The Federal Rules of Evidence: Defining and Refining the Goals of Codification

Margaret A. Berger

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol12/iss2/2

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
THE FEDERAL RULES OF EVIDENCE:
DEFINING AND REFINING THE GOALS OF CODIFICATION

Margaret A. Berger*

In less than a decade, the Federal Rules of Evidence have transformed the way in which a large percentage of the legal profession approaches evidentiary problems. A code, rather than case law, is now the initial point of inquiry. Of course, when we speak of the Federal Rules of Evidence and its state counterparts as a "code," we are not using the term in the same sense as when we examine a regulatory statute such as the Bankruptcy Code, or the Internal Revenue Code, or even the Uniform Commercial Code. The Rules are neither comprehensive nor, for the most part, "rules," in one regularly used sense of the word. The Rules do not treat all topics relating to the admission of proof—that is, the usual definition of the subject of evidence—and most of the Rules set forth general principles or "standards" rather than inflexible rules of law.

Even in the limited sense in which the Rules constitute a "codification," however, they do represent a change from prior practice.


1. For example, the Federal Rules treat only a few aspects of impeachment in rules 607, 608, 609 and 613, leaving all of impeachment by contradiction, bias and lack of mental capacity to case law.

2. See, e.g., McCormick, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 1 (2d ed. 1972) ("The law of Evidence is the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated.").

3. For a discussion of the distinction between "rules" and "standards," see Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976):

The first dimension of rules is that of formal realizability. The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.

The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.

Id. at 1687-88. See also H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).
While courts and commentators have assiduously interpreted the new codes, some fundamental issues posed by this remodeling of our evidentiary system have received little systematic scrutiny. This article examines two such issues: First, it identifies some of the consequences of “codifying” the law of evidence; second, it examines whether the experiences of the past decade point to measures for the future.

The growth of codification spawned by the Federal Rules of Evidence has been enormous. Before work on the Federal Rules began, only four states had codified their evidentiary rules. In 1976, when Hofstra Law Review published its first Symposium on the then infant Federal Rules of Evidence, five states had already adopted rules based on the federal model. Now, as the Rules near their tenth birthday and Hofstra Law Review sponsors this second Symposium, twenty-two more states, Puerto Rico, and the military have followed in the federal footsteps. The number will undoubtedly increase. Mississippi, New Jersey, New York and Rhode Island are among the states currently contemplating adoption of a code based on the Federal Rules.


5. 5 Hofstra L. Rev. 1 (1976).


Resort to an evidence code extends beyond the boundaries of the jurisdictions in which the Federal Rules or their counterparts have been adopted. Even a lawyer who does not appear in federal court, and does not practice in a state which has opted for codification on the federal model, is likely to encounter the Federal Rules. More than fifty percent of today's lawyers were admitted to the bar in the last decade. For such an attorney, exposure to the Rules probably began in the classroom, where virtually all evidence casebooks use the Rules as a point of departure. This education continued when studying for the Bar, where the evidence questions on the Multistate Bar Examination, which is currently administered in forty-six states, are based on the Federal Rules.

In the states that have drafted but have not as yet adopted a codification, members of the Bar come into contact with both their state's proposed version of a code and the Federal Rules when the proposed rules are analyzed and criticized in relation to the federal model during the often lengthy drafting and adoption process. Even in a state that has not adopted a code, practicing lawyers need to know about the Federal Rules because courts frequently cite them as persuasive authority, and sometimes can be persuaded to endorse a

13. E.g., R. LEMPERT & S. SALZBURG, A MODERN APPROACH TO EVIDENCE (2d ed. 1982).
15. In New York, for instance, two draft versions of a proposed code based on the Federal Rules have been extensively distributed as a public service by West Publishing Co., Inc. Public hearings and symposia have been held, and numerous bar groups have commented on the proposed rules. See A CODE OF EVIDENCE FOR THE STATE OF NEW YORK XVI (1982).
16. See, e.g., People v. Maerling, 46 N.Y.2d 289, 385 N.E.2d 1245, 413 N.Y.S.2d 316 (1978). Maerling discusses FED. R. EVID. 804(b)(3) which authorizes the admissibility against an accused of declarations against penal interest. The court noted that the "correctness of this view finds confirmation in its incorporation in respected recent evidence codes." Id. at 297, 385 N.E.2d at 1249, 413 N.Y.S.2d at 321.

The Supreme Judicial Court of Massachusetts, after reviewing the Proposed Massachusetts Rules of Evidence, concluded on December 30, 1982, that it would not be advisable to adopt an evidence codification substantially based on the Federal Rules at this time. The court's announcement concluded by stating: "The Proposed Rules have substantial value as a comparative standard in the continued and historic role of the courts in developing principles of law relating to evidence. Parties are invited to cite the Proposed Rules, wherever appropriate, in briefs and memoranda submitted." Comment, 68 MASS. L. REV. 83 (1983).
particular rule. Furthermore, lawyers who keep abreast of legal literature or engage in continuing legal education programs cannot avoid the Rules since the Federal Rules of Evidence are now routinely referred to whenever an evidentiary problem surfaces. The end result is that in less than a decade, in much of the legal work performed in the United States, a code of evidence has become the starting point for evidentiary analysis.

In light of this history, it is somewhat surprising that now that codification has become the norm, so little attention has been paid to the consequences. Has codification achieved the results that its proponents predicted, or have those inauspicious effects ensued which its detractors originally forecast? Seeking answers to these questions is, I think, important, because our conclusions bear on where we should go from here: are there problems with codification; are there problems with this codification; and do we want to entrust more of the law of evidence to codification?

Such an inquiry is timely now because the rule-making process is currently under Congressional scrutiny. If rule-making is retained, and a committee to consider the Evidence Rules is constituted, there may be a new impetus for looking at the Rules critically and assessing the experience of the last decade.

One way to start our inquiry is by investigating the various claims made by the proponents and opponents of codification. Over the years, a number of intertwined arguments have been put forward for adopting a code of evidence based on the federal model: (1) adoption of a code will improve the quality of bench and bar; (2)


18. See Blakey, Moving Towards An Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina, 13 N.C. CENT. L.J. 1, 9-17 (1982) (explaining in detail how North Carolina hearsay law was affected by the Federal Rules of Evidence even though North Carolina had not adopted an evidence code, and suggesting that "an evidence code will be needed in order to prevent unwelcome changes in existing North Carolina law").


GOALS OF CODIFICATION

codification promotes uniformity and predictability in the application of evidentiary rules so that gains in efficiency and declines in cost occur at both the trial and appellate levels; and (3) codification on the federal model leads to better decisions because more evidence is made available to the trier of fact and the trial judge is given sufficient discretion to do justice in the particular case.

Opponents of codification for the most part ignore the first argument and dispute the conclusions of the other two. While Wigmore would have objected to the Federal Rules on the ground that a code on this model cannot generate uniformity and predictability, he was not opposed to a comprehensive codification on a model such as he himself proposed. Others, however, doubt whether the law of evidence lends itself to codification, and whether any need for a code has been shown. Wigmore would have concurred in the most often voiced criticism of the Federal Rules—that increased admissibility coupled with enhanced trial court discretion does not lead to better adjudication. In 1942, Wigmore vehemently criticized the Model Code of Evidence:

[A]ny proposal to hand over a subject to the “discretion” of the Trial Judge is to most practitioners ominous, and fertile of forebod-

---


Predictability should lend itself to certainty, and not to dispute. But, no rule of evidence no matter how tightly drafted can meet the test of certainty because the system of proof at trial is governed by human conduct, and human conduct is not subject to prediction in every case.

Id. at 46.


ings. . . . When it is recalled that there are upwards of 5000
court-of-record trial judges, and that perhaps 20% of them come
newly to the bench every 6 years or so, is it not probable that in
these proposed large areas of "discretion" the Law of Evidence will
suffer, not a re-form, but a relapse into that primal condition of
chaos, described in Genesis 1:2, when the Earth "was without form
and void"?

Now that we have had almost a decade of experience with the Fed-
eral Rules of Evidence and more than a decade with some of the
state codifications, can we validate these claims about the conse-
quences of codification?

ADVANTAGES OF CODIFICATION

This inquiry focuses on three benefits the proponents of the Fed-
eral Rules perceived would be attained by codification: A marked
increment in (1) the quality of the bench and bar, (2) uniformity,
and (3) flexibility in decision making. While we probably do not
have sufficient information to assess the first claim objectively, gains
in uniformity and flexibility clearly have been achieved without a
break-down in our system of adjudication. We should now reexamine
the Rules in light of the goals proposed by the advocates of codifica-
tion to see whether we are maximizing these objectives to their
utmost.

Educational Value

Does codification enhance the competency of trial lawyers and
trial judges? Assessing the accuracy of this claim is important be-
cause if it can be confirmed, the chief objection of the opponents of
codification loses much of its force. Opponents feared that codifica-
tion would give too much discretion to trial judges. Yet, giving in-
creased discretion to trial judges is much less likely to plunge us into
chaos if the very process of codification improves the caliber of the
bench.

The argument for enhanced competency rests primarily on ac-
cessibility and education. Because a code of evidence is readily

30. See Blakey, supra note 18, at 5 ("The most important goal for an evidence code is to
make the evidence law that we already have accessible and usable."); Gill, Some Effects of the
New Rules of Evidence on Criminal Cases in Federal Courts, 11 Law Notes For The Gen-
eral Practitioner 931 (1975):
[T]he one thing that can be said with certainty is that the new Federal Rules of
available, all judges and attorneys can approach an evidentiary problem from the same starting point. Furthermore, judicial opinions construing a code are generally easier to find than cases in a purely common law system. Customarily, some annotation of rules and statutes exists, which is supplemented by treatises and law review articles. Often, these are conveniently organized on a rule by rule basis. Codification in both the federal and state jurisdictions has invariably been accompanied by an educational campaign both for the bar and the judiciary, consisting of training programs, law reviews, symposia, and the publication of new treatises. Codification also gives the appellate courts a fresh impetus to instruct the trial bench through opinions construing the new rules.

It should be borne in mind, however, that complaints about the competency of the trial bar have intensified in the very period in which the Federal Rules of Evidence and their state counterparts have become effective. This suggests either that we have become more sensitized to the issue of inadequacy of counsel, or that codification is not, in and of itself, a panacea. It is, of course, very difficult to define or to determine competency; perhaps it is not possible to evaluate the relationship between codification and trial lawyers' skills. On the other hand, our lack of information may be attributable to our customary indifference to empirical studies. A study

Evidence constitute a handy, brief, relatively complete checklist of all the rules of evidence, and, as such, will prove a most valuable tool for busy litigants and trial judges and necessarily tend to improve the quality of litigation in federal courts.

Id. at 98.


33. See Macaulay, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. LEGAL EDUC. 506, 513 (1982) ("We do not know what percentage of what kind of lawyers representing what kind of clients in what kind of case does an inadequate job as measured by what standard.").

34. See Bok, A Flawed System, 55 N.Y. ST. B.J. 32 (Nov. 1983):

Over a century ago, Christopher Columbus Langdell was fond of asserting that law is a science and "that all of the available materials of that science are contained in printed books." More recently, a witty law professor is said to have remarked: "All research corrupts, but empirical research corrupts absolutely."
could perhaps be designed to test the codification-competency hypothesis in a jurisdiction that has recently adopted evidence rules or is on the verge of doing so. Such a study might supply the information presently lacking, thereby providing us with an educated response to the arguments of both the proponents and opponents of codification, and it could also serve as a testing ground for applying proposed definitions of competency.

Moreover, we should at least reexamine the Federal Rules to ensure that their text does not put unnecessary obstacles in a lawyer's path. Certain of the Rules suffer from bad draftsmanship. For example, based on my teaching experience it would appear that rule 608 is incomprehensible on its face. Rule 608(b) states that impeachment by specific instances of conduct probative of credibility may not be achieved by extrinsic evidence. This provision not only confuses students, but courts as well, who sometimes think its strictures apply to modes of impeachment that are not covered by the Federal Rules of Evidence, such as bias and contradiction.

Rule 613(b) is also confusing. It states that extrinsic evidence of a prior inconsistent statement is not “admissible” unless the witness is afforded an opportunity to deny or explain, but obviously the evidence is in the first instance “admitted.” The rule actually operates

35. See, e.g., ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM 1 (1980).

36. Id. at 11.

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

37. See, e.g., United States v. Mehrmanesh, 682 F.2d 1303, 1310 (9th Cir. 1982) (court relies upon rule 608 in dealing with impeachment by contradiction and prior inconsistent statement); United States v. Sutherland, 656 F.2d 1181, 1198-99 (5th Cir. 1981) (court suggests that evidence not admissible pursuant to rule 608(b) to show witness' truthfulness or untruthfulness is also not admissible to show prejudice), cert. denied, 455 U.S. 949 (1982); United States v. James, 609 F.2d 36, 45-48 (2d Cir. 1979) (acknowledging how awkwardly rule 608 is written but finding harmless error in trial court's application of rule to bar evidence of bias), cert. denied, 445 U.S. 905 (1980); see also United States v. May, 727 F.2d 764, 765 (8th Cir. 1984) (court held that trial judge properly struck evidence that informant witness had threatened and harassed defendant because “[s]pecific instances of a witness's conduct used for impeachment may not be proved by extrinsic evidence. Fed.R.Evid. 608(b).”); United States v. Vaglica, 720 F.2d 388 (5th Cir. 1983) (reversal resulted from prosecutor's inability to understand rule 608).
to strike the evidence if no opportunity to explain is afforded. Finally, according to the advisory committee's note, rule 404 bars the circumstantial use of character evidence in civil cases. The rule achieves this result obliquely by using the word "accused" when it creates exceptions in subdivision (a) for evidence of a pertinent trait of character. This subtlety perhaps explains why a number of courts have allowed such evidence to come in during civil trials.

Other examples undoubtedly exist. Plainer English might make certain of the rules more comprehensible to students, practicing attorneys, and the trial bench. By not examining the more general question of the impact of codification on competency, however, we are ignoring the possibility of dealing with particularized instances of confusion.

The claim that codification has improved the competency of the trial bench has not to my knowledge been adequately explored. Is there less of a misunderstanding by the trial judges of settled evidentiary principles than in the precodification years? A sampling of pre and post-Rules transcripts might bring some objectivity to this inquiry.

The issue of judicial competency is of especial significance in the states. It has been suggested that the flexibility inherent in the Federal Rules poses no problems for the highly qualified federal bench, but that the caliber of many elected state court judges makes it undesirable to entrust them with so much discretion. A comparison of state and federal decisions on a particular issue could be undertaken in a state that has adopted a version of the Federal Rules.

38. Fed. R. Evid. 404 advisory committee note recognizes the arguments in favor of allowing circumstantial use of character in civil cases but maintains that "those espousing change have not met the burden of persuasion."

39. Rule 404(a)(1) and (2) both state that evidence of a pertinent trait of the accused's or victim's character, respectively, may be offered by an accused.

40. See, e.g., Harbin v. Interlake Steamship Co., 570 F.2d 99, 106 (6th Cir. 1978) (court assumed that if plaintiff had offered testimony as to his good character, evidence of plaintiff's old crimes and even his arrests would have become admissible, citing rules 404 and 405); see also Crompton v. Confederation Life Ins. Co., 672 F.2d 1248, 1254 n.7 (5th Cir. 1982) ("when evidence would be admissible under Rule 404(a) in a criminal case, we think that it should also be admissible in a civil suit where the focus is on essentially criminal aspects, and the evidence is relevant, probative, and not unduly prejudicial.").

41. Pursuant to rule 1006, a party offering a summary must demonstrate the admissibility of the underlying material, but the rule does not explicitly so provide. See AMERICAN BAR ASSOCIATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 347 (1983) (suggesting also that the rule be amended to provide for the summary's admissibility in evidence).

The outcome of such a comparison study would perhaps put to rest assertions that an elected state judge is less capable of utilizing the Rules than is a judge on the federal bench.

**Uniformity**

Many supporters of the Federal Rules of Evidence stressed the need for uniformity in the federal district courts, and argued that uniformity would lead to predictability, with subsequent savings in time and cost for both the bench and bar. Opponents voice the fear that "[i]f we adopt a 'black letter' code, lawyers will have a field day determining how many evidentiary angels can dance on the top of a pin. The rules may thus generate appeals and increase reversals on evidentiary rulings." They also expressed doubt that uniformity could be achieved.

Have we had enough experience with the Rules to sort out these contentions? It is beyond dispute that the rate of reversals for evidentiary errors in federal court is extremely low. This rate, however, sheds no light on whether more evidentiary objections are being

---

43. See sources cited supra note 22.
45. Id. at 1413 (statement of Rep. Smith).
46. Only twelve opinions in which reversible error occurred in conjunction with a Federal Rule of Evidence are reported in the first thirteen advance sheets of the Federal Reporter for 1984 (roughly one-quarter of a year): Belton v. Fibreboard Corp., 724 F.2d 500, 505 (5th Cir. 1984) (judge's instructions violated rule 408; judge's comments to jury were also erroneous); Zenith Radio Corp. v. Matsushita Elec. Indus., 723 F.2d 238, 316 (3d Cir. 1983) (grant of summary judgment reversed because evidentiary rulings erroneously excluded evidence which raised material issues of disputed fact); United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984) (in admitting post-hypnotic testimony, trial judge failed to apply rule 403); Breidor v. Sears, Roebuck and Co., 722 F.2d 1134, 1138-40 (3d Cir. 1983) (court erred in applying a too restrictive view of expert testimony); United States v. Ordonez, 722 F.2d 530, 536-38 (9th Cir. 1983) (hearsay and confrontation error); Wiedemann v. Galiano, 722 F.2d 335, 337 (7th Cir. 1983) (error pursuant to rule 606 to allow jurors to testify as to effect upon their minds of extraneous, prejudicial information); Curreri v. International Bhd. of Teamsters, 722 F.2d 6, 11-13 (1st Cir. 1983) (error in excluding testimony); Cardio-Medical Assoc. v. Crozer-Chester Medical Center, 721 F.2d 68, 75-76 (3d Cir. 1983) (error in taking judicial notice pursuant to rule 201 in dismissing a complaint on jurisdictional grounds); United States v. Pagan, 721 F.2d 24, 29-30 (2d Cir. 1983) (error to admit evidence of previous crime pursuant to rule 609(c)(1)); United States v. Brown, 720 F.2d 1059, 1069 (9th Cir. 1983) (testimony inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966), should also have been excluded under rule 403); United States v. Layton, 720 F.2d 548, 555-62 (9th Cir. 1983) (on government's appeal from denial of a pretrial motion to admit certain evidence, court found that statements were admissible pursuant to rules 801(d)(2)(E) and 804(b)(3)); United States v. Pinto-Mejia, 720 F.2d 248, 256-58 (2d Cir. 1983) (error in finding that document satisfied hearsay rule); cf. United States v. Vaglica, 720 F.2d 388, 395 (5th Cir. 1983) (error for prosecutor to erroneously suggest in closing argument that witness could have been presented but for rule of evidence).
made at trial or on appeal than before the Rules went into effect. It would seem, however, that few appeals have been generated where the Rules were able to treat an entire subject comprehensively, such as in articles IX and X. This suggests that we should examine the experience of the past decade with the objective of determining whether any potential for increased uniformity exists that has not yet been adequately realized. We can consider whether there are rules that should be recommitted to the rulemakers because we are now in a position to lay down a "black letter" rule.

While opponents of the Rules question the desirability of abandoning the slow common law process of evidentiary development, I feel that there are three circumstances when the gradual evolution of evidentiary principles is not worth the cost, and where we should make further use of the vehicle of codification. Codification has become possible in each of these categories because passage of the Rules has provided courts, commentators, and lawyers with a new impetus for looking at evidentiary problems. To this extent, supporters of the Rules were correct: the process of codification has led to some uniformity, namely to a uniform realization that certain problems exist. We have not yet, however, taken advantage of some of the new insights afforded.

The first instance in which greater uniformity lies within grasping distance is with issues that have been thoroughly explored by the legal community, but as to which unanimity has not been reached. The applicability of rule 407—dealing with the admissibility of subsequent remedial measures—in products liability cases, a topic discussed by Professor Seidelson in his article in this Symposium, is illustrative.

The courts have reached a variety of differing conclusions on whether evidence of post-accident remedial measures can be admitted in a case tried on a strict liability theory. Some say that rule 407 does not bar such evidence, while others hold that the ban in rule

47. Fed. R. Evid. 901-903 (authentication and identification).
49. E.g., 120 Cong. Rec. 1415 (1974) (statement of Rep. Holtzman) ("[T]he growth of our evidentiary law has been taking place over 100 years on a case-by-case basis. Codifying rules of evidence, therefore, marks a drastic departure from centuries-old tradition. . . ."); see also id. (statement of Judge Henry Friendly, quoted by Rep. Holtzman) ("when it is not necessary to do anything, it is necessary to do nothing").
51. E.g., Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980); Farner v. Paccar,
407 does apply.\textsuperscript{62} Still others look to the particular type of strict liability claim that is being made.\textsuperscript{63} Finally, some courts suggest that state law rather than rule 407 should apply because of \textit{Erie} compulsions.\textsuperscript{64}

The rationales supporting the various positions have been extensively explored by the courts and in the legal literature.\textsuperscript{65} Not only can we draw on considerable experience in seeing how the various judicially imposed solutions work, but we can also examine the model of code-mandated resolution, since a number of states explicitly dealt with the product liability issue when enacting their version of rule 407.\textsuperscript{56}

There is nothing to be gained by leaving this question open for further judicial resolution, other than an incentive for forum shopping, a lack of predictability in the circuits that have not yet addressed the issue, and a consequent expenditure of judicial resources. Of course, the last sentence sounds like an excerpt from a petition for certiorari, but given the Supreme Court’s apparent disinclination to review evidentiary issues,\textsuperscript{57} there is no guaranty that the Court

---


\textsuperscript{53} E.g., DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228 (8th Cir. 1983).

\textsuperscript{54} E.g., DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228 (8th Cir. 1983); Oberst v. International Harvester Co., 340 F.2d 863, 867 n.2 (7th Cir. 1965) (Swygert J., dissenting). A subsidiary question is whether recall letters should be treated identically. \textit{Compare} Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978) (dictum that would have allowed the admission of a cost estimate for changing dangerous design defect in order to comply with changing safety regulations) with Vockie v. General Motors Corp., 66 F.R.D. 57, 61-62 (E.D. Pa.) (such estimates held inadmissible), \textit{aff'd mem.}, 523 F.2d 1052 (3d Cir. 1975). \textit{See} Maine Rules of Evidence, Rule 407(b) (Supp. 1978) (“A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.”).

\textsuperscript{55} \textit{See} cases and literature cited in 2 J. \textsc{Weinstein} \& M. \textsc{Berger}, \textit{supra} note 10, ¶ 407[03].

\textsuperscript{56} \textsc{Alaska} R. Evid. 407; \textsc{Hawaii} R. Evid. 407; \textsc{Iowa} R. Evid. 407; \textsc{Me.} R. Evid. 407; \textsc{Neb.} Rev. Stat. § 27-407 (1979); \textsc{Tex.} R. Evid. 407; \textit{see} 1 J. \textsc{Weinstein} \& M. \textsc{Berger}, \textit{supra} note 10, at T-40-T-41, T-43, T-47. Colorado and Wyoming deal with the problem in commentary to the rule. \textsc{Colo.} R. Evid. 407 advisory committee note; \textsc{Wyo.} R. Evid. 407 advisory committee note; \textit{see} 2 J. \textsc{Weinstein} \& M. \textsc{Berger}, \textit{supra} note 10, ¶ 407[08].

\textsuperscript{57} Except for privilege cases noted infra note 102, the Supreme Court has refused to grant certiorari to clarify the meaning of a Federal Rule of Evidence even when a conflict exists in the circuits on an issue that could affect the outcome of a criminal trial, such as the admissibility of grand jury testimony pursuant to the residual hearsay exception. \textit{See} Garner v.
GOALS OF CODIFICATION

will examine rule 407 in the near future. Furthermore, this issue may be more appropriate for rule-making than adjudication. The Supreme Court does not have particular expertise with tort cases, nor in witnessing first-hand how evidence of subsequent remedial measures affects a jury. An advisory committee may be more in tune with such issues. Finally, in light of the complex *Erie* issue that lurks in the background, it may be more desirable to proceed by rule-making since a federal rule directly on point may, pursuant to *Hanna v. Plumer*, obviate the necessity to consider state law. Thus, in considering whether a conflict among the circuits should be resolved by amendment, the nature of the rule, the extent of experience with the rule, and the need for uniformity should all be assessed.


58. 380 U.S. 460 (1965). The court noted therein:
To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

*Id.* at 473-74 (footnotes omitted).

59. *But see* Moe v. Avions Marcell Dassault-Breguet Aviation, 727 F.2d 917, 930-35, 936 (10th Cir. 1984), wherein the majority states that rule 407 cannot be applied in diversity case without regard to state law, despite *Hanna v. Plumer*, because:
The ground for exclusion of remedial measures under Rule 407 rests on the social policy of encouraging people to take steps in furtherance of safety. The decision is necessarily a state policy matter. Product liability is not a federal cause of action but, rather, a state cause of action with varying degrees of proof and exclusion from state to state. If a state has not announced controlling rules, such as New Mexico, . . . the federal district court, sitting as a state court in a product liability diversity case, must determine whether Rule 407 applies. Where the state law is expressed in product liability cases, these expressions control the application of Rule 407. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). If the law of the state supplies the rule of decision, there is no justification for reliance on Rule 407. We recognize that, by its terms, Rule 407, when read in conjunction with Rules 401 and 402, does appear to apply in these cases. However, such a result is an unwarranted incursion into the *Erie* doctrine.

*Id.* at 932. The concurring judge noted that "the difficult question of possible conflict between state and federal rules of evidence" did not have to be resolved in order to decide the subsequent repairs issue which also rested on an independent ground. *Id.* at 936.

60. There are other rules as well which have had their meaning extensively explored by courts and commentators, and which should be amended because the intent of the drafters was not clearly stated. Among the candidates for amendment is rule 803(3), to clarify whether it applies to show what someone else did, *see* Seidelson, *supra* note 50, at 480-488; rule 612, to clarify whether it overrides claims of privilege, *see* J. WEINSTEIN & M. BERGER, *supra* note 10, ¶ 612[04]; and rule 606, to clarify whether a juror may be interrogated about the effect of extraneous influences on him; *compare* Krause v. Rhodes, 570 F.2d 563, 570 (6th Cir. 1977) (unsettled), *cert. denied*, 435 U.S. 924 (1978) with Wiedemann v. Galiano, 722 F.2d 335, 337 (7th Cir. 1983) (reversible error to allow testimony about effect on juror's mind).
The second instance in which we should consider additional codification is when the courts are approaching consensus on an issue. An example of such a consensus is the allocation of judge-jury functions in applying the coconspirator exception, a subject treated by both Professors Mueller and Seidelson in their articles in this Symposium. Both authors agree—although Professor Seidelson deplores the result—that every circuit that has considered the issue since the enactment of the Federal Rules has concluded that it is the responsibility of the trial judge rather than the jury to determine whether a statement satisfies rule 801(d)(2)(E). An obvious question is why bother with codification if uniformity via the traditional adjudicatory route is at hand? In the first place, non-codification raises the plain English concerns voiced earlier. If rule 801(d)(2)(E) is subject to rule 104(a), a lawyer (and court) should be able to determine this from reading the Rules. Secondly, once a consensus is clearly imminent, it does not make sense to wait until all twelve circuits have considered the issue. In those circuits that have not yet ruled, the issue will continually be raised both at trial and on appeal, resulting in an inefficient use of cost and time. Precisely when a consensus exists should be left to the rule makers, but a decade of experience, en banc opinions, and noticeable accord in the legal literature should function as indicators that a particular issue is ripe for inclusion in the Rules.

Finally, I would advocate imposing some procedural uniformity by means of the Rules. Two rules in particular, rules 404(b) and 609(a), have had procedural requirements tacked on to them through judicial action. These requirements vary from circuit to circuit.

63. Id. at 457-460.
64. See Mueller, supra note 61, at 364-65; Seidelson, supra note 50, at 455. Rule 801(d)(2)(E) states that statements of a coconspirator of defendant made during the course of, and in furtherance of, a conspiracy are not hearsay.
65. See supra notes 37-41 and accompanying text.
66. Fed. R. Evid. 104(a) (questions of admissibility generally).
67. For example, there seems to be a consensus that the terms “dishonesty or false statement” in rule 609 refer to crimes falling into the crimen falsi category. See 3 J. Weinstein & M. Berger, supra note 10, ¶ 609[04].
68. Fed. R. Evid. 404(b) (evidence of other crimes, wrongs, or acts are not admissible solely to show a criminal disposition).
69. Fed. R. Evid. 609(a) (general rule for impeachment by evidence of conviction of crime).
70. For a general discussion of the procedural aspects of rule 404(b), see 2 J. Weinstein
circuit, and within the circuits as well, since none of the appellate courts have comprehensively addressed all the procedural issues that arise in connection with both rules. The result is a considerable variation in practice before different district court judges in criminal cases. A few examples follow. Must the government give notice prior to trial that it intends to rely on evidence of other crimes? Must the trial judge give a limiting instruction on other crimes evidence—when asked, sua sponte? Must the defendant indicate the nature of the testimony that he intends to give when he seeks a ruling from the trial court excluding his prior convictions? Does the defendant waive his right to appellate review of a rule 609 ruling if he fails to take the stand after an adverse determination?

The resolution of these issues and others in a non-uniform manner forces counsel to learn different rules for different judges, and to raise numerous procedural issues on appeal. Submitting these issues to rule-making and a public debate would cause more information to surface about the procedures actually being followed by district judges so that their impact could more accurately be assessed. Most opinions do not discuss these issues at all, yet the procedural posture in which an evidentiary determination is made may have a significant effect. A uniform procedural approach might ultimately decrease the number of appeals generated by rule 404, which, with the possible exception of rule 403, is the single most-cited rule in the federal reported appellate opinions.

Flexibility

The claim put forth by supporters of codification based upon the Federal model that freer admissibility of evidence, coupled with a

& M. BERGER, supra note 10, ¶ 404[19]. For a general discussion of the procedural aspects of rule 609(a), see 3 J. WEINSTEIN & M. BERGER, supra note 10, ¶ 609[05].

71. See, e.g., United States v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980) (court suggested “that in future cases the Government exercise the discretion given it by Fed. R. Crim. P. 12(b)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts”).

72. See, e.g., United States v. Levy, 731 F.2d 997 (2d Cir. 1984) (defendant “entitled to a cautionary jury instruction”).

73. See United States v. Escobar, 674 F.2d 469, 474 n.10 (5th Cir. 1982) (court reserved decision on whether failure to give instruction in absence of request constitutes error).

74. The Ninth Circuit has so ruled. United States v. Cook, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980).

75. See United States v. Luce, 713 F.2d 1236, 1239 (6th Cir. 1983) (court holds that it will not review where trial judge reversed decision on motion in limine and suggests that non-reviewability should also be the consequence when the defendant fails to testify after an unfavorable in limine determination), cert. granted, 104 S. Ct. 1677 (1984).
considerable grant of discretion to the trial judge, leads to better decisions in the individual case than categorical rules,\textsuperscript{76} is probably impossible to substantiate. Even though inconsistencies in result can undoubtedly be shown, it does not, therefore, follow that rigid rules of exclusion work any better.\textsuperscript{77} Based on anecdotal evidence, the general sense seems to be that the Rules' preference for flexibility has worked well over the last decade in the federal courts. We should look, however, to see whether there are any particularized instances where the proper allocation between rules and standards has been questioned. Are there areas where we should reexamine the Rules to see whether they strike an appropriate balance between rigidity and flexibility?

One area in need of such clarification is the relationship between rule 609\textsuperscript{78} and rule 403.\textsuperscript{79} Is rule 609 subject to rule 403, or is this an instance, as the legislative history of rule 609 strongly suggests,\textsuperscript{80} and a number of courts have held,\textsuperscript{81} where there is no discretion in the trial judge to exclude convictions except for the limited discretion explicitly provided in rule 609 itself with regard to certain convictions offered to impeach the accused and defense witnesses? Not all circuits have passed on this issue, but it would seem appropriate to have a uniform construction of rule 609, instead of the non-conformity that exists within certain circuits.

The rules on expert testimony in article VII present a different problem. Some courts and commentators persist in constructing rigid exclusionary rules where none exist. This has been accomplished by superimposing the test enunciated in \textit{Frye v. United States},\textsuperscript{82} or

---

\textsuperscript{76} See \textit{supra} notes 21-23 and accompanying text.

\textsuperscript{77} See Teitelbaum, Sutton-Barbere & Johnson, Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?, 1983 Wis. L. Rev. 1147, 1195 (1983) (concluding on the basis of empirical data that judges cannot routinely determine prejudicial value but questioning whether categorical rules of exclusion would increase the possibility of accurate decisions).

\textsuperscript{78} \textit{Fed. R. Evid.} 609 (impeachment by evidence of conviction of crime).

\textsuperscript{79} \textit{Fed. R. Evid.} 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

\textsuperscript{80} See 3 J. \textit{Weinstein} & M. \textit{Berger}, \textit{supra} note 10, \S\S 609[2]- 609[40].

\textsuperscript{81} E.g., United States v. Wong, 703 F.2d 65 (3d Cir. 1983); United States v. Kiendra, 663 F.2d 349 (1st Cir. 1981); United States v. Leyva, 659 F.2d 118, 121-22 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1156 (1982); United States v. Toney, 615 F.2d 277 (5th Cir.), \textit{cert. denied}, 449 U.S. 985 (1980), all ruling that rule 403 does not apply to convictions admissible pursuant to rule 609(a)(2). On the issue of discretion as to prosecution witnesses, see United States v. Dixon, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976). On the applicability of rule 403 in civil cases, see Roshan v. Ford, 705 F.2d 102, 104 (4th Cir. 1983).

\textsuperscript{82} 293 F. 1013, 1014 (D.C. Cir. 1923) ("[W]hile courts will go a long way in admit-
some other threshold test, on top of rule 702 when the admissibility of novel scientific evidence is in question,\textsuperscript{83} or by rejecting expert testimony unless it is on a subject "beyond the jury's sphere of knowledge,"\textsuperscript{84} or by adopting a black letter rule that expert legal testimony is not admissible.\textsuperscript{85} All of these attempts obviously indicate a desire for a more restrictive approach to expert testimony, but fail to make a good case for why the "helpfulness" standard expressed in rule 702 is not an adequate touchstone.\textsuperscript{86} The appellate courts have generally resisted these efforts to undercut the flexibility inherent in article VII.\textsuperscript{87} This seems to be an area where the case-by-case approach mandated by the Federal Rules is working well, and where rigid rules excluding entire categories of evidence should not be allowed to develop.

The hearsay rules present the other side of the coin. Here the issue is not whether rules of exclusion should be imposed upon a flexible scheme, but rather the extent to which rigid rules mandating admissibility can or should be made subject to the trial judge's discretion. The traditional hearsay rule, like other categorical rules, is both over-inclusive and under-inclusive. Although grounded on a rationale of trustworthiness, it operates not only to exclude hearsay statements with a high degree of trustworthiness, but also to admit statements whose reliability is suspect.\textsuperscript{88} With the addition of the residual hearsay exceptions in rules 803(24) and 804(b)(5), theFed-
eral Rules of Evidence alleviated the over-inclusiveness problem by specifically giving the trial court discretion to admit particularly trustworthy statements otherwise inadmissible as hearsay. It is considerably less clear whether the Rules also afford the trial judge discretion to deal with under-inclusiveness by allowing him to rely on rule 403 to exclude otherwise admissible evidence on the ground that the rationale underlying the hearsay rule has not been satisfied. For example, if a piece of evidence satisfies the excited utterance exception or qualifies as non-hearsay pursuant to rule 801(d), may the trial judge refuse to admit the evidence because the proffered proof is so unreliable that its "probative value is substantially outweighed by the danger of unfair prejudice," or does the existence of a rule signify that reliability must be conceded? The problem can also arise with respect to statements that are not analytically hearsay according to the definition in rule 801(a)(c), but that, nevertheless, pose hearsay dangers.

Judge Friendly, in a recent opinion in United States v. DiMaria, held that the drafters of the Rules had opted for the second, non-discretionary approach. According to the judge, even if the statement seeking admission was made in circumstances which indicate a strong motive on the part of declarant to deceive, the trial judge may not exclude it, if the statement satisfied the tests of article VIII. "[T]he scheme of the Rules is to determine [issues of credibility] by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge." Other courts have been more willing to read the hearsay rules as subject to a rule 403 analysis, and to give the trial judge discretion to exclude statements when circumstantial guarantees of trustworthiness are lacking.

89. Fed. R. Evid. 803(24) advisory committee note: "Exceptions (24) and its companion provision in Rule 804(b)(6)[5] do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."


91. 727 F.2d 265, 270-72 (2d Cir. 1984) (court reversed conviction because trial judge had excluded statement offered by the defense that "fell within Rule 803(3), as it clearly did if the words of that Rule are read to mean what they say."). Id. at 271.

92. Id. at 272.

93. See United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980) (trial judge must weigh factors such as "age of the declarant, the physical and mental condition of the declar-
Judge Friendly justifies the choice of a categorical rule that admits some statements of dubious reliability on the ground that "[t]his evil was doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness, with attendant possibilities of delay, prejudgment and encroachment on the province of the jury." Even under the present scheme, this cost benefit analysis was rejected in the case of rules 803(6)-(8), which specifically require the judge to engage in a case-by-case assessment of "lack of trustworthiness." When statements are offered pursuant to these exceptions, the credibility of the declarant, who it was feared might often have a strong motive to misrepresent, is specifically left to the judge. And rule 804(b)(3) requires the trial judge to assess whether "corroborating circumstances clearly indicate the trustworthiness of the statement."

Now that we have had a decade's experience with the hearsay rules, are we satisfied with how they are working? Should we make article VIII specifically subject to rule 403 in order to cure the under-inclusiveness problem, or should some of the rules be amended to require a trial judge to make a preliminary finding of trustworthiness? Two of the authors in this Symposium argue for amendments—Professor Bein writes of the representative admissions covered by rules 801(d)(1)(C) and (D), and Professor Meuller ant, the characteristics of the event and the subject matter of the statements."); United States v. Ponticelli, 622 F.2d 985, 991 (9th Cir.) cert. denied, 449 U.S. 1016 (1980) ("The state of mind declaration also has probative value, because the declarant presumably has no chance for reflection and therefore for misrepresentation. . . . The greater the circumstances for misrepresentation, the less reliable is the declaration.")

95. Fed. R. Evid. 803(8)(C) advisory committee note: "The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Cf. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 782 (1982) ("lack of trustworthiness" test in Rule 803(8)(C) is subject to "unless clearly erroneous" provision of Federal Rule of Civil Procedure 52(a) rather than being reviewable for abuse of discretion).

96. The question of imposing a trustworthiness requirement not specified by a particular rule has arisen in connection with declarations against penal interest that inculpate a defendant. See, e.g., United States v. Riley, 657 F.2d 1377, 1385, 1390 (8th Cir. 1981) (majority imposes trustworthiness requirement; dissent states that this "requires more than was contemplated when Federal Rule 804(b)(3) was adopted"), cert. denied, 103 S.Ct. 742 (1983). The constitutional issues caused by rule 804(b)(3)'s imposing corroborating circumstances indicating trustworthiness solely on the defendant are discussed in Tague, Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception, 69 Geo. L. J. 851, 978-1011 (1981).

97. Bein, Party's Admissions, Agent's Admissions: Hearsay Wolves In Sheep's Cloth-
endorses adding a trustworthiness requirement to the coconspirator exception.\textsuperscript{88}

The issue of whether trial judges ought to have discretion to deal with untrustworthy statements that meet article VIII requirements has become particularly troublesome in criminal cases because of the Supreme Court's opinion in \textit{Ohio v. Roberts}.\textsuperscript{99} In a criminal case, when hearsay is introduced against the accused, the confrontation clause as well as the hearsay rules are implicated. In \textit{Roberts}, the Supreme Court formulated as follows the constitutional standard that governs the admissibility of hearsay statements:

\begin{quote}
[When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he was unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.\textsuperscript{100}]
\end{quote}

When taken at face value, which is what some lower courts have done,\textsuperscript{101} the \textit{Roberts} standard authorizes a court to use the identical test for hearsay rule and confrontation clause purposes, provided the declarant is unavailable and the hearsay exception relied upon is "firmly rooted." This means there need be no search for "indicia of reliability" if the Federal Rules of Evidence are interpreted to mandate a categorical under-inclusive hearsay rule that prohibits exclusion for lack of trustworthiness unless the particular rule so provides.

\textsuperscript{88} Hofstra Law Review, Vol. 12, Iss. 2 [1984], Art. 2

\textsuperscript{99} \textit{Mueller}, supra, note 61, at 388.
\textsuperscript{100} Id. at 66.

\textsuperscript{101} See United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), \textit{modified on other grounds}, 686 F.2d 356 (5th Cir. 1982) (statements admitted pursuant to rules 801(d)(2)(E), 803(1), and 804(b)(3) immune from confrontation clause challenge; "Here, both prongs of the Supreme Court's test are met in regard to each declaration Harvey challenges. First, the unavailability of the declarants is indisputable; they are dead. Second, we can 'infer the reliability' of these declarations because they all 'fall within a firmly rooted hearsay exception.' "). \textit{Cf.} United States v. Chappell, 698 F.2d 308, 312 (7th Cir.), \textit{cert. denied}, 103 S. Ct. 2095 (1983) (noting that since the circuit has repeatedly held that statements admitted pursuant to rule 801(d)(2)(E) do not violate the confrontation clause, no need to differentiate rule 801(d)(2)(D) statements which are analytically similar for confrontation clause purposes).
Finally, the privilege rules should be examined to determine how the flexibility incorporated into article V has worked. The formulation in rule 501—privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience”—has been interpreted by the Supreme Court in various dicta as requiring the recognition of privileges “on a case-by-case basis.” This suggestion has encouraged some lower federal courts to endorse qualified rather than absolute privileges. A qualified privilege represents an attempt to serve the policies underlying grants of privilege, while at the same time focusing on justice in the particular case. Such an approach turns privileges into standards rather than the absolute rules mandated by Wigmore’s classic formula. Despite this theoretical shift, however, it seems that the actual results in decided cases may not vary much from pre-Rules practice. Instead of refusing to find a privilege, the courts now recognize a privilege, but then find, on balance, that disclosure should be ordered. This result is disheartening to those who value the interests served by privileges and who hoped that the rule 501 formulation would in appropriate cases temper the traditional hostility of the judiciary towards rules that keep relevant information from the courts.

It is questionable, however, whether the efficacy of giving the courts discretion in formulating privileges will be reviewed in the context of codification, since codification, either through rule-making or legislation, appears to have been foreclosed. Privileges cannot be


105. See supra note 3.


107. E.g., United States v. Cuthbertson, 630 F.2d 139, 146-49 (3d Cir. 1980) (recognizing qualified first amendment privilege for reporters but requiring production in this circumstance); see Note, supra note 103, at 1096-99 (rule 501 adopted to facilitate recognition of new privileges on case-by-case basis as need arose).
adopted through the ordinary rule-making process—a result that is perhaps in accord with the dictates of the Rules Enabling Act, and is in any event mandated by 28 U.S.C. section 2076 which states that "any . . . amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall have been approved by act of Congress." Congress is, of course, free to enact privileges, but it would then have to make choices between competing groups clamoring for the privilege of having a privilege—the very choice it obviously sought to avoid by passing rule 501. If the limitation on rule-making rests on a separation of power rationale as well as the perception that privileges affect primary conduct and should be subjected to empirical fact-finding and legislative accountability, then Congress' action in passing 28 U.S.C. section 2076 and approving the formulation in rule 501 is tantamount to locking the barn after first having arranged to turn over the key to a horse thief. For the moment, however, regardless of policy arguments in favor of legislative solutions, it appears that any proposals to restructure privilege law—such as Professor Saltzburg's article in this Symposium suggesting that the corporate attorney-client privilege be guided by the privilege's underlying rationale—will have to be addressed to the Supreme Court as adjudicator, not rule-maker.

108. 28 U.S.C. § 2072 (1982) ("[s]uch rules shall not abridge, enlarge or modify any substantive right . . ."); see Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1185-92 (1982) (concluding that the basic purpose of the legislation was animated by a desire to allocate lawmaking power between Congress and the Supreme Court along a substance/procedure dichotomy rather than a federal/state dichotomy, and suggesting that "if lawmaking in an area necessarily involves the consideration of public policy—policies extrinsic to the process of litigation—the choices in that area are for Congress." Id. at 1190).


110. On the floor of the House of Representatives, Representative Holtzman stated:

Evidentiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. . . .

. . . . My amendment provides for the veto power with respect to all the other rules, but it would say that in the area of privileges, before a Supreme Court legislative rule would go into effect, it would have to be approved by act of Congress.

My amendment is consistent with my feeling of what Congressional prerogatives are and also consistent with my feeling that there will be an article III constitutional problem with allowing the Supreme Court to legislate in the area of privilege.

120 CONG. REC. 2391-92 (1974). See also Burbank, supra note 108 at 1187 n.738 (suggesting that the Supreme Court was in error when it suggested that the function of the Enabling Act was to ensure that state privileges would apply in diversity cases unless Congress authorized otherwise).

CONCLUSION

We have had almost a decade of experience with the Federal Rules of Evidence. The Rules have been interpreted by the courts, annotated by the commentators, critiqued by the law reviews, and revised by the states. We are now in a position to make some assessments about the consequences of codification. It may, therefore, be time to move on to the next step—to evaluate our experience and reflect on the future of the Federal Rules. This comment has suggested three courses of action we should consider: 1) clarification of certain of the Rules to make their meaning clearer; 2) further rule making in areas where uniformity is desirable, and 3) reassessment of some of the choices expressed in the Rules between categorical rules and rules conferring discretion.

In order to take advantage of the lessons of the past decade, we need a mechanism for amending the Rules. At this time, there is no Advisory Committee on the Federal Rules of Evidence, so that there is no way for rule-making to proceed. Legislation to amend the rule-making process—currently pending before Congress\(^\text{112}\)—would require the Judicial Conference to appoint a committee in the Evidence area.\(^\text{113}\) If this change occurs, we will be able to quicken the pace of our steps on the path of evidentiary reform.

