 (“[F]orce and fraud will be concentrated towards one end of the spectrum, or to say it another way, concentrated racially, by class and geography.”).

183 See Jonakait, supra note 173, at 784 (“The plain-meaning standard will do more than just transform the evidentiary landscape; it will also freeze the new forms into unchanging shapes.”).

184 Cf. Imwinkelried, supra note 3, at 412 (arguing that the text of the Federal Rules of Evidence should be given “far more weight” than extrinsic materials).
superior form by emphasizing the justificatory aspect of legal interpretation. Where positive law is frozen, revival comes through a more active judiciary.

Having explored the technical mechanics of living evidentiary theory, a few representative examples now help demonstrate the model's potential. Return, first, to Federal Rule of Evidence 803(2), generally known as the excited utterance exception. The rule allows hearsay statements into the courtroom if, inter alia, the statement was made when the declarant was under the shock of a startling event. By now, it is widely known that the excited utterance exception rests on folk psychology. Rulemakers initially claimed that statements made under stressful or panicked conditions are inherently trustworthy because the declarant is not in a position to fabricate. Of course, modern empirical literature has largely disproven the general claim that stress aids declarant reliability; in truth, it has the opposite effect. Nonetheless, given the dormancy of evidence law, the excited utterance exception stands strong. Despite its empirical fallibilities, it continues to serve as a vehicle for ushering unreliable hearsay statements into the courtroom. And, within our existing framework, that comes as no surprise. For example, for a judge adopting a textualist posture toward the Federal Rules of Evidence, the technically correct move is to continue to allow excited utterances into the courtroom. That interpretation maximizes “fidelity.”

But living evidentiary theory changes the game. Since text and purpose—the notion of “fidelity”—no longer exhaust the requisite interpretive analysis, a judge must also turn her attention to the modern scientific literature to consider whether applying the excited utterance exception in a fashion that simply ignores empirical truth constitutes the most justifiable option among the range of acceptable approaches. Of course, it doesn’t. Instead, recognizing that Rule 803(2)’s empirical basis has largely been vitiated, a judge should reassume her historic power to craft a solution—to step in where rulemakers will not. And here, a weighing of both fidelity and justifiability reveals a

185 Fed. R. Evid. 803(2).

186 See, e.g., Liesa L. Richter, Goldilocks and the Rule 803 Hearsay Exceptions, 59 WM. & MARY L. REV. 897, 918-19 (2018) (“Judge Posner has suggested that the present sense impression and excited utterance exceptions represent nothing more than baseless ‘folk psychology’ and laments a judge’s obligation to admit them.”).

187 See Fed. R. Evid. 803(2) advisory committee’s notes on proposed rules (1975) (“[C]ircumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”); United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) (“The rationale for this hearsay exception [excited utterances] is that the excitement of the event limits the declarant’s capacity to fabricate a statement and thereby offers some guarantee of its reliability.”).

188 See 2 MCCORMICK ON EVIDENCE, supra note 28, § 272, at 366 (“The entire basis for the [excited utterance] exception may . . . be questioned. . . . [g]iven the distorting effect of shock and excitement upon the declarant’s observation and judgment.”).
number of superior approaches to the administration of the excited utterance exception in the courtroom. For instance, a judge might note that blindly applying Rule 803(2) to every statement made under stressful or startling conditions risks vitiating its basis entirely—in many instances, these statements will be less reliable, not more.\textsuperscript{189} Thus, perhaps a superior means of applying the excited utterance exception is to require that proponents offer proof not only satisfying the rule’s enshrined elements but also affirmatively demonstrating reliability. That is, a judge could evolve the application of the excited utterance exception to require a demonstration of trustworthiness that directly addresses the contrary scientific consensus. Notably, this approach still expresses fidelity to Rule 803(2)—albeit in a purposivist sense.\textsuperscript{190} But, when trying to determine the optimal approach to interpreting and applying Rule 803(2), the purposivist model above is more justifiable than a strict textualism given its ability to align evidence law with best empirical understandings. Rather than turning a blind eye to folk psychology in our evidentiary regime, the judge channels evidence law to a better form.

As suggested above, living evidentiary theory does not solely premise reform on improved empirical and scientific understandings; rather, it also seeks to align evidence law with modern cultural sentiments and evolving standards of decency. Consider, as one of many potential examples, how the living evidentiary model might bring reform to Federal Rule of Evidence 606(b). Generally stated, Rule 606(b) prevents a juror from testifying about the jury’s decisionmaking process.\textsuperscript{191} From a technical standpoint, where there is an “inquiry into the validity of a verdict or indictment,” Rule 606(b)(1) prevents a juror from testifying 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.”\textsuperscript{192} Like many provisions in the evidentiary code, exceptions to this broad exclusionary rule exist. For instance, jurors are permitted to testify that “extraneous prejudicial information” infected deliberations or that “an outside influence was improperly brought to bear on any juror.”\textsuperscript{193} For most of its existence, though, Rule 606(b) has offered little solace to defendants convicted by a malevolent or prejudiced jury. Courts, centrally focused on text and

\textsuperscript{189} Id.

\textsuperscript{190} See Anita S. Krishnakumar, Textualism and Statutory Precedents, 104 VA. L. REV. 157, 160 (2018) (“[T]extualists tend to prioritize the predictability and stability of legal rules and other ‘rule of law’ values over the flexibility associated with looser, case-by-case decision-making. Purposivists, by contrast, tend to be more willing to tolerate inconsistency and case-by-case adjudication.”).

\textsuperscript{191} See FED. R. EVID. 606(b) (prohibiting jurors from testifying as a witness before other jurors or about their deliberations unless an exception applies).

\textsuperscript{192} FED. R. EVID. 606(b)(1).

\textsuperscript{193} FED. R. EVID. 606(b)(2).
“fidelity,” have interpreted Rule 606(b)’s exceptions in an exceedingly narrow fashion. For instance, a recalcitrant juror cannot testify that the jury completely ignored the judge’s instructions, or that it otherwise convicted a defendant on some legally irrelevant basis. She can’t testify that the jury spent the entirety of a trial intoxicated. As far as Rule 606(b) is concerned, she can’t even testify that invidious prejudice or animus served as the basis of a jury’s verdict. In application, then, Rule 606(b) has proven immensely problematic.

Applying living evidentiary theory to Rule 606(b)’s exceptions, the model does not fetishize fidelity; nor does it protect prejudicial decisionmaking by narrowly insisting that that outcome accords best with Rule 606(b)’s text. Instead, in light of rulemaker stagnation, an interpreter should couple “fidelity” with “justifiability” to pinpoint which application of Rule 606(b) is sufficiently faithful to the rule and most normatively defensible. When viewed through that holistic lens, it is clear that Rule 606(b) should not be applied in a manner that protects, indeed enables, prejudice and misconduct in the deliberation room. Rather, courts should allow jurors to testify about decisionmaking animus, perhaps by adopting a more permissive reading of Rule 606(b)’s exceptions. After all, in enshrining the no-impeachment rule, rulemakers sought to foster more legitimate trial verdicts. But if legitimacy is the coin of the realm, then animus and prejudice in the deliberation room should be exposed and condemned, not protected. Indeed, it is hard to think of a verdict basis more illegitimate than a conviction premised on problematic

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194 See Capra & Richter, supra note 121, at 1883 (“Although the prohibition on juror testimony is subject to exceptions when the jurors are exposed to extraneous prejudicial information or outside influences, courts have interpreted these exceptions narrowly and constitutional challenges to the Rule 606(b) prohibition have traditionally proved unsuccessful.”).

195 See, e.g., United States v. Ewing, 749 F. App’x 317, 322 (6th Cir. 2018) (“A juror’s statement suggesting that the jury misunderstood or misapplied instructions or the law is also typically considered internal and therefore subject to Rule 606(b)’s bar.”).

196 See supra note 50 and accompanying text.

197 See Steven D. DeBrota, Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine, 64 IND. L.J. 375, 388 (1989) (“Arguments appealing to the racial prejudices of the jury are anathema to a multiracial society founded on principles of racial equality and equal treatment under law.”).

198 See FED. R. EVID. 606(b) advisory committee’s notes on proposed rules (discussing how prohibiting jurors from impeaching their own verdicts is designed to “prom[ote] . . . [the] freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment”); Ashok Chandran, Color in the “Black Box”: Addressing Racism in Juror Deliberations, 5 COLUM. J. RACE & L. 28, 36 (2015) (“[B]y the time of Tanner, it was accepted that the core purpose of Rule 606(b) was to preserve the legitimacy of the jury process.”).
animus against the defendant. Far from usurping Rule 606(b), then, living evidentiary theory again gives the rule its best form.

One final aspect of living evidentiary theory warrants exploration: despite the model’s radical reform proposals, one might fairly question whether living evidentiary theory can actually affect doctrine in a tangible way. Can “fidelity” and “justifiability” truly bring material, principled change to evidence law? Or is it, at best, mere academic whimsy?

Fortunately, here, we need not speculate. As mentioned above, “fidelity” and “justifiability” have already been operationalized in a bespoke fashion to effect significant substantive evolution amid other frozen doctrinal spaces. Consider, for example, living evidentiary theory’s eponymous cousin—the burgeoning jurisprudential approach known as “living constitutionalism.”

Just like this Article’s proposal regarding the Federal Rules of Evidence, living constitutionalism did not emerge from an ex ante claim the United States Constitution is inherently flawed. Instead, living constitutionalism emerged in the face of a frozen positivist system. The “cumbersome amendment process” housed in Article V has made it functionally impossible to amend the Constitution. To borrow Professor David Strauss’s words, “the world has changed in incalculable ways . . . and it is just not realistic to expect the cumbersome amendment process to keep up with these changes.” Because the formal avenue of constitutional change has largely become foreclosed, living constitutionalism instead encourages functional constitutional amendment via judicial intervention. That is, it sees judicial evolution of constitutional law “necessary if the Constitution is to meet the needs of a changing society.”

And, molding similar “fidelity” and “justifiability” principles to the ones espoused above, living constitutionalism not only encourages judges to weigh faithfulness to source text when choosing among possible interpretations of the Constitution, but it also spurs judges to complement that fit assessment with equal consideration of which possible outcome achieves a normatively optimal result. It sees constitutional text as a constraining and informative (but not necessarily exhaustive) data point

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200 See United States v. Krohn, 573 F.2d 1382, 1389 (10th Cir. 1978) (“[A]ny appeal to racial prejudice is a foul blow which must be rejected by the courts.”).
201 See Scott Dodson, A Darwinist View of the Living Constitution, 61 VAND. L. REV. 1309, 1320 (2008) (describing a “living’ Constitution” as “one that adapts to changing circumstances and evolves over time”).
202 See supra notes 35–40 and accompanying text.
205 CHEMERINSKY, supra note 203, at 24.
206 See Balkin, supra note 37, at 1133 (noting how common law decisionmaking encouraged by living constitutionalism is “flexible but not lawless, adaptable to circumstance yet constrained by long tradition” and that “[i]t protects fundamental rights from transient public opinion and adapts to changing times without becoming a plaything of the judges”).
in determining how the principles and ideals housed in the Constitution apply to evolving modern circumstances. And, in uniquely adopting elements of the bivariant model, living constitutionalism did not surrender to substantive torpidity. It did not merely resign itself to the fact that formal constitutional amendments are unlikely to survive Article V’s arduous hurdles. Instead, living constitutionalism harnessed “fidelity” and “justifiability” to effect immense constitutional change.

Living constitutionalism is a ray of hope for evidence law. It demonstrates that “fidelity” and “justifiability” can indeed inspire tangible substantive evolution despite the impassibility of formal amendment channels. Moreover, the factors and circumstances that led to the initial emergence of living constitutionalism now, too, echo in evidence law. Evidence law’s turn to codification has left it with an evidentiary regime that is, by and large, immobile. Living constitutionalism’s solution therefore informs the path ahead for our evidentiary regime. Judges should serve as vehicles of change when interpreting and applying the Federal Rules of Evidence.

2. Rulemakers as Regulators

By now, one might fairly question whether living evidentiary theory is simply a façade masking a deeper discomfort with positivism generally. Isn’t the model just an attempt to roll back evidence law’s codification effort? Doesn’t it simply express a preference for common law decisionmaking? If so, some might (rightly) insist that the project calls for little more than judicially sanctioned anarchy. Without reconciling living evidentiary theory’s core tenets with a political reality that vests ultimate decision-making authority over evidence law with rulemakers, the model risks becoming perceived as little more than a call for a judicial power grab.

Despite its intuitive appeal, this critique is ultimately misplaced.

The division of authority in the development of evidence law is not a zero-sum game. The locus of substantive evolution is not indivisible, and forcing a complete tradeoff between rulemakers and the judiciary is a false dilemma. Pushing back against that faux binary, the living evidentiary model introduced above seeks to foster a symbiotic, mutually beneficial relationship...

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207 See id. (describing how constitutional text “serves primarily as a focal point” and noting the “virtues” of “[c]ommon-law decision making”).

208 Cf. Balkin, supra note 37, at 1131 (“[T]he central problem that living constitutionalism faces is constraining judicial behavior.”); Barry J. Swanson, Cloning and the Constitution: An Inquiry into Governmental Policymaking and Genetic Experimentation, 84 MICH. L. REV. 658, 661 (1986) (reviewing IRA H. CARMEN, CLONING AND THE CONSTITUTION: AN INQUIRY INTO GOVERNMENTAL POLICYMAKING AND GENETIC EXPERIMENTATION (1985)) (noting that some forms of living constitutionalism “invariably result in constitutional anarchy with each person defining his or her own constitutional rights”).
among rulemakers and the judiciary. In fact, the practical effect of incorporating “fidelity” and “justifiability” into the judicial interpretation of the Federal Rules of Evidence is an ideal division of labor. Judges seek to make the code the best it can be, but their innovation potential is constrained by the need to sufficiently fit or comport their application of an evidentiary rule with the existing code. The judiciary’s role is to optimize application of the Federal Rules without wholly departing from its contents. Concurrently, living evidentiary theory sees rulemakers’ role as more vital than ever before. As judicial innovation occurs, it remains the rulemakers’ responsibility to offer the final word regarding evidence law’s development by expressly endorsing, abrogating, or systematizing certain judicial innovations. Far from usurping rulemakers’ authority, living evidentiary theory puts rulemakers in the best position to effect positive change. For the past half century, rulemakers have largely been unable to bring material improvement to evidence law given the arduous bureaucratic maze required for even the smallest adjustment to the Federal Rules of Evidence. Through the living evidentiary framework, though, rulemakers can efficiently shape evidence law by fostering and grooming judicially inspired evolution.

Though perceiving of rulemakers as regulators (rather than innovators) of evidence law might initially seem a radical departure from the status quo, the truth is that our evidentiary system has already seen a forerunning drift toward this model. Despite the formalities of the current system—formalities that technically require any amendment or alteration to the Federal Rules of Evidence to come from rulemakers—experience suggests that courts are increasingly exhibiting an eagerness to reassume their historic position at the progressive spearpoint of evidentiary change, and rulemakers appear equally willing to embrace a more evaluative, regulatory function. Simply put, the doctrinal space has organically positioned itself for the arrival of living evidentiary theory.

209 For an analog demonstrating how text can constrain purposivist interpretation, see Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 879-80 (2015) (“[A]ttention to the foundation of purposivism in positive law extends recent work recognizing the ‘new,’ ‘structured,’ or ‘textually constrained’ positivist purposivism in judicial practice, which relies more heavily on statutory text as a basis for understanding purpose and views purposivist interpretations as constrained by statutory text.”).

210 See Balkin, supra note 37, at 1133 (noting how living constitutionalism is “flexible but not lawless, adaptable to circumstance . . . without becoming a plaything of the judges”).

211 See Jonakait, supra note 173, at 784 (“As the plain-meaning standard replaces the common law methods, much of evidence law’s capacity for orderly growth is lost.”).

212 Teter, supra note 4, at 154 (describing how amendments to the Federal Rules of Evidence are entertained by the Advisory Committee on Rules of Evidence, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, the Supreme Court, and Congress).
Consider, for instance, the genesis of many existing amendments to the Federal Rules of Evidence. We’d expect that, if evidence law were truly committed to a purely positivist regime, most (if not all) of the changes to the Federal Rules of Evidence would follow formal channels—that is, the amendments would originate in the Advisory Committee before commencing on their long journey through the Standing Committee, Supreme Court, and Congress. Of course, technically speaking, each amendment to the Rules has survived that labyrinth. But a survey of the changes made to the Federal Rules of Evidence reveals that many amendments have not found their true inception in rulemaking committees. Rulemakers have not acted as the system’s sole innovators. Rather, caselaw has increasingly motivated evidentiary change. Of the formal amendments made to our evidentiary regime since 1975, for example, no less than fourteen have their genesis in judicial decisions. The amendments to Rules 609, 701, 702, 801, and 803 all came in direct response to a prior court decision wrestling with their application. For example, rulemakers’ 1997 Amendment to Rule 801(d)(2)(E) was motivated by issues first raised in the Supreme Court’s United States v. Bourjaily opinion. And in resolving one of those issues, rulemakers merely enshrined the preexisting solution already advanced by circuit courts of appeals. The Supreme Court’s prominent decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. inspired rulemakers to revisit Rule 702. Melendez-Diaz v. Massachusetts spurred changes to Rule 803.

213 See id.; WRIGHT & GRAHAM, supra note 60, § 5006.
214 FED. R. EVID. 609 advisory committee’s note to 1990 amendment (“The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable.”); FED. R. EVID. 701 advisory committee’s note to 2000 amendment (“The amendment incorporates the distinctions set forth in State v. Brown, 836 S.W.2d 530, 549 ([Tenn.] 1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on ‘special knowledge.’”); FED. R. EVID. 702 advisory committee’s note to 2000 amendment (“Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999).”); FED. R. EVID. 801 advisory committee’s note to 1997 amendment (“Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987).”); FED. R. EVID. 803 advisory committee’s note to 2013 amendment (“Rule 803(10) has been amended in response to Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).”).
216 See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C. Cir. 1992) (collecting sources); see also FED. R. EVID. 801 advisory committee’s note to 1997 amendment (same).
218 FED. R. EVID. 803 advisory committee’s note to 2013 amendment (“Rule 803(10) has been amended in response to Melendez-Diaz v. Massachusetts.”) (citation omitted).
Indeed, courts inspired the creation of Rule 804(b)(6) altogether. Still other amendments to Rules 103, 404, 407, 408, 606, 703, 804, and 807 were motivated by circuit splits or "questions in the court" that forced the rulemakers to step in and provide clarification. And again, rulemakers’ 1997 amendment to Rule 407 simply enshrined circuit courts’ already-existent view that Rule 407 does indeed apply to products liability actions. Stepping back, then, the historical record demonstrates that courts can motivate (and have motivated) doctrinal evolution; likewise, rulemakers’ assumption of a regulatory role would be far from unprecedented. Living evidentiary theory thus affirmatively embraces a model that the system is increasingly geared to accept.

Judges’ and rulemakers’ seemingly anomalous treatment of Rule 410 also points to the future viability of living evidentiary theory. Rule 410 is a specialized relevance rule dealing with, *inter alia*, statements made during criminal plea negotiations. The text of the rule forbids a party from introducing statements made during plea negotiations “against the defendant who . . . participated.” As one might intuit, Rule 410 largely constitutes an

219 FD. R. EVID. 804 advisory committee’s note to 1997 amendment (noting that, prior to the enactment of Rule 804(b)(6), every circuit had already “recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied”).

220 FD. R. EVID. 103 advisory committee’s note to 2000 amendment (“The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "in limine“ rulings. . . . Courts have taken differing approaches to this question.”); FD. R. EVID. 404 advisory committee’s note to 2006 amendment (“The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases.”); FD. R. EVID. 407 advisory committee’s note to 1997 amendment (“This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.”); FD. R. EVID. 408 advisory committee’s note to 2006 amendment (“Rule 408 has been amended to settle some questions in the courts about the scope of the Rule . . . .”); FD. R. EVID. 606 advisory committee’s note to 2006 amendment (“The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors.”); FD. R. EVID. 703 advisory committee’s note to 2000 amendment (“Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference.”); FD. R. EVID. 804 advisory committee’s note to 1997 amendment (“Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the texts for determining whether there is a forfeiture have varied.”); FD. R. EVID. 807 advisory committee’s note to 2019 amendment (“Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.”).

221 See, e.g., Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint E. Dist. & S. Dist. Asbestos Litig. v. Armstrong World Indus., Inc., 995 F.2d 343, 345 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, Inc., 628 F.2d 848, 856 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 888 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980); Flauminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 534, 656-57 (9th Cir. 1986); see also FD. R. EVID. 407 advisory committee’s note to 1997 amendment (collecting sources).

222 See FD. R. EVID. 410.
efficiency-oriented intervention by rulemakers. 224 Cognizant of the fact that our criminal justice system is now, functionally, a system of pleas, Rule 410 seeks to encourage the viability of plea discussions by placing a firewall around the negotiation table. 225 Nothing said by the defendant—even the most probative and inculpatory admission—can later be used against him at trial. 226 Drafters therefore saw Rule 410 as encouraging frank, open, and honest discussions about the possibility of a plea deal. 227

But Rule 410 contains an oddity. Despite drafters’ intention to place a firewall around plea negotiations, the text of the rule only forbids parties from introducing statements against the defendant who participated; there is no textual prohibition that equivalently prevents defendants from using statements against, say, prosecutors. 228 But allowing a defendant to introduce statements against a prosecutor risks vitiating the rule’s entire purpose. As a logical matter, if a prosecutor fears that her statements during plea negotiations will later come back to haunt her, there’s a material risk that she’ll avoid robust, transparent plea negotiations altogether. In recognition of this phenomenon, courts innovated by functionally amending Federal Rule of Evidence 410 to also exclude plea statements offered against prosecutors. In United States v. Verdoorn, for example, the Eighth Circuit made clear its intention to broaden the scope of Rule 410 to better achieve rulemakers’ intention to ensure “that plea negotiations remain confidential to the parties if they are unsuccessful.” 229 And since Verdoorn, judges across the country have followed suit, generally “ignor[ing] the strict language of the rule” and “barr[ing] the evidence.” 230 Conceptually, though retroactively, living evidentiary theory easily explains the judicially driven functional amendment to Rule 410. Sensing Rule 410’s textual oddity, courts searched for a more justifiable application of the Rule that still expressed fidelity to its spirit. For the Verdoorn court, that interpretive approach led to a broad reading of Rule

227 FED. R. EVID. 410 advisory committee’s notes on 1975 proposed rules.
229 528 F.2d 103, 107 (8th Cir. 1976) (“Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.”).
Of course, following that judicial innovation, rulemakers retained authority to rein in—to regulate—this judicial discretion with a clear directive. For instance, an Advisory Committee Note could have foreclosed Verdoorn’s expansion of Rule 410; even through the prism of living evidentiary theory, it would have entirely vitiated the “fidelity” of the Eighth Circuit’s expanded Rule 410 interpretation because of the clear contrary directive. But rulemakers stayed their hand. Instead, they endorsed Verdoorn’s judicial innovation by omitting such an addition.

In these examples, we begin to see glimpses of the potential of living evidentiary theory. By encouraging judges to improve the application of the Federal Rules of Evidence, evidence law again begins to evolve. It again assumes its historic march toward a more empirically sound and normatively desirable system of truth-seeking. At the same time, rulemakers remain as important as ever. They must regulate substantive evolution to maintain uniformity and stability in the Federal Rules of Evidence. Where judicial innovation causes a circuit split, rulemakers endorse the optimal path forward. Where judicial innovation results in a misstep, rulemakers claw back the proposed change. Where judicial innovation is unequivocally beneficial, rulemakers systematize the identified improvement. Thus, from a pragmatic vantagepoint, living evidentiary theory does not usurp rulemakers. It empowers them.

3. Overcoming Textualism’s Hegemony

In her oft-quoted 2015 speech, Supreme Court Justice Elena Kagan gamely declared, “We’re all textualists now.” What Justice Kagan meant to convey, of course, is that the ascendency of textualism has been ubiquitous in the American legal system over the past fifty years. Simply put, textualism has become the elephant in the interpretive room.

It will thus come as no surprise to learn that textualism currently has a deep hold over evidence law. After all, the Supreme Court has encouraged judges to use the “traditional tools of statutory construction” when interpreting and applying the Federal Rules of Evidence. Within that traditional toolbelt, textualist reasoning is a centerpiece. Moreover, the Court itself has increasingly

\[^{231}\text{Verdoorn, 528 F.2d at 107 (8th Cir. 1976)}\ (“If [Rule 410’s] policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful.”).\]

\[^{232}\text{See id.}\]


\[^{234}\text{See also Jonathan T. Molot, The Rise and Fall of Textualism, 106 COLUM. L. REV. 1, 23-43 (2006)}\] (tracing the growth of modern textualism).

drifted toward textualism when reading the Rules. Strict application of the Federal Rules of Evidence is common; judicial consideration of the merits of that approach has been, to this point, quite rare.

Given textualism’s hegemony, how will living evidentiary theory win the day in evidence law? That is, why should a judge see textualism as an inferior model for interpreting and applying the Federal Rules of Evidence?

The answer calls for recognition that interpretation does not occur in a vacuum. Theoretical debates over interpretive models are important, but those debates must also descriptively account for systematic realities within a doctrinal space. Evidence law is stagnating. In that state, textualism only exacerbates evidence law’s ills. A sole fixation on “fidelity” forecloses any hope of substantive evolution, as it asks judges to forgo any innovation and instead rely on stymied rulemakers for change. For nearly fifty years, that model has proven ineffective.

A deep appreciation for the current, lethargic state of evidence law serves to render unpersuasive many of the arguments supporting evidentiary textualism. For instance, evidentiary textualism’s support rests, primarily, on the revolutionary significance of the Federal Rules of Evidence. As discussed above, the Rules constituted a historic shift toward codification and away from evidence law’s common law roots. For some esteemed scholars, the codification movement constituted a final and express abrogation of judicial rulemaking authority over evidence law. In Professor Ed Imwinkelried’s words, “[F]ederal courts no longer possess the common-law authority to create or enforce uncodified exclusionary rules” because “[t]he Congress that enacted the Federal Rules of Evidence was a legislature jealous of its constitutional prerogatives.” Separation of powers concerns were at the

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236 See Jonakait, supra note 173, at 745 (“The [Supreme] Court has imposed the plain-meaning standard of statutory interpretation on the Federal Rules of Evidence. The Court has indicated that the plain language of the Rules now controls outcomes without regard to policy, history, practical operation of the law of evidence, or new conditions.”).

237 See id.

238 Relatedly, it was legal formalism’s waning descriptive power that led to the rise of legal realism. Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 849 (1935).

239 See Jonakait, supra note 173, at 784 (“The plain-meaning standard will do more than just transform the evidentiary landscape; it will also freeze the new forms into unchanging shapes. . . . [T]he law will be fixed until Congress acts. And Congress will not act often.”).


241 Imwinkelried, supra note 3, at 416 (“Professor Richard Lempert, an eminent American evidence commentator . . . stated that one notable trend was that congressional politics is becoming an increasingly significant force in shaping Federal Rules of Evidence used by the courts. Congress continues to challenge the traditional, common-law judicial hegemony over evidence law.”).

242 Imwinkelried, supra note 240, at 232.
heart of the evidentiary codification movement and, therefore, the proper role of a judge interpreting the Federal Rules of Evidence is simply to actualize the will of rulemakers through textualism.\footnote{Id. at 246 ("[The focus on the separation of powers] may well have contributed to the emergence of the modern textualist approach to statutory construction.").}

To be sure, \textit{in vacuo}, there is merit in this textualist argument. The Congress that approved the Federal Rules of Evidence was intentional in its efforts, and if it deemed rulemaking channels as the dominant avenue for evidence law’s substantive evolution, judges should take seriously the requirement that they defer to that bureaucratic process.\footnote{Id. at 246-47.}

But the game has changed. We live not in the aspirational future once imagined by the Rules’ codifiers in the 1970s. Rather, we live in a world in which the system is broken. Evidence law has not retained its historic substantive development through rulemaking channels; the original vision of codifiers has not materialized. Instead, evidence law has grown torpid. As the world continues to evolve, unearthings revelations that render certain rules normatively problematic or scientifically unsound, there is no concerted effort to update the code—there’s not even a widespread belief that the code could be materially changed if there existed widespread support for a reform measure. In the face of this less-than-idyllic reality, what is to be done?

To borrow an oft-quoted aphorism, this Article suggests that the Federal Rules of Evidence are not an epistemological suicide pact.\footnote{Cf. \textit{Kennedy v. Mendoza-Martinez}, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.").} Preserving textualism for textualism’s sake is not a worthwhile endeavor. Instead, given present systematic realities, change is essential. Where formal channels for amending a legal regime become functionally inoperable, judges are best positioned to effect substantive evolution. And that conclusion, though radical, is not unprecedented. Consider, for instance, another kindred cousin of living evidentiary theory—Judge Guido Calabresi’s prominent framework for the judicial reinvigoration of outmoded statutory spaces. In his immensely influential book, Calabresi examines statutory regimes that have become obsolete due to lawmaker inaction.\footnote{\textit{CALABRESI, supra note 38, at 163-66.}} In the face of dilapidated statutes, what is the responsibility of a judge? Is it to turn a blind eye to the ills of a problematic system, despite a clear-eyed recognition that change will not come through formal channels? Or, alternatively, is a judge to intervene, to step in where others will not? Unsurprisingly, Calabresi’s prominent model calls judges to action, forgoing textualism to instead effect otherwise
inaccessible substantive improvements. Living evidentiary theory does the same. It offers a path forward where currently there is none. It forgoes textualism and “fidelity” given a more pressing need to address evidence law’s flaws. And unlike textualism, living evidentiary theory takes the world as it is—not as we wish it would be.

* * *

Stepping back, the guiding light for living evidentiary theory is ultimately a set of ideals already enshrined in the Federal Rules of Evidence. In outlining the purpose of the Federal Rules of Evidence, Rule 102 notes that the Rules seek 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.” And, testifying to the importance of those ideals, a Chair of the Advisory Committee once emphasized that Rule 102 is “not mere rhetoric. . . . [Similar] language [is not] employed in the Civil Rules, Criminal Rules, or Appellate Rules.” Instead, evidence law is sui generis and, therefore, “the Law of Evidence should have a measure of flexibility if room for growth is to be afforded . . . . [S]ome play [was left] in the joints.”

Living evidentiary theory allows evidence law to live up to those ideals. It sees evidence law returned to its natural, evolving form.

B. The Promise of Living Evidentiary Theory

Living evidentiary theory is ambitious. It seeks to bring material progressive reform to evidence law by reinventing the existing relationship between courts and rulemakers. It seeks to make evidence law the best it can be.

Testifying to that ambition, this subsection outlines the promise of living evidentiary theory. The pages below offer a window into the framework’s potential by detailing how, both directly and indirectly, a more active judiciary can renew and restore evidence law. Living evidentiary theory improves the application of the Federal Rules of Evidence. It inspires systematic reform in existing rulemaking structures. And, ultimately, it revives evidence law’s perpetual march toward a superior system of truth-seeking.

247 Jonathan Macey, Executive Branch Usurpation of Power: Corporations and Capital Markets, 115 YALE L.J. 2416, 2423 (2006) (noting that Calabresi’s theory “restore[s] the traditional balance between the judiciary and the legislature by applying common law techniques of judging to update . . . statutory rules.” (citing id. at 82, 101-09)).
248 FED. R. EVID. 102.
250 Id.
1. Substantive Reform

Without question, the most significant benefit associated with judicial adoption of living evidentiary theory is the substantive reform it promises. Unshackled from a cumbersome, bureaucratic rulemaking process, a living evidentiary regime puts judges in a position to directly address widely recognized problems in the Federal Rules of Evidence.

Consider first how a living evidentiary regime directly pursues necessary alignment between the Federal Rules of Evidence and the leading edge of the scientific and empirical literatures. As mentioned, scholars have long noted that many of the Rules are anachronistic.251 Folk psychology and outdated cultural claims serve as the predicate for admitting many unreliable pieces of evidence. As discussed above, for instance, Rule 803(2)’s excited utterance exception stands strong despite multiple studies questioning its empirical basis.252 But Rule 803(2) is far from anomalous.

Federal Rule of Evidence 803(1), colloquially known as the present sense impression exception, also rests on highly specious psychology-based claims. The present sense impression exception allows hearsay statements into the courtroom so long as the declarant made the statement contemporaneous to the time she observed the subject of her declaration.253 The empirical basis that rulemakers insist supports Rule 803(1) is a psychology-based claim about fabrication. Namely, Rule 803(1) rests on the belief that, given an exceedingly short period of time between an observation and a statement, it will be extremely difficult for a declarant to fabricate a present sense impression.254 And, without ample time for a declarant to formulate a lie, the statement is necessarily reliable.255 Except it’s not. Since Rule 803(1)’s enactment, leading neurological studies have demonstrated that human capacity to formulate false narratives is near-instantaneous.256 Within exceedingly short time horizons, humans are able to color an observation to align with or confirm an overarching narrative.

251 Joseph F. Weis, Jr., Are Courts Obsolete?, 67 NOTRE DAME L. REV. 1385, 1391 (1992) (“[T]he exclusionary rules of evidence in many instances are based on outdated stereotypes or asserted unfair prejudicial effect—suppositions that have never been established by empirical data.”).
252 2 MCCORMICK ON EVIDENCE, supra note 28, § 272, at 366 n.7 (collecting scientific studies undermining the psychological basis for the excited utterance exception).
253 FED. R. EVID. 803(1).
254 FED. R. EVID. 803 advisory committee’s note on of advisory committee on proposed rules (1975) (“The underlying theory of [803(1)] is that substantial contemporaneity of event and statement negative the likelihood of deliberate of [sic] conscious misrepresentation.”).
255 See id.
256 McFarland, supra note 28, at 918 (“[S]ocial science demonstrates that liars fabricate lies with amazing rapidity.”).
Federal Rule of Evidence 804(b)(2), too, has significant empirical problems. Commonly known as the dying declaration exception, this hearsay exception renders admissible statements from dying declarants who pinpoint the cause of their death. Historically, the underlying claim supporting the reliability of dying declarations was an insistence that those nearest to death will speak only truth, given their imminent departure from this earth. Modern psychology-based studies, though, offer reason for concern. Medical science has now established that those facing imminent death often suffer from material cognitive impediments. Hypoxia, for example, is a symptom that often accompanies blood loss; a primary symptom of hypoxia is a rapid decline in cognitive ability, such a short-term memory loss. Nonetheless, the dying declaration exception would allow statements from a victim suffering from hypoxia into the courtroom because of an anachronistic belief in its outsized guarantees of trustworthiness.

Modern empirical studies demonstrate that the hearsay rule itself is devoid of substantial empirical support, at least with respect to its purported historical basis. In crafting Rule 801’s hearsay prohibition, most would say that rulemakers intended to shield factfinders from unreliable evidence. Of course, hearsay constitutes evidence that is not subjected to the crucible of cross-examination, nor is it offered by a witness subjected to the oath before a jury. “Because out-of-court statements are often not presented to a jury under those circumstances, evidence policymakers believe that there is a substantial risk that fact finders will overvalue those out-of-court statements.”

257 Fed. R. Evid. 804(b)(2).
258 Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Texas L. Rev. 271, 318 n.258 (2006) (“The argument for reliability is the same under the new exception as it was in the eighteenth century: no declarant wants to go to his or her death with a lie on his or her lips.”); Orenstein, supra note 28, at 1412-13 (“The traditional theory is that, because no one would dare face the wrath of God by dying with a lie on her lips, dying declarations are particularly trustworthy.”).
260 See, e.g., United States v. Parry, 649 F.2d 292, 294 (5th Cir. 1981) (finding that Rule 801 protects the jury from statements made out of court which are not exposed to credibility safeguards of statements taken under oath).
261 Id.
statements.” Recent empirical studies, though, vitiate that fear. In fact, they tend to demonstrate that laypeople generally view hearsay evidence skeptically and as a relatively weaker form of evidence than in-person testimony. Again we find in the Federal Rules of Evidence faulty reasoning.

Despite these (and other) widely recognized empirical infirmities in the bases underlying many of the Federal Rules of Evidence, rulemakers have exhibited a significant reluctance to reform any evidentiary rule because of new empirical findings. Whether that reluctance is ultimately the product of an entrenchment effect, a reverence for the status quo, or a simple perception that rules that aren't causing an urgent problem don't require a fix, the end result is a dampening of the epistemological process in the courtroom. The employment of an anachronistic evidentiary regime distorts the search for truth.

Living evidentiary theory promises change. By encouraging judges to couple “fidelity” with “justifiability,” those evidentiary rules lacking modern empirical support immediately come under fire. No longer do outdated or unreliable evidentiary rules continue to stand solely on the basis of rulemaker inaction. Instead, our evidentiary regime becomes defined by empirics rather than mere path dependency. The Federal Rules of Evidence are given their best form, tailored by judges to apply in a manner that accords with (not ignores) our best empirical and scientific understandings.

Beyond aligning our evidentiary regime with the empirical literature, a living evidentiary regime also allows for reexamination of some of the more problematic Rules of Evidence. That is, living evidentiary theory seeks to equally incorporate improved cultural understandings and modern moral norms into the application of our evidentiary regime. For example, the preceding Section discussed how living evidentiary theory can yield a more normatively defensible interpretation of Rule 606(b), one that seeks to combat—not protect—animus in the jury deliberation room. But as in the empirical context, that proposal for normative reform is far from anomalous. Indeed, many other rules also demand revision in light of evolving moral norms.

Consider Federal Rule of Evidence 609. Rule 609 is, without question, one of the most controversial rules of evidence. Under certain conditions, it allows a party to impeach a witness by demonstrating that that witness has

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263 See Justin Sevier, Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance, 103 GEO. L.J. 879, 914-15 (2015) (finding that data does not support the concern that jurors do not recognize the infirmities of testimonies that are not cross-examined).
264 See id. (finding that jurors systematically devalue statements to the degree those statements contain hearsay).
265 See supra subsection II.A.1.
266 See Carodine, supra note 31, at 524.
previously been convicted of a crime.\textsuperscript{267} Most would agree that Rule 609 thus rests on a status claim.\textsuperscript{268} Professor Julia Simon-Kerr, for example, has insisted that Rule 609 reflects the normative belief that those who have broken the law—those deemed “criminals” in the public parlance—are unworthy of our trust.\textsuperscript{269} The Federal Rules of Evidence therefore provide an avenue for the jury to discover when they’re receiving testimony from tainted lips. Needless to say, that perception of the veracity and inherent nature of criminal offenders is highly offensive.\textsuperscript{270} Indeed, because of the controversial basis underlying Rule 609, some states have already taken steps to expunge its analog from their state evidentiary code or, alternatively, to significantly reduce its scope.\textsuperscript{271} Federal Rule of Evidence 609, however, stands strong. As with the empirically questionable Rules analyzed above, rulemakers have demonstrated little appetite to revise Rule 609 to better conform with evolving cultural and moral sentiments.\textsuperscript{272}

Living evidentiary theory again changes the game. Rather than continuing to allow Rule 609 to play a distorting role at trial, the framework offers judges the needed latitude to evolve Rule 609 to modern moral and cultural sentiments. And, given dislocations between Rule 609’s basis and evolving sentiments surrounding criminal justice reform, a judge might rightly determine that the most justifiable application of Rule 609 is one that significantly restricts its scope. The empirical literature does not support a claim that a criminal offender is a perpetual, habitual liar; modern criminal justice reform efforts likewise bring into question the historic perception of

\textsuperscript{267} See Fed. R. Evid. 609.

\textsuperscript{268} Foster, supra note 30, at 5 (“Rule 609 is the product of the law’s long-standing and dogmatic assumptions that criminal convictions reflect character, and that character determines veracity.”).

\textsuperscript{269} See Julia Simon-Kerr, Credibility by Proxy, 83 Geo. Wash. L. Rev. 152, 190-92, 200-01 (2017) (discussing how prior crimes have served as a proxy for who is worthy of belief); Julia Simon-Kerr, Moral Turpitude, 2012 Utah L. Rev. 1001, 1002 (“As moral turpitude spread and was appropriated for use in other fields, it functioned differently, working as a standard that purported to judge character instead of reputational harm. It was used not to sort out entitlement to civil damages, but instead to determine who should be permitted to join or continue to belong to a particular community or who could exercise basic citizenship rights.”).

\textsuperscript{270} Blinka, The Modern Trial, supra note 31, at 688 (“Rule 609 is . . . problematic.”).

\textsuperscript{271} See Anna Roberts, Conviction by Prior Impeachment, 96 B.U. L. Rev. 1977, 1981 (2016) (noting that Hawaii, Kansas, and Montana are “three diverse states [that] offer examples of jurisdictions where [impeachment through prior criminal conviction] has been rejected for decades”).

\textsuperscript{272} Such stagnation is particularly surprising in this context due to widespread concern with its effect. That is, Rule 609 does not merely rest on flimsy support; it also has a significant chilling effect on defendant testimony at trial. See Robert G. Spector, Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward, 1 Loy. U. Chi. L. J. 247, 250 (1970) (describing the prejudice caused by the introduction of past convictions on the defendant as a “chilling effect”); see also Daniel R. Tilly, Victims Under Attack: North Carolina’s Flawed Rule 609, 97 N.C. L. Rev. 1553, 1610 (2019) (emphasizing that the defendant is the one who reaps the windfall of systemic revictimization through North Carolina Rule 609).
a criminal offender as persona non grata.\textsuperscript{273} Given these evolving understandings, judges should correspondingly narrow Rule 609. The living evidentiary framework makes this possible.

The relevancy rules, too, could use clarification. Generally stated, Federal Rules of Evidence 401–03 constitute the foundation of evidence law.\textsuperscript{274} These core rules dictate the boundaries of what factfinders may consider when determining an appropriate outcome in a case. Increasingly, relevancy rules are applied in a manner that runs contrary to evolving cultural and moral norms. For instance, certain applications of Rules 401–03 are in tension with an urgent national awakening regarding the invidious ills of structural and systematic racism. Hewing closely to text and “fidelity,” many courts have narrowly interpreted the relevance rules to forbid parties from demonstrating that systematic racism infused, infected, and influenced the factual background of a particular case.\textsuperscript{275} But evolving cultural and moral sentiments reveal such exclusionary decisions as deeply problematic. Revelations about systematic racism can provide factfinders a robust explanatory model for the events in a case—a model that factfinders might miss absent direct exposition. Scholars have rightly emphasized that courts must often assess evidence in light of “the purpose, pervasiveness, and permanence of racism.”\textsuperscript{276} Living evidentiary theory again opens the door to reform. Interpreting the relevance rules to more liberally allow for evidence of systematic racism comfortably comports with the contours of Rules 401–03; after all, the relevance rules are, at their core, rules for sifting out which facts matter when deciding a case. Evolving notions of morality and fairness demand a reckoning with the role that race plays in the dispensation of justice; thus, allowing parties to discuss systemic forces at play in a case will often constitute the most normatively defensible application of the relevancy rules.\textsuperscript{277}

Still other examples abound. Despite Federal Rule of Evidence 404(b)’s nominal prohibition of propensity evidence, the code’s copious exceptions to

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  \item \textsuperscript{273} Carodine, supra note 31, at 524 (detailing how the historic perception of criminal offenders as untrustworthy is deeply misguided).
  \item \textsuperscript{274} United States v. Washington, 969 F.2d 1073, 1081 (D.C. Cir. 1992) (declaring “the most important” admissibility restriction to be “Rule 403, which requires that the ‘probative value of the evidence not be “substantially outweighed” by its potential prejudice.’” (quoting United States v. Miller, 895 F.2d 1431, 1435 (D.C. Cir. 1990))).
  \item \textsuperscript{275} See, e.g., Stewart v. Daimler Chrysler Fin. Servs. Ams., LLC, No. 07-60510, 2008 WL 1133226, at *2 (S.D. Fla. June 19, 2008) (discussing the court’s disagreement that assertions of racism in the workplace were relevant to the discussion of plaintiff’s individual race discrimination); Beck v. Koppers, Inc., No. 3-03-60, 2006 WL 2228878, at *2 (N.D. Miss. Apr. 3, 2006) (finding that evidence intimating racial discrimination was irrelevant to the case); Settle v. Fowler, No. 93-4293, 1995 WL 638997, at *3 (E.D. La. Oct. 26, 1995) (finding that racist comments were irrelevant to the case and would cause confusion for the jury).
  \item \textsuperscript{276} Gonzales Rose, supra note 54, at 2303.
  \item \textsuperscript{277} See id.
\end{itemize}
Rule 404(b) have often erased a defendant’s hope for a “clean slate” at trial.\footnote{FED. R. EVID. 404(b); see also Klein, supra note 140, at 709 ("Rule 404(b) is perhaps the most controversial of the Federal Rules of Evidence.").} Living evidentiary theory could demand that Rule 404(b)’s exceptions are applied narrowly, thereby ensuring a defendant’s past mistakes do not influence the determination of his guilt at a later trial. For far too long, the Federal Rules of Evidence have allowed prosecutors to introduce evidence of a defendant’s flight from police as indicative of a consciousness of guilt.\footnote{E.g., United States v. Benedetti, 433 F.3d 111, 116 (1st Cir. 2005) ("Flight evidence is controversial and must be handled with care."); Gonzales Rose, supra note 54, at 2245 ("The investigation of the relevance of flight introduces the concept of ‘racialized reality evidence’ and demonstrates how evidence of people of color’s lived experiences of systemic racism are regularly excluded at trial, while evidence of white norms and beliefs receives ‘implicit judicial notice.’").} Living evidentiary theory gives courts the tools to significantly narrow use of flight evidence, particularly given previously discussed systemic tensions that offer many alternative explanations for defendant flight. Federal Rules of Evidence 602 and 701 currently allow eyewitnesses to testify liberally regarding what took place in a particular case, despite a growing recognition that faulty eyewitness testimony is one of the leading causes of false convictions.\footnote{Bellin, supra note 148, at 309 ("The primary evidentiary contributors to false convictions [include] mistaken eyewitness identifications.").} Living evidentiary theory can rework eyewitness testimony, for example, by cautioning the admissibility of pretrial identifications in light of their potential unreliability.\footnote{See id.}

The examples above are merely the tip of the iceberg. When fully embraced, living evidentiary theory leaves no stone unturned; every rule warrants examination. And, through that thorough and continual introspection, the interpretive model improves truth-seeking at trial. It aligns the code with modern empirical and scientific understandings and accords the rules with rapidly evolving cultural and moral norms. Ultimately, living evidentiary theory renews evidence law.

2. Systematic Reform

When detailing the substantive evolution that living evidentiary theory can bring to the Federal Rules of Evidence, it should not be lost that the framework also has the potential to revitalize evidence law indirectly. That is, the emergence of the interpretive model is likely to spur other institutional actors to take evidence law’s present ills seriously.

How, for instance, might rulemakers respond to a more active judicial posture toward evidence law?
The most likely reaction—and the response endorsed by living evidentiary theory—is that rulemakers drift toward a regulatory role, sprucing judicial innovation in evidence law. The benefits of that response were explored in depth above. But other possibilities, of course, exist. For instance, at the most basic level, a progressive push by the judiciary might bring renewed urgency to the rulemaking process. At present, with no significant rival to their control over evidence law’s substantive development, rulemakers have assumed a conservative approach when weighing structural changes to the Federal Rules of Evidence, choosing to let evidence law become outdated before risking a misstep. With the emergence of living evidentiary theory, though, comes an alternative model for change. Now, the judiciary too is offered a principled basis for renewing their role in evidence law’s progression. In response to their fading monopoly, rulemakers might discover a more ambitious posture toward their own work. Progressive reforms might find their way through the arduous amendment process. The system could begin to work as designed.

As emphasized throughout this Article, though, much of the stagnancy that now exists in evidence law is the fault of structural barriers outside of the control of rulemakers. For example, regardless of how ambitious and committed certain members of the Advisory Committee are, the process for amending the Federal Rules of Evidence is simply too cumbersome to serve as a mechanism for continual substantive change. A second response that living evidentiary theory might inspire, then, is structural reform. That is, if living evidentiary theory reveals the existing positivist system as broken, some might naturally seek to fix it. And here, too, is reform potential immense. For example, empowering the Advisory Committee to independently revise the Federal Rules of Evidence could help ameliorate the overbearing burden of the Rules’ current amendment process and remove related fears that one misstep could prove an intractable error for evidence law. Increasing the size of the Advisory Committee to include more practitioners, academics, and stakeholders would simultaneously ensure that the rulemaking process does not become obstructed by one powerful interest group, again increasing the likelihood that needed change comes swiftly to evidence law.

282 See supra subsection II.A.2.
283 Teter, supra note 4, at 160 (“The evidentiary rulemaking process is inherently conservative.”).
284 Bellin, supra note 148, at 327 (describing how proposed amendments to the Federal Rules of Evidence have been quashed by Congress even after receiving enthusiastic support from the Advisory Committee).
285 Paul R. Rice, Back to the Future with Privileges Abandon Codification, Not the Common Law, 38 LOY. L.A. L. REV. 739, 779 (2004) (“The . . . reason the Advisory Committee process has been an inadequate and largely ineffective method for maintaining the evidence rules is that special interest groups have been introduced into the rule-making process.”).
In the face of these potential alternative responses, how should a living evidentiary theorist respond? With enthusiasm. Recall that living evidentiary theory emphasizes “justification” over “fidelity” only when controlling law—the Federal Rules of Evidence—is stagnant, outdated, and problematic. Because evidence law has become a frozen positivist landscape, the judiciary currently constitutes the best (and perhaps only) means of revivifying doctrine. But the model is dynamic. If the emergence of living evidentiary theory motivates rulemakers toward structural reform, the framework does not call for continual power struggle. As emphasized repeatedly, living evidentiary theory is not a call for a bare judicial power grab. Rather, at its core, it is a call for evidence law’s renewal. If the simple emergence of the interpretive framework is sufficient to inspire positivist wheels to again turn toward evidence law’s substantive development, that is a victory. In this way, living evidentiary theory acts as a check, not as a brute vehicle for vetoing rules on the basis of substantive disagreement, but instead as a sophisticated mechanism for ensuring the urgent revitalization of evidence law.

CONCLUSION

Is evidence law compatible with codification? This Article seeks to suggest that, at least at present, the answer is no. The Federal Rules of Evidence constitute an admirable project; it is certainly a monumental achievement to have crafted an evidentiary regime in 1975 that still enjoys widespread legitimacy almost a half century later. But for how long will that legitimacy last? The empirical literature has evolved significantly since the initial codification of the Federal Rules of Evidence, so much so that judges, litigants, and scholars now chuckle at the folk psychology contained within its pages. Cultural norms, too, have evolved. Rules that disadvantage rehabilitated criminal offenders and protect discriminatory animus in the courtroom are rightly seen as problematic. Yet, these ills arise from the same root problem—a perception that evidence law is dead. Judicial authority over evidence, we’re told, vanished with the enactment of the Federal Rules of Evidence. But reformers have faced frozen legal landscapes before. In those contexts, a “living” judicial posture toward positive law was the key for substantive revivification. It’s time for evidence law, too, to embrace revival.

286 See supra subsection I.A.1.
287 See, e.g., Lust v. Sealy, Inc., 363 F.3d 580, 588 (7th Cir. 2004) (Posner, J.) (discussing how the folk psychology of evidence is difficult to take seriously as rationale); Richter, supra note 186, at 918-19 (“Judge Posner has suggested that the present sense impression and excited utterance exceptions represent nothing more than baseless ‘folk psychology’ and laments a judge’s obligation to admit them.”).