SPEAKER: I am delighted to welcome you today to this wonderful book panel. And I want to thank Greg Mitchell, Charles Parson, and Rebecca Klaff for organizing this event, and everyone who helped make it happen. And thank all of our panelists, especially Judge Rakoff and Professor Griffin, who have traveled to be with us today.

We are so happy to celebrate Fred Schauer's latest book,*The Proof, Uses of Evidence in Law, Politics, and Everything Else.* Not a small thing, everything else. Scholarship can be a lonely undertaking and you do it a lot of it, alone, at your desk, even in a place as committed to a vibrant intellectual community as this one. That is still true. And so we take opportunities to celebrate scholarship when we can. And this is definitely one such opportunity.

Fred Schauer, as I'm sure you all know, is a remarkable scholar and teacher. And we are lucky to have him on our faculty here. Many of you are familiar with Fred's astounding productivity and the awards, accolades, and prominence that have attended it. This book is his 15th in addition to hundreds of law review articles and other shorter works.

And I want to say-- Fred, you can correct me if I'm wrong, this book in draft form came into my inbox with a note on top that said, "what I've been up to during the pandemic." I do not have a book to show for what I was up to during the pandemic.

His works have been translated into Italian, Spanish, Portuguese, French, Chinese, and Turkish. He is a capacious scholar. He is an expert on subjects ranging from free speech and the First Amendment to rule based decision making evidence and the philosophy of law. Fred is a fellow of the American Academy of Arts and Sciences and a corresponding fellow of the British Academy.

He is a recipient of a Guggenheim Fellowship and to many other awards and accolades to name, as well as an editor of many scholarly journals, including Legal Theory, which he co-founded.

So the book that we're celebrating and discussing today is*The Proof.* And in it, Fred probes what evidence is and how we use it in law and policy making, in science and historical scholarship, in public and private decision-making.

The book has been described as masterful, extraordinarily readable, and a pleasure to read. As one reviewer said in *The Wall Street Journal* this summer-- I really enjoyed this review. "Mr. Schauer displays a level of intellectual honesty one rarely encounters these days. His political opinions are, if I'm interpreting the evidence of this book correctly," get the pun, the evidence of the book, "decidedly on the left most tellingly of all, perhaps he drives a Subaru. And yet, Mr Schauer is not afraid to examine his subject in ways that don't align with his political preferences."

Fred may be best known to the world as a legal writer and scholar, but among his students, he is, perhaps, foremost a terrific teacher. He has won teaching awards at both Harvard and William and Mary. And this summer, our first cohort of roadmap scholars, 12 rising college juniors, who are first generation and low income students, were lucky enough to encounter Fred and Bobby Spellman, and Fred's book, *Thinking Like a Lawyer* as their first introduction to UVA Law and to law school. I can't think of a better way to have kicked off the roadmap scholars education.

Just a few weeks ago, one of our second year students wrote to say that he had been asked to draft several motions in limine at his summer jobs. And he wrote to Professor Schauer, "Having taken professor showers course, I felt well prepared to anchor my drafts in the conceptual rules of evidence and the case research flowed naturally from that. I was also surprised to discover that my knowledge of certain rules like 104(b)s conditional relevance standard," you see, the student really knows, "was sharper than experienced attorneys by their own admission. I credit that to Professor showers teaching last semester."

Fred noted in response that this was very gratifying praise to receive even if it did damage his quote, "reputation" as a head in the clouds theorist with no practical sense or importance. I don't know about but I have never thought of Fred that way. And this book, as well as that testimony from the student, is proof-- my pun is intended, that he is as adept at the practical as the abstract.

Fred's brilliant mind, incisive prose, and skillful teaching have made him a treasured member of our faculty during the last decade and a half. And we are thrilled to celebrate his latest work today. I'm now going to turn things over to Charles Parson, today's moderator. Charles is a professor of law and the director of our program in legal and constitutional history at the law school.

He is a 2005 graduate of the law school and also received an MA in that program. He writes and teaches on constitutional law, torts, evidence, and history of legal thought. He joined the law faculty in 2008 after serving as a Climenko fellow and lecturer at Harvard Law School.

He is the author of a slew of scholarly articles and book chapters, and is writing his own book that we hope, one day, to celebrate here. I I'm going to enjoy every minute of today's book panel, and I trust you will as well. Thank you.

CHARLES PARSON:	What I'm going to do is I'm going to introduce each of the panelists, and then each panelist will speak for 15 minutes. And then Fred will have 15 minutes to respond to the comments, and then we'll open it up for a little time for Q&A.
	OK. So proceeding down the panel this way, Judge Jed Rakoff has served as a US District Judge for the Southern District of New York since 1996. Judge Rakoff graduated from Swarthmore College, got a master of philosophy and Indian history from Balliol College at Oxford University, and received his JD from Harvard Law School.
	Before being appointed to the court, Judge Rakoff practiced law for two years and served as a prosecutor in the US Attorney's office for the Southern District of New York for seven years. He has served on the National Commission of forensic science from 2013 to 2017 and as co-chair of the National Academy of Sciences Committee on Eyewitness Identification.
	Judge Rakoff has presided over many important trials, has published extensively on evidence topics and other topics, and has taught at a variety of law schools, including this one, University of Virginia. And I believe that this January, he's teaching a J term course called Science on the Courts. Is that right?
JED RAKOFF:	Correct.
CHARLES PARSON:	The website's got that right. OK, good. Lisa Kern Griffin--

JED RAKOFF: Sign up now.

CHARLES PARSON: What's that? Yeah, exactly. Lisa Kern Griffin is the Candace M. Carol and Leonard B. Simon professor of law and the Senior Associate Dean for faculty and research at Duke Law School. Professor Griffin graduated from Stanford Law School, clerked for Justice Sandra Day O'Connor, and then served as a federal prosecutor in Chicago for five years before returning to the Academy.

Her scholarship focuses on evidence theory, constitutional criminal procedure, and federal criminal justice. Professor Griffin is currently working on a book called *Lying, Truth Seeking, and the Law of Questioning,* which will be published soon by Cambridge University Press.

And Greg Mitchell, immediate to my left, is the Joseph Weintraub-Bank of America distinguished professor of law here at UVA. He received his PhD and JD from the University of California at Berkeley. And he conducts a scholarship on a variety of evidentiary issues. OK, thank you. Judge Rakoff, why don't you take it away?

JED RAKOFF: And I first want to give as my judicious opinion, which are the only kinds of opinions I have, that this is a terrific book. This is just so good. It is precise. It is concise. It's accessible to people of all walks of life, but it is totally persuasive to experts, as well as laypeople. It is really a wonderful book.

It made me think about some things that I really had never thought about. For example, to give one trivial example, early in the book, Fred makes the point of talking about hearsay, quote, "I the date of my birth because my mother told me."

So I'm thinking about that if I were ever a witness in a court, and I said my birthday is August 1, 1943, objection, hearsay, sustained. And then supposing all right, I called my mother as a witness or maybe the adversary did.

Mrs. Rakoff, isn't it true that your son was actually born a few minutes before midnight on July 31 and you just adopted August 1 because you sounded like the sound of it better. Don't waffle, Mrs. Rakoff. Stop looking down, look at the jury and tell the truth.

And Mrs. Rakoff, let me ask you this. Do you have any other witness to this event? Because obviously, Judge Rakoff can't remember it at all. You say your husband, the obstetrician, he delivered? Well, how long had you been married? By then 10 years, your husband wasn't going to contradict you. He knew something about 10 years of marriage.

So the point is that this book makes you think about some obvious things that maybe you haven't thought about before. Now, Fred also points out that not every statement is offered for its truth. For example, he gives the following example. Let me find it, the quote. This is on page 90.

"If my colleague says to me that the Dean just told them that she was Joan of Arc, my colleague is not asking me to take the Dean statement as true. Neither of us think that she is Joan of Arc, nor that there is even the remotest possibility that she is."

Now I want you to that statement is false. Joan of Arc was not burned on the stake. She is here, masquerading under the name Risa Goluboff. And if you need any further proof, just think, what kind of courage would it take to be Dean of a law school in this era of academic infighting. Only a Joan of Arc could possibly do this.

OK. All this silliness aside, I thought that though I find almost everything Fred says in this book convincing, that I did have two little quibbles. And I thought I would take advantage of this opportunity to raise them.

And the first is that he suggests that burdens of proof should be thought of in terms of probabilities. He says in the book that probabilities is his thing. And I forgive him for that.

So for example, he would have juries instructed that proof beyond a reasonable doubt is that it's 90% likely that the defendant committed the crime. And similarly, for clear and convincing evidence, it's 75% likely that the defendant committed a crime. I'm very skeptical about that suggestion.

Now it is true that the instructions that are normally given are somewhat vague. The normal instruction for proof beyond a reasonable doubt, the one I give is, quote, "proof beyond a reasonable doubt must be proof of a convincing character that a reasonable person would not hesitate to rely on in making an important decision."

And similarly for clear and convincing it is defined usually in the case law as quote, "substantially, more likely to be true than not true." And those are not very precise standards. They give the jury a fair amount of leeway. I think that's a good thing.

I think if I were ever to tell the jurors in my courtroom proof, you need to find if you want to find proof beyond a reasonable doubt, that it was 90% or more likely that the defendant committed the crime, the first thing I would get was what exactly do you mean and how do we go about calculating that. And I wouldn't have a clue. And I doubt they would. So I do have some skepticism as to that one suggestion.

The other quibble I have relates to his discussion of how jurors go about determining credibility of witnesses. And this is in the context of suggesting that some things like polygraphs might be, maybe should be made admissible. They are in New Mexico, but nowhere else. Or at least, admissible under certain circumstances because the jury needs all the help it can get.

And again, I'm a little skeptical. I have a little expertise here. I totaled up in advance of this how many jury trials I've had as a judge. I've had 311 jury trials. And I always talked to the jurors after each trial.

Now Fred says this. This is at page 120. Quote, "most people, including most jurors listening to witness testimony in court, believe that certain behaviors are reliable indicators of lying. One of these behaviors is looking directly at the questioner, the common belief being that the liars will avoid eye contact.

Similarly, liars are generally believed to speak less confidently than truth tellers to fidget and display other overt signs of nervousness and to look down rather than up even apart from the question of eye contact."

Now with apologies, I have to tell you that I've never had the jurors tell me, after any of those 311 jury trials, that that's how they decide a credibility, never. What they usually tell me is they look for consistency.

And if there is an inconsistency in the testimony of a witness, then they think about whether the explanation given to try to explain away the inconsistency is plausible or absurd. And to be Frank, that's pretty much how I determine credibility in bench trials.

And I think that's a pretty good way to determine credibility. But it's very different from what is described in that passage I just read. It is true that those other things have been shown to be not very good measures of credibility but my point is that's not really how juries operate.

They operate most often in my experience, at least, by looking for consistency or inconsistency. And if there's inconsistency, whether it is explained plausibly or not.

I also have some questions in my mind, whether the introduction of polygraphs or other quasi scientific devices with which are known to have high error rates would really be a good thing. My belief is that jurors would give them too much weight because they pose as being scientific even though they're not.

There have been a few studies that dispute them, that say that no, juries don't give extra weight. Those are mostly studies done with mock jurors. And I think that's-- it's unfortunate that sociologists have to rely on mock jurors. But the trouble with that is that it's a really different state of mind. And jurors in real cases take it so much more seriously than mock jurors do.

And so I am suspicious, at least, about those studies. And my guess is that too much weight would be given to this doubtful quasi science.

Now having made those two little quibbles, and I look forward to Fred's responses, I do want to emphasize, in closing, just how terrific this book is. There is so much here. He covers the entire field of evidence and proof.

He ends, regretfully, on a kind of depressing point, which is that there are, in modern American society, too many people for whom proof is irrelevant.

The closing words of his wonderful book are as follows. "This book has been written for those for whom evidence matters and for when it matters to them. For whom evidence does not matter, no amount of evidence and no amount of the analysis of evidence is going to make a difference." And I'm afraid that's the truth. Thank you so much.

LISA KERN GRIFFIN: Thank you so much for having me here today. I'm really honored to be included in a celebration of Fred Schauer's work. Thank you Greg for the invitation. Thanks to Rebecca for organizing. It's a privilege to be at UVA.

And I'm grateful to have the chance to say a few words about a scholar who is truly inspired a whole generation of students and legal academics, and whose work has influenced everything that I write about evidence theory.

And I love the book, *The Proof* because it brings together many of the things in those 15 books, which does sound like a lot. I agree, [INAUDIBLE]. And it addresses a whole series of topics. And it addresses them for a wide variety of audiences.

And I think that those layers that the book has are actually fitting because they're a reflection of the author who contains multitudes as well. So I want to start by talking a little bit about the layers that Fred has, and then some of the insights from the book.

So first and foremost, Fred is a rigorous theorist of evidence. And he's framing the insights in *The Proof* with philosophy especially with epistemology, with psychology, with science, with history, with public policy. And he is making those concepts accessible throughout the book.

And the reason that the richness of the book is so accessible is because of a second essential characteristic of Fred, which is that he is a teacher. And he is showcasing, in this book, decades of experience, introducing students to some very complex concepts.

Anyone interested in the production of knowledge or the construction of facts is going to gain something from reading this book, from the clear and engaging presentation of the most important concepts in evidence and evidence law. And my own law students are going to be learning from parts of this book for years to come.

And there's a third essential thing about this book for students and for writers everywhere, which is that Fred is a brilliant writer. You often hear people say that you should edit your own writing by reading it out loud to yourself. And that's a hard and awkward thing to do. But this book demonstrates why that works.

It has an exquisite and personal voice. And it is perfectly conversational throughout. It stitches together sophisticated ideas, but none of the seams from that stitching show when you're reading it. It enters the reader's mind mostly through the ear rather than the eyes. It's as though you have listened to the best and most thorough podcast. And you have listened to it on a very long walk that went by in a blink because of the ease of reading the book.

And finally, I think *The Proof* showcases that Fred has long been a public intellectual. It's not just legal scholarship, of course. In fact, it's a very aspirational book. It expressly seeks to enter a much broader conversation, not just about law, not just about politics, but about everything.

And that's important because there is, as Judge Rakoff just mentioned, a true crisis of facts in our public life about votes, about viruses, about climates, about economics. A lot of scholarship and commentary focuses on this, including, sometimes, my own. And it seems to start, unlike Fred's starting point, from existential dread.

It echoes disbelief and distress about the epistemic crisis that we face. Not this book. This is a book by a public intellectual. It's a book that observes and explains and defines and reflects. It will provide some readers with a brand new vocabulary. It starts a conversation. And not once does it wag a finger or raise its voice.

It's not at all surprising that an author, who has so many facets, would produce a book that is a treasure trove of different kinds of ideas. And there are many things I could call from the book to focus on, but I want to mention two core insights that I think are really important, and then a third step that the project suggests but does not take.

The first contribution is about how we reach conclusions, how we know things and become convinced of them in our own minds. At various points, professor Schauer reminds you that it is, sometimes, imperfect evidence that is the best that we can do.

I actually think that imperfect evidence is always the best that we can do in law, at least, if not, in science. I'm not personally in a position to see what's inside a water molecule. I'm told that it's two parts hydrogen and one part oxygen. And I will take that as perfect evidence.

But in the law, when it comes to the sorts of decisions that we study and that courts make, we never have perfect evidence. We cannot turn back time and see what happened. We cannot enter the mind of another person and see what they truly intended. We're just looking at snapshots, and trying to come up with verdicts from those.

So it's mostly imperfect evidence and yet, we still have to decide and we still have to proceed, somehow. And I think the core of the book, maybe in chapter seven, where Fred says that "weak evidence is better than evidence free guessing, and slight evidence is better than superstition, and worse evidence is often better than nothing."

I like the often because worse evidence can, sometimes, mislead and distort and impose false certainty. But what he is teaching us here is a really important visual for the law, which is that it's a scale that we weigh evidence.

And it's not a switch that you flip. And it's not a binary, yes or no or pure and perfect evidence or not the right percentage of evidence. We are using probabilities. And our mind is engaging in probabilistic thinking, but we are weighing things. And we are not flipping switches. We are holding scales.

And when we do that, we are also doing it in a particular context. And here is the core structure of the book. The question is not whether evidence is good, but whether it is good enough for what you're going to do with it.

So you need to for what, compared to what, what are the alternative ways for you to answer this question, and what are the costs of error if you proceed. And here he differentiates different kinds of consequences of decision making under uncertainty.

If the consequence is a wrongful conviction, then we can agree that is a distinctive kind of error that we strive to avoid. But there are other kinds of consequences of error, where you might accept less evidence because what you want to do with it is less significant.

I take some issue with the effort to count false acquittals as a potential cost of error if only because I think we can't identify those. I think they are mostly speculative. If we get an acquittal factually wrong, but it's not the wrong decision because there was some procedural defect in the government's case, then that's not really a problem. But we would never say that a wrongful conviction is the right thing to do. But that's exactly what Fred is talking about when he talks about weighing and doing it in a particular context.

The second contribution that I found particularly interesting from the book is how much it discusses trust. We make facts, certainly as lawyers, mostly out of words. And often, out of the assertions that other people offer to us.

As Fred says, much of our knowledge comes from the assertions of others. So he asks how we guard against lying in a world in which verbal testimony is such an important part of the evidence we use, not just in law, but throughout our lives.

The law has all sorts of ways of trying to guard against lying and he discusses those in the book. Witnesses take oaths, cross-examinations are supposed to be adversarial questioning. We don't allow evidence of past history about current acts for the most part, except for past history of lying, which we do introduce when witnesses take the stand because we think that they should be exposed for that so that jurors can assess it.

And I'm going to do a little spoiler which is the short version of chapters 5 through 8 of the book, none of this works at all. None of these lay lie detection techniques are working at all. This is especially true of the myths about cross examination, which as Professor Schauer describes, includes dramatically unrealistic pictures of the nature and effectiveness of that sort of questioning.

Witnesses who are lying are going to continue to lie under cross. Witnesses who are mistaken are going to reiterate their mistakes. There are very few Perry Mason or Elle Woods moments that unearth real adversarial achievements on cross examination. And the behavioral cues like gaze aversion that people, including police officers, think are indicating intentional deception, actually do nothing of the sort.

So I agree with Fred that it is very strange that courts give instructions to jurors to use their common sense and try to figure out who's lying to them. And I agree that they encourage lay lie detection way too much.

Like Judge Rakoff, I disagree that we should instead revert to polygraphs. I'm more skeptical than Fred is of detecting lies through blood flow or brain waves or micro-expressions or pupil size or any such, I would say, hackery. But we're getting better at that. And someday, that might change.

The reason I disagree with him is not because he isn't making an intuitive and important point about the difference between scientific lie detection, if you will, and lay lie detection, but because I actually think detecting lies is mostly beside the point in our legal system and increasingly in public life as well.

I think the most enduring errors in the criminal justice system come from what Fred calls honest mistakes. And his prime example is the discussion of eyewitnesses in chapter eight/ they testify in good faith, but they're often wrong because of failures of perception or memory or reporting.

I think a lot of other bad evidence comes from other kinds of honest mistakes too. Finding out whether people are lying does not help us very much in a world where they increasingly believe truly insane things. The flat earthers were not just in 1491. They are back and going strong.

And that's the problem with how sticky collective knowledge is. As Fred says, people believe many false propositions too. And the rapid fire spread of and misinformation on the internet means, as he says, that the value of widespread belief as a reliable indicator of likely truth becomes even smaller.

I think this is actually the problem with expertise too. Mostly, those are honest mistakes. Bad experts are earnestly and sincerely wedded to the methodologies from which they make their livings, including astrologists and virologists and all kinds of experts Fred criticizes in the book.

And I actually think that Daubert screening of experts makes a mistake that the screening for the reliability of eyewitness testimony does as well. It relies too much on sincerity and expressions of certainty. And that's why the book concludes, I think, aptly, that we need to be establishing the validity of evidence with evidence, including, in the case of expert evidence, error rates for any particular methodology.

So one more observation about the strengths of the book, and then a quibble that is very similar to Judge Rakoff's. There are some prescriptive interventions in the book, but mostly, the tone of the book is what I would characterize as a sort of calm curiosity about a host of problems.

It is an unusually balanced piece of scholarship. Fred is not only acknowledging, but in some cases, accepting and even advancing counterpoints to what he is trying to say. So there is a lot of nuance. He says eyewitnesses make errors, but that we shouldn't discount them across the board because that would be an overcorrection and he's trying to avoid that.

He often describes things, including things like hearsay as pretty good evidence even though not the best evidence. He notes, I think, correctly, that polygraphs and ballistics aren't strong enough evidence to carry a prosecutor's burden of proof, but that they might be admissible to raise questions for the defense.

He says that experts merit a little more respect than they get in some of the criminal justice literature, but not too much respect, and that we shouldn't endow them with an authority that extends beyond the scope of their expertise.

And he notes that it's never enough to just say believe in science or I follow the science because the question is follow it where. Scientist can and should tell us what will happen if we take certain measures, but whether or not to take them is not a scientific question.

So I admire the style and the substance and the subtlety in the book. But there is one thing I want to take issue with, which is its serenity. Fred describes the book as about what we and when we know it. But what happens when we want to persuade people who need persuading of some ground truths in the world?

Public life is increasingly impervious to empiricism. And I think that's actually an urgent problem. How do we get things from our minds when we've done all this weighing into other peoples minds? That's especially of interest to those of you in the room who are here to learn the lawyerly arts. That's what lawyers do.

And for such a renowned First Amendment scholar, Fred is somewhat skeptical of the marketplace of ideas construct, but we do need to restore epistemic baselines and have some shared facts in our public life.

So I picked up on the same moment that Judge Rakoff picked up on. For a really soothing book, it has a last line that's pretty gutting. And that is that no amount of the analysis of evidence is going to make a difference.

And I don't think we can leave it there because facts matter. They remain, as Fred says, the foundation for sound public and personal decision making. And sometimes, lawyers have to make them matter to other people.

They matter to the parents of the children who were murdered at Sandy Hook because now, Alex Jones has had to say in court that their children were real. They mattered in 2020 when 200 different court cases concluded that there wasn't really any fraud in the election. We want them to matter. We want our policymakers to use common math about crime rates, and economic indicators, and the climate.

And so I'm going to end by saying that the book is so brilliant, but too modest. We actually need to change minds about some of these things. And that is something I'd love to hear more about from Professor Schauer. Thank you.

GREG MITCHELL: All right. Let me begin with two comments. First, it's so nice to see Charles sober today. Stick with me. Second, I am delighted to be here to talk about the best book I've ever read. Now those two statements illustrate two very important topics in Fred's book.

The first statement is an example of what Fred and others call paltering or attempting to deceive without saying anything that is literally false. So when I say how nice it is to see Charles today, I am implying that he's usually three sheets to the wind. Those of you who him will draw your own conclusions, but that was the implication. So that's an example of paltering or a palter.

My second statement was a lie. I intentionally tried to deceive you about my current emotional state and about the quality of Fred's book. I'm not delighted to be here. It's not the best book I have ever read. That would be *Vagrant Nation* by Dean Goluboff. I'm lying. It was really the *False Promise* of *Civil Rights.*

So while *The Proof* is certainly not the best book I've ever read, it is a very good book, Fred. But no book, not even one by your Dean or Professor Schauer is perfect, so I want to make a few comments on the topic of paltering that hasn't really been talked about yet, and the topic of lying, which has been touched on already, but I'll say some things that agree and some that disagree, perhaps, a little bit with what has already been said.

So first, paltering or deceiving without outright falsehoods. For my money, Fred is much too quick with his treatment of paltering in *The Proof.* He correctly notes there that the world is awash with paltering, and that paltering greatly affects our ability to know what is true in the world.

In an earlier, really excellent paper that Fred wrote with Richard Zechauser, Fred and Zechauser estimated that paltering is much more common and much more consequential than outright lying. And I wholeheartedly agree with that view. And once you have the idea in your head, just start looking around you and you will find you are awash in paltering. I would submit that academia is awash in paltering.

Yet, *The Proof* devotes all of 1 and 1/2 pages to the topic and devotes big parts of chapters to the topic of lying. Now, that may be understandable. Although the book says it's about everything and not just trials. Trials, factor, very heavily into the book.

So it's understandable that *The Proof* focuses so much on lying given its threat to the integrity of the outcomes of trials. But I think paltering, not lying, is really the primary problem in trials and life, more generally.

So *The Proof* does not zero in on the problems of paltering for trials. So for instance *The Proof* correctly notes that perjury prosecutions are really quite rare. And so they can only serve as a very limited mechanism for policing lies at trial. But one of the main reasons why perjury prosecutions are so rare is because many witnesses palter instead of lie.

So witnesses share half truths. They make past events seem more traumatic or dramatic than they really were or less. So they add qualifications that give them an out if other witnesses or documents should turn out to disagree with their testimony, right? They know what they're doing.

So phrases like "the best I can recall" or "it could have happened that way," make it difficult to say that someone has intentionally lied even though the speaker may perfectly recall what happened, but wants to remain fuzzy about some aspect of the event.

My own domain for my own work, and from my research in this area, reveals to me that expert witnesses are in fact the king of polterers, even ahead of politicians. And I would say that applies in the world, in general, where we're awash with expert potters. Precisely because of their special status in court, experts know that they will receive deference.

Lawyers and jurors, usually, and many judges, present company accepted, lack the expertise to know. And This is actually true when it comes to forensic science, at least. You wouldn't want to be a palterer forensic scientist in Judge Rakoff's courtroom.

But experts that lawyers and jurors lack the expertise to really test their testimony. They know when they say that a weak and barely confirmed theory is really strong and robust. Nobody's going to catch them in that. Even at worst, they're going to be in a battle of experts with the expert who says the contrary thing.

The use of vague verbiage is just rampant if you read expert reports, where they use cans, mites, and then they leap to case specific conclusions without any support or methodology. And they get away with it regularly. It's a tremendous problem.

So in short, as Fred emphasized in his earlier work on paltering, the paper he wrote with Zechauser, paltering witnesses are so problematic because they leave wiggle room or as they say there. Because lies involve literal untruths, they are easy, or at least easier than palters to identify.

Conversely, because palterers are harder to identify, there is considerable incentive for those who wish to deceive to turn to paltering rather than to lying. The harms of paltering and the need to prevent and limit the use of paltering both inside and outside the court, in my opinion, are much more pressing problems than the problems of lying, which gets a much bigger play in the book.

I wish we had much more about that because I think that is something the public needs to be more aware of. But that brings us to the topic of lying. So you've already heard from others that one of the more controversial arguments in *The Proof,* and a book that really does try to walk a fine line between identifying issues and being fair to both sides.

Fred actually takes a fairly strong position in favor of courts more readily admitting polygraph evidence or the evidence from other forms of lie detectors or are a lot of additional new attempts to detect lies using technology.

Fred argues for greater openness to polygraph evidence in court noting that polygrapher tend to be right 80% to 85% of the time when trying to distinguish truths from lies. And in support, he cites a 2002 National Academies of Science report on polygraphy that does include that range, in what the research shows in terms of accuracy level. And he cites some other sources to that effect.

And then he argues that those accuracy rates, as you've heard already, compared very favorably to demeanor-based lie detection, which he's absolutely right. Most people cannot do better than chance using demeanor-based lie detection.

So that part is fair, but I think the picture Fred paints about the accuracy of polygraph evidence is misleading in a few respects. So I feel obliged to call him out on that. First, that 80% to 85% accuracy level that Fred reports, as I say, can be found in the literature. But the National Academies report specifically states that we believe that estimates of polygraph accuracy from existing research overestimate accuracy and actual practice. And it goes on to state that evidence does not allow any precise quantitative estimate of accuracy.

And subsequent research, looking at post 2002 research, has come to the same conclusion. So I would say that while there is some support for the accuracy levels Fred reports, that is an issue where it is much, much more unsettled in terms of what we really about the accuracy levels of polygraphs.

Something Fred doesn't mention as well is that there is fairly good empirical evidence that people can be trained to beat the polygraph. And now I'm going to tell you something that you would pay hundreds of dollars to learn from somebody if you're about to take a polygraph test.

When you are given the comparison or control questions on the polygraph test, so these are questions like have you ever lied about your sexual activity. Most people will say, no. And they're lying about that, of course. That's not what the polygraph the polygraph test is trying to detect. They also want to did you steal property from UVA. So they'll ask you that.

So the theory behind polygraph evidence is that liars will show more stress on the accusation questions. Polygraph just measures your level of bodily stress through different measures. And on the comparison or control questions, the truth tellers will show more stress because they are being deceptive. They have nothing to hide on the accusation questions.

So how do you beat the polygraph? You elevate your level of stress on the comparison questions, the ones that have nothing to do with the supposed crime. How can you do that? Very successfully by slightly biting your tongue, pushing your toes into the floor very hard, or counting backwards by seven.

You don't have to pay me, but if your job is on the line, now you can beat that polygraph test. And the evidence is that most people can be trained to do that in 30 minutes. Just taking one or two practices. OK.

Fourth, Fred argues that the reliability requirements for expert evidence, perhaps, should at least be relaxed when it comes to criminal defendants who want to introduce polygraph evidence. I don't have a huge problem with that, but I would argue that what that's going to result in, because the government cannot compel a criminal defendant, to take a polygraph exam.

Thanks to the privileging and self-incrimination, who is going to be able to use the polygraph evidence? Almost certainly only defendants who can afford to pay for a polygraph and can afford to learn how to beat a polygraph, unless they're innocent, right?

Now, funds could be given, but federal and state courts are very stingy with giving funds for experts. So I worry tremendously that we're really just going to be producing potentially faked polygraph evidence if we go down that route.

My second concern with Fred's treatment of lying-- am I killing you on time? All right. All right. Really just completely echoes what Judge Rakoff said. I think Fred's treatment of lie detection in court as primarily a matter of demeanor-based protection just falls into the trap that many legal scholars fall into when they talk about how lying is detected at trials.

Jurors and judges certainly take into account witness demeanor. My experience in my own trials is that the jurors did sometimes talk about witness demeanor, actually. But that was not all they talked about. Sorting true and false at trial is much more than a battle of witness demeanor.

Fact finders consider confessions, documentary evidence, video evidence, trace evidence, impeachment evidence, including information about motives to lie, perceptive abilities, perceptual abilities and memory problems.

And then you're hearing from multiple fact witnesses, who often have nothing at stake in the case and little reason to lie, although they might be mistaken as Lisa was mentioning. And then they ask, does all the evidence fit together and point towards guilt or not? Varies, I agree, entirely with what Judge Rakoff was saying.

The trials are a process of falsification and verification, where they're looking for consistencies and inconsistencies. They're not merely choosing which witnesses appear more sincere or honest.

Very quickly, I would also submit that lying at trial is less common than most people believe. And I'll just quickly run through some reasons why I think that's the case. First, most people do not regularly tell serious lies. A small minority of prolific liars tell big lies, but most people in serious circumstances, actually don't lie.

Now this evidence is based largely on surveys. And can we trust surveys about lying behavior? But they're anonymous, so some proof. More importantly, I think as a much more serious constraint on lying in court, it is the consequence of being caught in a lie.

There is actually quite good empirical evidence that when observers believe they've caught a witness in a lie-- now these are mock jury studies, they actually not only discount that witness' evidence, they will generalize it, at times, to the party that called the witness to the stand. There's a very real risk that your whole case will be harmed seriously if you put on a liar or at least a liar who can be detected.

And let us not forget lawyers have strong incentives not to put on false evidence. You're going to lose trust with the judge if you're caught. You're going to violate every state's ethical codes if you're caught. You may even be hit with subordination and perjury charges, which numerous attorneys have actually been convicted of. I see you, Charles. I'm almost done. All right.

If you're caught putting on false evidence, it is, if not, the death penalty for your law license, it is automatic suspension. This is a very serious thing to lawyers. They may lose the case and they may lose their law license.

So to sum up, in my humble opinion, we worry too much about lying and not enough about paltering. And *The Proof* misses the opportunity to better calibrate our worries about both. Notwithstanding all of that, *The Proof* really is a very good book. It covers a great range of topics, does so fairly and engagingly. And it really does have very interesting history lessons sprinkled throughout.

Buy the book. You'll enjoy it. You'll learn from it, I did. And that is not a lie.

FRED SCHAUER:	So let me just start by thanking a bunch of people all of you for coming Lisa Griffin and Judge Rakoff for traveling here from afar just to be part of this event, Charles and Greg for being part of it, Rebecca Claff for organizing the event with some frequency we don't give credit, to the organizers as opposed to the performers. She's been great.

And finally, to Risa Goluboff, who supported not only writing this book, but a whole bunch of other things that I have done. I'm very grateful. I could thank my colleague and spouse, Bobby Spellman. She's my toughest audience. And a fair number of lessons that are in the book really come from her. Compared to what is among them. But so thank you all and thank you all for coming.

Let me just respond to a couple of things that different people have brought up. So I think it is important-- and here I am responding to Judge Rakoff. I think it is important to distinguish using numbers as a heuristic from using numbers as a way of encouraging people to engage in a calculation.

I agree that we don't want jurors or judges to be calculating 90% certainty or 51% certainty or whatever. I do think that rough numbers like 51, 75, and 90 maybe a better way of describing to people the appropriate level of confidence than the verbal formulas that we tend to use.

So my sympathy with using numbers, when we are engaged in what is ultimately a probabilistic enterprise, is as a way of illustrating the probabilistic ideas rather than thinking that we ought actually to engage in some calculation.

Now interestingly, everyone talked about or all the commentators talked about polygraphs. And there's a good reason for that. The good reason for that is that the modern techniques of lie detection are unpronounceable.

It is very difficult to say, and I'm going to try now to say, periorbital spectrography in front of an audience, so to with electroencephalography and so on. All of these, for most people, don't come off the tongue nearly as easily as polygraph.

So I mention that to suggest that when I am in the book, talking about polygraphs, what I'm really doing is talking about modern scientific techniques of lie detection. Indeed, Judge Rakoff and I first met when we both found ourselves as part of the board of directors, or whatever it was called, of the MacArthur neuroscience project. That wasn't much about polygraphs and was a lot about functional magnetic resonance imaging. Brain scans, to put it in a more pronounceable way.

I mean, the points are generalizable across all of these different methods. But I do talk, in the book, about various other forms of lie detection. Now what interests me in lie detection, among other things, is the way in which there is an interesting contrast between the literature and the commentary on lie detection and the literature and commentary on a host of other forms of scientific forensic evidence.

If there is a center of gravity of the literature and commentary on eyewitness testimony, more accurately, eyewitness identification or fingerprints or handwriting or a whole bunch of other things, bite marks, tool marks, whatever, most of that literature, usefully and valuably, says lots of people believe this stuff but it's not as good as you think.

What's different about lie detection is the valence of the commentary is just the opposite. So I want to at least stress that, maybe, this is one area in which, although the law, New Mexico apart has dismissed it, ever since William Marston, the creator of Wonder Woman, first came up with a machine that was excluded at trial by the DC Circuit in Frye, a century or so ago, the traditional view has been that lie detection technology should not be used.

And part of what I want to suggest is that this may be one area in which we ought to think about well, maybe, it's a little bit better than the legal system has long assumed, which is a contrast to all of these other things, where the center of gravity of the commentary is maybe this stuff isn't as good as the legal system has long assumed.

But it's an important issue. We need to have more discussion, more debate, more of all of this. And I've learned from the comments here. So a few other reactions, comments, and so on.

Lisa Griffin talks about persuasion. So actually, she talks about persuasion by starting with the observation that I am a public intellectual. I deny it. And the reason that I deny it is that I know a lot of people who describe themselves as public intellectuals and almost all of them are neither.

So yes, it is true I wrote a book that I hope will be read outside of the academic world and outside of the legal profession, but I don't claim to be a public intellectual. I think not being one is, in general, a good thing.

But let me say a little bit about persuasion. I think in part, it is true. It would be nice if we had more persuasion of more persuasion about the value of truth and the like. But I don't have the ability to write that book. That is persuasion, like a lot of other things, is actually something that's been the subject of a lot of research. It's not just about evidence.

How do you persuade people? What methods of persuasion work? What methods of persuasion don't work? All of the research about that is quite important. But even if I wanted to try to persuade people more than I do in the book, writing more about persuasion would have required skills, research, and training that I don't have.

So I'm happy to put things out there and leave it at that more broadly if I can be a bit self referential for a moment. Especially in the world of legal scholarship, there's a lot of advocacy, there's a lot of persuasion. Some of it is very effective, some of it is very thought-provoking.

I like to think that, at least, much of my work aims less at persuasion and less at advocacy. I want to get things straight. And once I can clarify the issues and help people get things straight, then I'm happy to stop at that, and leave the changing of minds to others.

So I'm grateful that Greg Mitchell acknowledged my good friend and co-author on some number of different things, Richard Zechauser. Richard is an economist, a former colleague of mine. I had never heard the word paltering until Richard mentioned it.

So the use of faltering comes from him. Now having said that, I want to take a little bit of issue with Greg because he wants to collapse into one category-- paltering, hedging, fudging, waffling, qualifying, all sorts of things like that. I think paltering is a particular kind of hedging.

It involves, as Greg's opening example made clear, it involves saying something that is literally true that is designed to create the opposite impression. That's the example of observing that someone is sober today and so on. But that's different from hedging, qualifying, waffling, and so on. All of those things announce to the listener, that maybe the speaker is not certain.

Paltering, in the literal sense, doesn't do that. Paltering, in the literal sense, is perhaps even more deceptive. Because by saying something that is literally true, the listener or reader or whatever doesn't recognize the hedge, the fudge, the waffle, and so on.

So I'll just repeat here, one of the things that I'm proudest of in the book, there are a lot of things that I would write again, differently. But one of the things I'm proudest of relates to paltering, it's the warning. And yes, maybe this is a little bit of attempted persuasion.

The warning about very common phrases like there is no conclusive evidence, there is no definitive evidence, there is no concrete evidence. As soon as we see all of that, I would suggest that we ought to be alerted to the fact that the person who says that acknowledges that there is some evidence, and they want to build in a burden of proof. They want to build in a standard of proof as part of an argumentative strategy.

OK, I think there are a bunch of other things that all of you have said that I could respond to, but I'm not going to. It's late in the afternoon. I'm grateful that you all came. I'm grateful that you are interested in the book. And again, especially grateful to those who engaged with it so carefully. So thank you.

[APPLAUSE]