

THE GOLDEN ANNIVERSARY OF THE “PRELIMINARY STUDY OF THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE FEDERAL COURTS”: MISSION ACCOMPLISHED?

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Rules of court are the preferable means of governing the admissibility of evidence and the competency of witnesses¹

It is common for courts and commentators to bemoan indeterminacy in the law. Uncertainty in the law makes it difficult for lower courts to decide cases and for practitioners to advise their clients. Evidence law is no exception. Many commentators have pointed to the splits of authority under the Federal Rules of Evidence and the confusion generated by such divisions of authority.² Some commentators criticize the obscurity of the inextricably intertwined doctrine under Federal Rule of Evidence 404(b),

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1. Comm. On Rules of Practice and Procedure, Judicial Conference of the United States, *Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the U.S. District Courts*, 30 F.R.D. 73, 116 (1962) [hereinafter *The Preliminary Study*].

2. See e.g., Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997).

permitting the prosecution to introduce testimony about the accused's uncharged acts closely connected to the charged crime.³ Other commentators lament the conflicted state of the law under Rule 501 as to when the attorney-client privilege extends to independent contractors serving as a client's expert consultant.⁴ Still others point to the troubling division of judicial sentiment under Rule 702 over the question of how far forensic experts such as fingerprint examiners can go in attributing trace evidence to a single source.⁵

Although these complaints have a large measure of merit, it is easy to forget that today the indeterminacy in Evidence law is more manageable than it was a half century ago. Fifty years ago in 1961, the Special Committee on Evidence, appointed by Chief Justice Warren, submitted its famous report entitled "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts."⁶ The report's golden anniversary presents an opportune time to reflect on the impact of the report and, more specifically, consider the extent to which in the intervening years the federal courts have achieved the objectives set out in the report.

Like contemporary commentators, the committee complained about the indeterminacy of Evidence law.⁷ After surveying the landscape of Evidence law in 1961, the committee wrote that many of the then current evidentiary doctrines were "not clear."⁸ The committee described the status quo as a "crazy quilt."⁹ The committee approvingly repeated the complaint that "the law of evidence is . . . too uncertain to apply accurately on the spur of the moment."¹⁰ It is true that the committee did not cite any empirical studies to support its assertion.¹¹ Moreover, twelve years later, when Congress was deliberating over the proposed Federal

3. Milton Hirsch, "This New-Born Babe an Infant Hercules": The Doctrine of 'Inextricably Intertwined' Evidence in Florida's Drug Wars, 25 NOVA L. REV. 279 (2000).

4. See Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727 (2009).

5. David Kaye, *Probability, Individualization, and Uniqueness in Forensic Science Evidence: Listening to the Academies*, 75 BROOK. L. REV. 1163, 1167 (2010); Michael Saks & Jay Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 VAND. L. REV. 199, 218 (2008).

6. The Preliminary Study, *supra* note 1.

7. *Id.* at 95, 109.

8. *Id.* at 95.

9. *Id.* at 109 (quoting Edward M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

10. *Id.*

11. 21 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5006, at 16-17 (2d ed. 2005).

Rules of Evidence, a leading jurist, Chief Judge Henry Friendly of the Court of Appeals for the Second Circuit, vigorously disputed the committee's assertion.¹² Nevertheless, in 1961, the committee unanimously endorsed that view, and its endorsement persuaded the Chief Justice to appoint the Advisory Committee that undertook the task of drafting the rules¹³ ultimately transmitted to Congress.¹⁴ Eventually the rules took effect as statutes on July 1, 1975, after President Ford's signature.¹⁵

The recurring theme of the committee's report was the need for a body of Evidence law that would be more readily accessible to trial judges and litigators.¹⁶ If appellate courts expected trial judges and attorneys to apply evidentiary rules "quickly in the heat of battle,"¹⁷ the rules needed to be more "easily accessible."¹⁸ If the rules were to be useful in real world trial courtrooms, the rules had to be "express[ed] . . . in usable and convenient form . . ."¹⁹ If the rules were to be of genuine assistance to the key actors in trial courtrooms, the rules could not be "scattered"²⁰ in a disorganized "mass of [case law] rulings and statutes . . ."²¹

With the benefit of fifty years of retrospect, we can now assess whether the end result of the committee's efforts, the Federal Rules of Evidence of 2011, have made Evidence law more accessible and useful to trial judges and attorneys. The thesis of this essay is that although there persists a significant amount of indeterminacy in modern Evidence law, the enactment of the Federal Rules—coupled with several subsequent developments—has yielded modest but significant improvements in the system of federal Evidence law. The first part of this essay identifies the specific respects in which the committee hoped

12. Hearings on Proposed Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 14 (1973) [hereinafter House Subcommittee Hearings].

13. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

14. Rules of Evidence, Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence of the United States Courts and Magistrates, H.R. DOC. NO. 93-46 (1973).

15. RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 20 (6th ed. 2007).

16. The Preliminary Study, *supra* note 1, at 112, 115.

17. *Id.* at 109.

18. *Id.* at 115.

19. *Id.* at 111.

20. *Id.* at 115.

21. *Id.* at 109 (quoting WIGMORE, EVIDENCE xii (3d ed. 1940)).

that the adoption of a set of evidence rules would enhance the accessibility and determinacy of evidence doctrine. This part of the essay reviews each respect and evaluates the extent, if any, to which the committee's hopes have been realized. The second part of the essay addresses the broader lessons to be learned from the experience with the Federal Rules of Evidence. This part of the essay concludes that while the Federal Rules of Evidence have generated important gains, the history of the rules is, in part, a story of shortsightedness and political naïveté. If we can internalize these lessons, future rulemaking efforts can be even more productive.

I. SPECIFIC RESPECTS IN WHICH THE COMMITTEE HOPED THAT THE
PROMULGATION OF EVIDENCE RULES WOULD ENHANCE THE
DETERMINACY AND ACCESSIBILITY OF EVIDENCE LAW

A. The Assurance of the Existence of a Rule in Point

The most fundamental cause of uncertainty about a question can be the lack of any rule governing the question. Prior to the enactment of the Federal Rules of Evidence, that problem sometimes materialized in federal court.

When the committee convened, the federal courts looked to Federal Rule of Civil Procedure 43 and Federal Rule of Criminal Procedure 26 as the starting points in searches for governing evidentiary rules. In pertinent part, Rule 43 read:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs The competency of a witness to testify shall be determined in like manner.²²

For its part, Criminal Rule 26 provided: “[t]he admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted

22. The Preliminary Study, *supra* note 1, at 90.

. . . in the light of reason and experience.”²³ The courts struggled with these provisions.²⁴ Both provisions suffered from general wording²⁵ and included no detailed evidentiary prescriptions.²⁶

Rule 26 provided only a general, common-law methodology for formulating evidentiary rules²⁷ while Rule 43 contained a list of sources for evidentiary rules. The rub, though, was that there was no guarantee that any of those sources would yield a controlling rule. The committee noted that sometimes even after exhausting all the sources, the trial judge would find “no . . . authorities.”²⁸ The committee pointed out that the Supreme Court itself had been reluctant to take the lead in reforming evidence law.²⁹ During his Congressional testimony, Judge Friendly discussed the reference in Rule 43 to the evidentiary rules in equity:

[T]his was not a very good provision because nobody really knew what rules of evidence the Federal courts had been applying in suits in equity, and particularly as the years have gone on, antiquarian research into what had been done in a few cases that one could find . . . did not seem a fruitful effort.³⁰

In short, the “identification” of the federal evidence doctrine was occasionally little more than an educated guess.³¹

In sharp contrast, today, if a federal trial judge or litigator wants to find a controlling rule, all that he or she usually needs to do is open a copy of the Federal Rules of Evidence.³² There he or she will find a rule providing an answer to the clear majority of evidentiary questions that arise in federal court.³³ Admittedly, there are still gaps, both general and

23. *Id.* at 92.

24. WRIGHT ET AL., *supra* note 11, at § 5006 n.171.

25. The Preliminary Study, *supra* note 1, at 81.

26. *Id.* at 92.

27. *Id.* at 85 (explaining that the rule borrowed the language, “in the light of reason and experience,” from the Supreme Court decisions in *Funk v. United States*, 290 U.S. 371 (1933) and *Wolfe v. United States*, 291 U.S. 7 (1934)).

28. *Id.* at 95.

29. *Id.* at 99 n.108 (citing *Michelson v. United States*, 335 U.S. 469, 486 (1948)); see also Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 911 (1992) (noting that “the Supreme Court rarely grants certiorari” on non-constitutional, evidentiary issues).

30. House Subcommittee Hearings, *supra* note 12, at 247.

31. *Id.*

32. See generally FED. R. EVID.

33. *Id.*

specific. There is a general gap in the law of privileges.³⁴ Although the Supreme Court transmitted to Congress a draft Article V including 13 detailed privilege provisions,³⁵ the proposed provisions generated so much controversy that Article V prompted the Congress to intervene and prevent the rules from taking effect as court rules.³⁶ Ultimately, Congress adopted Rule 501 as a compromise.³⁷ Harking back to Federal Rule of Criminal Procedure 26, Rule 501 directs the federal courts to continue to develop privilege law "in the light of reason and experience"³⁸ There are more specific gaps as well. By way of example, Article VI, dealing with the impeachment of witnesses, omits a provision regulating proof of a witness's bias.³⁹ Similarly, there is no Article VI provision dealing with another common-law impeachment technique, specific contradiction.⁴⁰

With those notable exceptions, the Federal Rules of Evidence comprise a relatively comprehensive set of regulations of evidentiary issues. If the federal judge or litigator is looking for a rule answering an evidentiary question, far more often than not, he or she will find a relevant provision in the text of the Federal Rules.

B. The Ease of Locating the Rule in Point

Although it is comforting to the judge and practitioner to be assured that ordinarily there will be a rule in point, the comfort would still be minimal if it is hard to locate the rule. In its 1961 report, the Committee argued that it often proved difficult to find the controlling rule. In the Committee's words, the judge or litigator sometimes had to wade

34. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 4.2.2(c) (2008).

35. IMWINKELRIED, *supra* note 34, § 4.2.2.c, at 211 (2008).

36. *Id.* § 4.2.2(a).

37. *Id.* § 4.2.2(c)-(e).

38. FED. R. EVID. 501.

39. In *United States v. Abel*, 469 U.S. 45, 52 (1984), the Supreme Court noted the omission. Nevertheless, the Court held that proof of a witness's bias is still a permissible method of impeachment in federal court. *Id.* The Court reasoned that since bias is undeniably relevant to a witness's credibility, Rule 402 supplies all the authorization needed. *Id.* Rule 402 provides that logically relevant evidence is admissible unless it can be excluded pursuant to such sources as the Constitution, statute, or other provisions of the Federal Rules of Evidence. FED. R. EVID. 402. Surprisingly, neither the Court nor the litigants pointed out that Federal Rule 408 governing compromise statements expressly mentions proof of "a witness's bias or prejudice . . ." FED. R. EVID. 408(b).

40. As in the case of bias impeachment, the federal courts have concluded that specific contradiction remains a permissible impeachment method. IMWINKELRIED, *supra* note 34. See also *United States v. Miller*, 159 F.3d 1106, 1112 (7th Cir. 1998).

through “voluminous”⁴¹ amounts of literature to “search[] out the rule . . .”⁴² According to the Committee, “[s]ome United States district judges have estimated that at least fifty percent of their time since they have been on the bench has been occupied with trying to determine the correct rule of evidence to apply in a specific situation.”⁴³ In the same report, the Committee also characterized the relevant authorities as “scattered.”⁴⁴

The National Conference of Commissioners on Uniform State Laws had released its Uniform Rules of Evidence in 1953.⁴⁵ During the Conference deliberations over the Uniform Rules, Judge Charles Clark of the Second Circuit—the principal draftsman of the Federal Rules of Civil Procedure⁴⁶—championed the idea of “a ‘pocket bible’ of the law of evidence.”⁴⁷ Although the Committee shied away from using that expression, its Reporter, Professor Thomas Green, saw value in reducing the law of evidence to “a brief pamphlet . . . which may easily be read in 2 or three hours . . .,” significantly lessening the need for the judge or litigator to resort to other materials.⁴⁸ The committee argued that to “sav[e] time,”⁴⁹ the rules of evidence should be memorialized in a more “convenient form.”⁵⁰

To an important degree, the promulgation of the Federal Rules of Evidence has realized that objective. As previously stated, there are gaps in the coverage of the Federal Rules. Thus, if the researcher wants to determine a point of federal privilege law, he or she will have to consult the Supreme Court’s leading privilege precedents.⁵¹ However, in most of the doctrinal areas of Evidence law, the Federal Rules serve as the type of convenient, readily accessible source the Committee favored.⁵² In the majority of cases, the text of the Federal Rule is not only the starting

41. The Preliminary Study, *supra* note 1, at 109.

42. *Id.* at 110.

43. *Id.* at 99.

44. *Id.* at 115.

45. WRIGHT ET AL., *supra* note 11, § 5005 n.306.

46. *Id.* § 5005, at 159 n.252.

47. *Id.* § 5005, at 168 n.314; WRIGHT ET AL., *supra* note 11, § 5006, at 178 n.41.

48. WRIGHT ET AL., *supra* note 11, § 5006 n.41.

49. The Preliminary Study, *supra* note 1, at 112. *See also* WRIGHT ET AL., *supra* note 11, § 5006 at 178 n.41.

50. The Preliminary Study, *supra* note 1, at 111.

51. *See generally* Swidler & Berlin v. United States, 524 U.S. 399 (1998); Jaffe v. Redmond, 518 U.S. 1 (1996); Univ. of Pa. v. E.E.O.C., 493 U.S. 182 (1990); United States v. Zolin, 491 U.S. 554 (1989); United States v. Arthur Young & Co., 465 U.S. 805 (1984); Upjohn Co. v. United States, 449 U.S. 383 (1981); United States v. Gilock, 445 U.S. 360 (1980); Trammel v. United States, 445 U.S. 40 (1980); Fisher v. United States, 425 U.S. 391 (1976).

52. *See supra* notes 49-50 and accompanying text.

point of the judge's or litigator's research; it will also be the ending point. Prior to the adoption of the Federal Rules, the researcher might start at one point and be led increasingly far from that starting point when he or she consults other relevant materials. Now the researcher consults material such as extrinsic legislative history or scholarly commentary in order to develop a sound interpretation of the statutory text which was the starting point; the other materials lead back to and assist in the construction of the governing Federal Rules of Evidence.

C. The Ability to Rely on the Continued Existence of the Rule—the Relative Permanence of the Rule

If the judge or litigator can locate the rule, the next question is whether he or she can rely on it. In his Congressional testimony on the then-proposed Federal Rules, Judge Friendly discounted the need for uniform evidentiary rules that could be confidently relied on:

I don't think there is any great need of uniformity in this area. We need uniformity where people conduct themselves one way or another because they know that certain consequences will or won't ensue and those should be the same in all Federal courts. Nobody conducts himself one way or another because of the rules of evidence that are going to apply in a trial⁵³

Judge Friendly was certainly correct in suggesting that evidentiary rules rarely have a significant influence in shaping a client's primary, prelitigation behavior outside court.⁵⁴ However, they do have a pronounced impact on litigators' conduct both at trial and pretrial. Before trial, the litigator must conduct pretrial discovery and, based on such discovery, decide whether the case should be settled or tried. It is easiest to settle a case when both sides come to roughly the same conclusion as to the value of the case. In part, the value of the case is determined by the admissibility of the respective parties' best evidence. To the extent that it is difficult for the parties to evaluate the admissibility of the crucial items of evidence, it will be harder for them to reach common ground as to the settlement value of the case.⁵⁵ If the litigator cannot identify the rule determining the admissibility of the vital evidentiary items, he or she must guess as to settlement value.

53. House Subcommittee Hearings, *supra* note 12, at 254.

54. *Id.*

55. However, it must be acknowledged that, in some cases, the uncertain admissibility of a vital item of evidence may give a litigant a practical incentive to settle.

If the client decides against settling, the litigator must prepare to go to trial. Trial preparation is a planning process,⁵⁶ which can be quite lengthy in a major case. Before investing tens of hours and thousands of dollars in preparing a phase of his or her trial presentation, the litigator not only wants to be confident that the evidentiary rule governing at the time of the pretrial preparation currently allows the admission of the testimony; the litigator would also like the assurance that that rule will remain in effect months later at the time of trial.

When the governing rule takes the form of case law, that assurance may be lacking. Just as the appellate court giveth, it can quickly taketh away. Rules announced in case law can be moving targets. For that matter, when there are multiple intermediate appellate courts, a decision by any of them can undermine the assurance that the litigator seeks. Suppose, for example, that at the time she initially plans her case-in-chief, a First Circuit litigator relies on a Second Circuit decision which approves the admission of the key evidence the litigator contemplates presenting. A contrary decision by any of the circuit courts of appeals could muddy the waters and raise grave doubts about the admissibility of the testimony. As a practical matter, it may even be difficult for the litigator to learn that a Third Circuit case is winding its way through the appellate process and about to undo her planning efforts. In short, favorable case law precedent can be fleeting.

In contrast, a court rule in a form such as a Federal Rule of Evidence is more permanent. The process for promulgating federal court rules is regulated by statute.⁵⁷ Section 2073(a)(1) authorizes the United States Judicial Conference to draft and propose such rules.⁵⁸ Section 2073(a)(2) contemplates that the conference will appoint committees to undertake the drafting.⁵⁹ Section 2073(c)(1) provides that any business meeting of any drafting committee must be public.⁶⁰ Section 2073(c)(2) mandates that the committee publish advance notice of any business meeting.⁶¹ The customary practice is for drafting committees to circulate drafts of new court rules to the public for comment, as the Evidence Advisory Committee did with the drafts of the restyled Evidence Rules which took effect December 1, 2011.⁶² To provide adequate publicity, the drafts sometimes appear in the advance sheets of the Federal Third and Federal

56. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* §§ 7.2, 9.2 (4th ed. 2010).

57. 28 U.S.C. §§ 2071-77 (2006).

58. 28 U.S.C. § 2073(a)(1) (2006).

59. *Id.* § 2073(a)(2).

60. *Id.* § 2073(c)(1).

61. *Id.* § 2073(c)(2).

62. See e.g., *Akers v. Beal Bank*, et al., 760 F. Supp. 2d 1 (2011).

Supplement Second opinions.⁶³ After the Supreme Court endorses the proposed rule, 28 U.S.C. § 2074(a) requires the Court to transmit the draft to Congress. Congress then has an opportunity to veto the rule.⁶⁴ Moreover, under 28 U.S.C. § 2074(b), if the rule is one “creating, abolishing, or modifying an evidentiary privilege,” the rule does not take effect “unless [affirmatively] approved by Act of Congress.”⁶⁵ Given this multi-step process, when a litigator sees a Federal Rule of Evidence in print, he or she can rely on the continued existence of that rule for at least the immediate future.

D. The Ability to Rely on the Face or Text of the Rule

The preceding subsections demonstrated that the original design of the Federal Rules has contributed to the realization of some of the committee’s hopes. The committee approvingly quoted two of the leading evidence scholars of the twentieth century, Professors Morgan and Maguire:

The complaint about the law of evidence is that it is too extensive, too complex, and too uncertain to apply accurately on the spur of the moment But the trial judge has to answer such questions right off the bat, with possible reversal if he gets it wrong. What is the difficulty? It is that a system of rules that is supposed to be applied quickly in the heat of trial has become so complex and voluminous that it cannot be accurately and quickly used.⁶⁶

As we have seen, in three respects the original Federal Rules ameliorated the problem identified by Morgan and Maguire. After the adoption of the Federal Rules, the trial judge and litigator had greater assurance that there would be an evidentiary rule in point, that they could quickly find it, and that they could rely on the rule, since it was promulgated in relatively permanent form.

However, two subsequent developments have also advanced the achievement of the Committee’s objectives. One development is the federal courts’ shift to a textualist approach to statutory construction.

63. *Id.*

64. 28 U.S.C. § 2074(a) (2006).

65. *Id.* § 2074(b).

66. The Preliminary Study, *supra* note 1, at 109. *See also* Becker & Orenstein, *supra* note 29, at 910 (“During the crucible of trial, . . . counsel must make important decisions without much time for reflection or research.”).

Prior to the adoption of the Federal Rules, many federal jurists subscribed to the traditional legal process approach to statutory construction. According to that school of thought, each piece of legislation is rational and purposive;⁶⁷ legislators are viewed as reasonable persons pursuing social purposes in good faith.⁶⁸ If legislators benignly endeavor to achieve rational purposes, they will presumably attempt to produce extrinsic legislative history materials that accurately shed light on the meaning of the legislation; consequently, there is little risk that the court will be misled if it resorts to and relies on such extrinsic material. In 1978, Professor Edward Cleary, the Reporter for the Advisory Committee that drafted the Federal Rules, released a now-famous article about the interpretation of the Federal Rules of Evidence.⁶⁹ In that article, he voiced the conventional legal process approach when he wrote that in the event of a “collision[] between [extrinsic] legislative history and the seemingly unmistakable meaning of [the text of] a Rule,” the legislative history material should trump the statutory text.⁷⁰ As he remarked, the extrinsic material carried so much weight that the popular saying in Washington was that “[y]ou can write the bill, if you let me write the report.”⁷¹

Of course, that approach to the statutory interpretation of the Federal Rules could significantly frustrate the Committee’s efforts. The Committee wanted the judge, faced with a “spur of the moment” objection “in the heat of trial,” to be able to rule “right off the bat” by consulting and relying on the court rule.⁷² However, to the extent that an appellate court can later consult extrinsic material such as committee reports at odds with the statutory text’s seeming plain meaning, the trial judge’s reliance may be misplaced. It becomes treacherous for the judge to base his or her ruling squarely on the face or text of the rule.

Although the legal process approach was still dominant when Professor Cleary published his article, in the intervening years a new, textual approach to statutory construction has emerged. This new approach emphasizes the primacy of the statutory text. To begin with, only the text has the force of law. After all, while Congress as a whole votes on the proposed statute, it does not vote on the supporting

67. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 571 (1988).

68. *Id.* at 575-76.

69. Edward Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

70. *Id.* at 918-19.

71. *Id.* at 910.

72. The Preliminary Study, *supra* note 1, at 109.

committee reports.⁷³ Suppose that although a statute is silent as to a certain requirement, an item of extrinsic legislative history such as a committee report advocates the requirement. There are obvious separation of power concerns if, on the basis of the passage in the report, the judge imposes the requirement as a gloss on the statute;⁷⁴ the judge is arguably usurping the legislative function.⁷⁵ Moreover, empirical political science research gives us good reason to be skeptical of extrinsic material.⁷⁶ It is now clear that "committee staff members and lobbyists often write [these documents]."⁷⁷ Rather than trying to accurately describe the collective sense of the legislature, the lobbyist or staff member may be attempting to manipulate the legislative history.⁷⁸ The language may have been inserted in the report for the very purpose of misleading a court into giving a special interest group a victory by way of statutory interpretation that the full legislature would have refused to grant.⁷⁹ Textualists recognize a strong presumption that the judge should give effect to the apparent plain meaning of the statutory language.⁸⁰ The presumption is rebuttable, and it will yield, for instance, in an extraordinary case⁸¹ when the contrary intent is very clearly

73. *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), *reh'g denied*, but *cert. granted sub nom. Chamber of Commerce of the U.S. v. Candelaria*, 130 S. Ct. 3498 (2010).

74. *See City of La Mesa v. Cal. Joint Powers Ins. Auth.*, 31 Cal. Rptr. 3d 411, 417 (Cal. Ct. App. 2005).

75. *Id.*

76. *See Note, Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005 (1992).

77. *Id.*

78. *ESKRIDGE & FRICKEY*, *supra* note 67, at 710, 715-17.

79. *See Hirschey v. F.E.R.C.*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

80. *See United States v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002); *United States v. Koh*, 199 F.3d 632, 637-39 (2d Cir. 1999); *United States v. Mack*, 164 F.3d 467, 472 (9th Cir. 1999); *United States v. Wallace*, 476 F. Supp. 2d 1129 (D. Ariz. 2007); *In re Worldcom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 244 (S.D.N.Y. 2004); *United States v. Siart*, 178 F. Supp. 2d 1171, 1173 (D. Or. 2001); *United States v. Gluzman*, 953 F. Supp. 84, 91 (S.D.N.Y. 1996); *Guilles v. Sea-Land Serv., Inc.*, 820 F. Supp. 744, 751 (S.D.N.Y. 1993); *Gang v. United States*, 783 F. Supp. 376, 380 (N.D. Ill. 1992).

81. *See Salinas v. United States*, 522 U.S. 52, 57 (1997); *Standiford v. United States Trustee*, 641 F.3d 1209, 1213-14 (10th Cir. 2011); *United States v. Marcus*, 628 F.3d 36, 44 (2d Cir. 2010); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 169 (1st Cir. 2009); *Sharp v. United States*, 580 F.3d 1234, 1288 (Fed. Cir. 2009); *United States v. Sabri*, 326 F.3d 937, 943 (8th Cir. 2003), *aff'd*, 540 U.S. 944 (2004); *In re First Merchants Acceptance v. J.C. Bradford & Co.*, 198 F.3d 394, 403 (3d Cir. 1999); *United States v. Gollapudi*, 130 F.3d 66, 70 (3d Cir. 1997); *Malloy v. Eichler*, 860 F.2d 1179 (3d Cir. 1988); *Martinez v. Dept. of Homeland Sec.*, 670 F. Supp. 2d 1325, 1327 (M.D. Fla.

expressed⁸² or a rare situation in which a plain meaning construction leads to a truly absurd result.⁸³ But in the run-of-the-mill case text triumphs over extrinsic legislative history material.

It is true that some academic commentators have been critical of the federal courts' shift to a textualist approach.⁸⁴ However, in most of the Supreme Court's post-1975 cases construing the Federal Rules of Evidence, the majority of the justices have followed an essentially textualist approach.⁸⁵ Moreover, the tenor of the lower federal court opinions makes it clear that, taking their cue from the Supreme Court, most federal District Court judges apply the same approach.⁸⁶ On

2009); *In re B & H Towing, Inc.*, 434 F. Supp. 2d 383, 385 (S.D. W. Va. 2006); *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 659-60 (W.D.N.Y. 2003); *United States v. Nipper*, 198 F. Supp. 2d 818, 821 (W.D. La. 2002); *S. States Coop., Inc. v. I.S.P. Co., Inc.*, 198 F. Supp. 2d 807, 813 (N.D. W. Va. 2002); *In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, 304 (D.N.J. 2001); *U.S. Football League v. Nat'l Football League*, 634 F. Supp. 1155, 1161 (S.D.N.Y. 1986).

82. See *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1460 (11th Cir. 1992); *Johns-Mansville Corp. v. United States*, 855 F.2d 1556, 1559-62 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

83. See *Kaluom v. Stolt Offshore, Inc.*, 504 F.3d 511, 519 (5th Cir. 2007); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589 (5th Cir. 2004); *Quarles v. U.S. ex rel. Bureau of Indian Affairs*, 372 F.3d 1169, 1172 (10th Cir. 2004); *Consumer Elecs. Ass'n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003); *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001); *In re Palmer v. I.R.S.*, 219 F.3d 580, 584 (6th Cir. 2000); *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396, 1398 (11th Cir. 1997), *rev'd* 526 U.S. 344, 353-54 (1999); *Red Lake Band of Chippewa Indians v. U.S. Dept. of Interior*, 624 F. Supp. 2d 1, 24 (D.D.C. 2009); *Brinker v. Namcheck*, 577 F. Supp. 2d 1052, 1059 (W.D. Wis. 2008); *Teva Pharm. Indus., Ltd. v. F.D.A.*, 355 F. Supp. 2d 111, 118 (D.D.C. 2004); *Minnesota ex rel. Hatch v. Fleet Mortg.*, 181 F. Supp. 2d 995, 999 (D. Minn. 2001); *Wyss v. Gen. Dynamics Corp.*, 24 F. Supp. 2d 202, 206 (D.R.I. 1998).

84. See generally Randolph N. Jonakait, *Text, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551 (1996); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995); Andrew Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329 (1995); Andrew E. Taslitz, *Daubert's Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3 (1995); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992).

85. Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 395-96 (1996); Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993).

86. See *supra* notes 80-81, 83.

occasion, they will consider extrinsic legislative history material, but as a general proposition they attach great significance to the statutory language if the language apparently has a plain meaning.⁸⁷

The textualist approach advances the Committee's agenda. When Professor Cleary published his article,⁸⁸ an appellate court could easily frustrate the trial judge's and litigators' reliance on the face of a Federal Rule.⁸⁹ Although the meaning of the rule may have seemed reasonably clear in the trial court, months later an appellate court could seize on a snippet from an extratextual source, such as a committee report, as the basis for a different reading of the rule. In subsequent decades, the federal courts' gradual movement toward textualism has reduced the risk of relying on the statutory language. Today, it will be the rare case in which the appellate court finds the extrinsic material so compelling that it trumps the face of the rule that the trial judge and attorneys relied. The trial judge can be more confident when he or she "quickly" consults the rule's wording "in the heat of trial."⁹⁰

E. The Ease of Interpreting the Text of the Rule

Long before the Committee convened, commentators had indicted the phrasing of many sources of evidence doctrine. Edward Livingston, who had served as a United States Attorney, a member of Congress, and the Mayor of New York,⁹¹ was one of the leading champions of law reform in the United States in the early nineteenth century. He drafted a Code of Evidence for Louisiana.⁹² He castigated "the mystery of [the] technical language"⁹³ of many of the legal sources of his time. In the early part of the mid-twentieth century, Spencer Gard, the chair of the committee that drafted the Uniform Rules of Evidence, stressed the need to incorporate "simple language" in evidence rules.⁹⁴ In its report, the Committee echoed Livingston and Gard.⁹⁵ The committee expressed the hope that its efforts would lead to the development of an "understandable set of rules of evidence"⁹⁶ In the Committee's mind, to make

87. See *supra* notes 80-81, 83.

88. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

89. *People v. Bostick*, 53 Cal. Rptr. 2d 760 (Cal. Ct. App. 1996).

90. See The Preliminary Study, *supra* note 1, at 109.

91. WRIGHT ET AL., *supra* note 11, § 5005 at 127-28 nn.36-40.

92. *Id.* § 5005, at 128 n.39.

93. *Id.*

94. *Id.* § 5005, at 168 n.45.

95. The Preliminary Study, *supra* note 1, at 109.

96. *Id.*

evidentiary doctrines accessible in a meaningful sense, court rules codifying the doctrines had to possess the characteristic of “clarity.”⁹⁷

Once again a development subsequent to the enactment of the Federal Rules has advanced the Committee’s agenda. After the adoption of the Federal Rules, the “Plain English” movement gained momentum in the United States.⁹⁸ That movement was an impetus for the preparation of the new “restyled” version of the Federal Rules of Evidence. On December 1, 2011, unless Congress intervenes, the restyled Federal Rules of Evidence will take effect.⁹⁹ In the process of drafting the restyled Rules, the Advisory Committee made a concerted effort to attain the original Committee’s objective.¹⁰⁰ The Advisory Committee retained “a legal writing authority,” Bryan Garner, “as its style consultant.”¹⁰¹ Near the end of the restyling project, Professor Joseph Kimble, “the author of *Lifting the Fog of Legalese*” replaced Mr. Garner.¹⁰² One of the Committee’s stated goals was to identify and eliminate any “ambiguous” terms in the prior version of the rules.¹⁰³ Each Federal Rule now has a new Committee Note, and every Note expressly states that “[t]he language of [the] Rule . . . has been amended as part of the general restyling of the Evidence Rules to make them more easily understood”¹⁰⁴ After reviewing the Committee’s work product, the American Bar Association Litigation Section commented that “[t]he overwhelming majority of the proposed changes will lead to clearer rules”¹⁰⁵

97. *Id.* at 112.

98. *E.g.*, RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 1998).

99. *See* Rules & Policies: Federal Rules Published for Comment, U.S. COURTS, <http://www.uscourts.gov/rulesandpolicies/federalrulemaking/publishedrules.aspx> (last visited Aug. 1, 2012).

100. *See* Memorandum from the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, *Report of the Advisory Committee on Evidence Rules* (May 10, 2010), available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx>; *see also* Joseph Kimbel, *A Drafting Example from the Proposed New Federal Rules of Evidence*, 88 MICH. B.J. 52 (2009).

101. Memorandum from the Advisory Committee on Evidence Rules, *supra* note 100, at 2.

102. *Id.*

103. *Id.* at 7 (“The restyled rules minimize the use of inherently ambiguous words. For example, the word ‘shall’ can mean ‘must,’ ‘may,’ or something else, depending on context. The potential for confusion is exacerbated by the fact the word ‘shall’ is no longer generally used in spoken or clearly written English. The restyled rules replace ‘shall’ with ‘must,’ ‘may,’ or ‘should,’ depending on which one the context and established interpretation make correct in each rule.”).

104. *Id.* at 6.

105. *See* Letter from Landis C. Best et al., officers and members, Council of the Section of Litig. of the Am. Bar Ass’n, to Peter G. McCabe, Secretary, Comm. on Rules

Thus, just as the federal courts' shift to textualism makes it safer for the trial judge and litigators to rely on the text of the Federal Rule, the "Plain English" movement and the publication of the restyled Rules will make it easier for them to construe the text of the rule. The upshot is that in 2011—a half century after the release of the committee's report—in several respects evidentiary doctrine is realistically more accessible:

- Trial judges and attorneys have greater assurance that there is a governing rule.
- It is easier for them to find that rule, at least in the sense that they know where to start their search.
- When they locate the rule, they know that the rule has relative permanence and will not change without substantial advance notice.
- The dominance of the textualist school of statutory interpretation in federal court makes it safer for them to rely on the face or text of the rule.
- The release of the restyled version of the Federal Rules should make it easier for them to interpret the text of the rule.

It would be an overstatement to claim that as a result of the Committee's efforts, indeterminacy has been banished from American Evidence law. To be frank, a degree of indeterminacy is unavoidable. However, there have been important, albeit modest, improvements from the status quo when the Committee released its report in 1961.

II. THE GENERAL LESSONS TO BE LEARNED FROM THE PROCESS OF PROMULGATING AND REVISING THE FEDERAL RULES OF EVIDENCE

Although the efforts of the original committee and its successor committees have effected significant improvements in the system of Federal Evidence law, there have been bumps in the road—lessons that future committees facing similar tasks should take to heart.

A. Shortsightedness

The committee and the Judicial Conference were short-sighted. When the Advisory Committee completed its drafting task and Congress ultimately approved a version of the Rules in 1974,¹⁰⁶ the Judicial Conference allowed the Advisory Committee to disband. In the ensuing years, the courts identified ambiguities in the text of the Federal Rules;

of Practice & Procedure (Mar. 3, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-014-Comment-Best.pdf>.

106. See CARLSON ET AL., *supra* note 15, at 20.

and several important splits of authority emerged over the resolution of the ambiguities.¹⁰⁷ That development prompted Judge Edward Becker and Professor Aviva Orenstein in 1992 to call on the Judicial Conference to re-establish the Advisory Committee to monitor the Rules.¹⁰⁸ They pointed out that the circuit courts of appeals were sharply split over the proper interpretation of at least seven provisions in the Federal Rules.¹⁰⁹ They argued that rather than responding in an ad hoc, piecemeal fashion when troublesome splits arose, the conference ought to reconstitute the Advisory Committee to constantly monitor the state of federal evidence law.¹¹⁰ They added that the federal courts' shift to a textualist approach to statutory interpretation increased the need for an advisory committee.¹¹¹ In their words, textualism has become "the theory of choice in interpreting the Federal Rules" of Evidence; and the ascendancy of textualism made it even more imperative to "mak[e] the words [of the Rules] more specific and clarify[] what is intended."¹¹² Their proposal was eminently sensible, and in 1993 the Judicial Conference reestablished the Evidence Advisory Committee.¹¹³

It is perhaps understandable that the Judicial Conference allowed the committee and the Advisory Committee to lapse. After the committee submitted its report in 1961, Chief Justice Warren circulated its report to various segments of the legal profession.¹¹⁴ He eventually appointed the Advisory Committee to draft the rules in 1965.¹¹⁵ The Advisory Committee spent years on the drafting project, and it was not until 1973, during Chief Justice Warren Burger's tenure that the Court finally

107. Federal Rules of Evidence Advisory Committee, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 684 (2000).

108. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992).

109. *Id.* at 892-94 (discussing circuit splits regarding: Rule 103, at 893; Rule 407, at 894; Rule 703, at 896; Rule 801(d)(1)(B), at 897; Rule 803(3), at 898; and Rule 804(b)(1), as well as the residual hearsay exception set out in Rules 803(24) and 804(b)(5)).

110. *Id.* at 910, 913-14.

111. *Id.* at 899.

112. *Id.* at 868.

113. The current Reporter is Professor Daniel Capra of the Fordham University School of Law. Biography of Daniel Capra, FORDHAM UNIV. SCH. OF LAW, <http://law.fordham.edu/faculty/1079.htm> (last visited Aug. 1, 2012).

114. WRIGHT ET AL., *supra* note 11, § 5006, at 180 n.53.

115. *Id.*

transmitted the draft to Congress.¹¹⁶ Congress then undertook a lengthy consideration of the proposed rules.¹¹⁷ Almost two years elapsed before Congress passed the Rules and President Ford signed the bill on January 2, 1975.¹¹⁸ The conference may have believed that after such extended, thorough deliberations, it was unlikely that the rules would need immediate or frequent revision. However, that belief turned out to be mistaken.¹¹⁹ The lesson is that even when the draft of a set of court rules has been subjected to intense, prolonged scrutiny, regular monitoring is still necessary.¹²⁰ The drafters may be too close to their linguistic work product to recognize latent ambiguities, and unanticipated developments can force the courts to apply the statutory texts to unforeseen factual settings. No matter how earnestly the drafting committee has discharged its task, when the draft is promulgated monitoring and revision mechanisms should be put in place.

B. Political Naïveté

The original committee and its successor committees may have been guilty of shortsightedness, but Professor Kenneth Graham levels a more serious accusation: political naïveté.¹²¹ When the Supreme Court had previously transmitted the drafts of the Federal Rules of Civil and Criminal Procedure to Congress, Congress raised no objection.¹²² In fact, Congress had “passively acquiesced” to the Court’s promulgation of court rules for 40 years.¹²³ However, “[t]he Court’s submission of the draft evidence rules triggered a veritable crisis in the rule-making process, straining relations between the Federal Judiciary and Congress.”¹²⁴ The draft created a furor in Congress.¹²⁵ Congress

116. See generally RULES OF EVIDENCE: COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, H.R. Doc. No. 93-46, 93d Cong. (1st Sess. 1973).

117. 31A C.J.S. *Evidence* § 10(1)(B) n.5 (2011).

118. See CARLSON ET AL., *supra* note 15, at 20.

119. See generally WRIGHT ET AL., *supra* note 11, § 5007.

120. See *supra* Part I.E.

121. See generally WRIGHT ET AL., *supra* note 11, § 5006.

122. See IMWINKELRIED, *supra* note 34, § 4.2.2(a), at 203 nn.159-60.

123. *Id.* at n.158.

124. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675, 682-85 (1975).

125. 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 509[02], at 509-14 (1996) (“violent reaction”); see also Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002); 28 U.S.C. § 2074(b) (2006).

intervened and quickly adopted legislation preventing the proposed rules from taking effect.¹²⁶

The Advisory Committee was probably shocked. As Professor Graham has noted, most committee members subscribed to the Progressive procedural ideal that “rules of evidence are neutral, value-free, and apolitical instruments in the search for truth”¹²⁷ The most controversial part of the draft turned out to be Article V, which is devoted to evidentiary privileges. Although a 1959 article highlighted the contentious nature of privilege doctrine,¹²⁸ it evidently did not occur to a majority of any of the committees that draft Article V would prove to be so troublesome.¹²⁹ The draft transmitted to Congress not only federalized federal privilege law—essentially forbidding federal judges from recognizing state privileges; the draft also curtailed the spousal and medical privileges and omitted a reporter’s privilege while expanding government and corporate privileges.¹³⁰ Many members of Congress found those proposals to be “emotionally provocative.”¹³¹ Rather than proving to be “apolitical,” the privilege provisions prompted Congressional testimony or statements by such special interest groups as the Association of American Physicians and Surgeons,¹³² the Washington Council of Lawyers,¹³³ the Association of the Bar of the City of New York,¹³⁴ the Fairmount Medical Clinic,¹³⁵ the Reporters Committee for Freedom of the Press,¹³⁶ the Project on Corporate Responsibility,¹³⁷ the American Mental Health Association,¹³⁸ the American Psychological Association,¹³⁹ the American Medical Association,¹⁴⁰ and Columbia Broadcasting System.¹⁴¹

126. IMWINKELRIED, *supra* note 34, § 4.2.2.a, at 203 n.163.

127. WRIGHT ET AL., *supra* note 11, § 5006, at 177 n.36.

128. *Id.* § 5006, at 175 n.27 (citing Ronan E. Degnan, *Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 346-47 (1959)).

129. *See* Broun, *supra* note 125, at 774-75.

130. IMWINKELRIED, *supra* note 34, § 4.2.2, at 202-03 n.163.

131. Comm. on Fed. Courts, *Revisiting the Codification of Privileges under the Federal Rules of Evidence*, 55 REC. ASS’N B. OF N.Y.C. 148, 149-50 (2000).

132. House Subcommittee Hearings, *supra* note 12, at 449.

133. *Id.* at 158.

134. *Id.* at 102.

135. *Id.* at 342.

136. *Id.* at 367.

137. *Id.* at 392.

138. House Subcommittee Hearings, *supra* note 12, at 449.

139. *Id.*

140. *Id.* at 192.

141. *Id.* at 240.

Representative Hungate chaired the house subcommittee that considered the draft Rules. His committee rejected all thirteen specific provisions in draft Rule V and prepared an early version of current Rule 501 generally authorizing the federal courts to develop privilege doctrine “in the light of reason and experience.”¹⁴² When his subcommittee sent the draft Rules to the House floor, the bill was accompanied by an unusual rule precluding any amendments.¹⁴³ To justify the rule, Representative Bolling explained that Rule 501 was a compromise “that could easily blow up all over the place if amended.”¹⁴⁴

Representative Hungate was the first witness in the subsequent Senate hearings.¹⁴⁵ He informed the Senate committee that “50 percent of the complaints in our committee related to the section on privileges.”¹⁴⁶ He bluntly warned the Senators that if they “open[ed] this [issue] up,” it would be “very difficult” to decide which special interest groups deserved a privilege.¹⁴⁷ If Congress tried to make those decisions, Hungate warned, “the social workers and the piano tuners will want a privilege.”¹⁴⁸ He essentially told the committee that special interest groups had made the issue a political “hot potato.”¹⁴⁹ It was a Pandora’s box¹⁵⁰ that Congress dared not—and did not—open.

Of course, the draft Federal Rules weathered that political storm; Congress ultimately enacted the Rules as statutes.¹⁵¹ However, again the proposed Rules survived and were ultimately approved only after Congress deleted all thirteen specific privilege provisions in draft Article V.¹⁵² Moreover, in the following years, politics continued to influence the evolution of the Federal Rules.¹⁵³ Subsequent developments reinforced the message that rule drafters must proceed with political sensitivity and caution.¹⁵⁴

142. See IMWINKELRIED, *supra* note 34, § 4.2.2(a), at n.169.

143. *Id.* § 4.2.2.c, at 213 n.232.

144. *Id.* § 4.2.2.c, at n.234.

145. See IMWINKELRIED, *supra* note 34, § 4.2.2(c).

146. *Id.* § 4.2.2(d), at 214 n. 246.

147. *Id.* § 4.2.2(d), at n.247.

148. *Id.* § 4.2.2(d), at 215 n.248. Representative Hungate’s sarcastic reference to “social workers” proved to be ironic. *Id.* In *Jaffee v. Redmond*, the Court recognized a privilege for licensed clinical social workers. *Jaffee v. Redmond*, 518 U.S. 1, 15-18 (1996). However, the piano tuners are still waiting for their privilege.

149. Symposium, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 759 (2002) (noting a remark by Professor Stephen Burbank).

150. IMWINKELRIED, *supra* note 34, § 4.2.2(d), at 215 nn.247-48.

151. *Id.*

152. *Id.*

153. *Id.* § 4.2.2(f), at n.271.

154. *Id.* § 4.2.2(c), at n.221.

C. Federal Rule of Evidence 412

The rape shield statute, Federal Rule of Evidence 412, is a case in point.¹⁵⁵ As previously stated, the Federal Rules of Evidence took effect in 1975.¹⁵⁶ The ink was hardly dry on the rules when in 1975 Congress first began considering whether to prescribe evidentiary rules to protect rape victims.¹⁵⁷ In 1976 alone, eight different bills relating to the topic were introduced.¹⁵⁸ Congressional interest in the topic then waned until the mid 1970s.¹⁵⁹ In 1977, "H.R. 4727, the bill which was to become [Federal] Rule [of Evidence] 412," was introduced.¹⁶⁰ The lobbying effort on behalf of Rule 412 was:

a political alliance between feminist groups and prosecutors. The rhetoric used to support the bill was a combination of feminist concern for the fate of the victim in a male-dominated legal system and conservative "law-and-order" arguments that the existing system permitted criminals to escape by discouraging their victims from reporting the crime.¹⁶¹

The supporters of the legislation invoked both feminist concerns and the prosecutorial argument during the Congressional debates.¹⁶² In his signing statement, President Carter voiced both.¹⁶³ In short, Rule 412 was not the result of the normal administrative rule-making process. Rather, like the original Federal Rules, Rule 412 took effect as a Congressional statute—direct Congressional intervention on a "politically-charged evidentiary issue"¹⁶⁴

Raw politics played an even larger role in the Congressional decision to enact Federal Rules of Evidence 413-15 into law.¹⁶⁵ Federal Rules of

155. See FED. R. EVID. 412.

156. See *supra* notes 12-14 and accompanying text.

157. See generally 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5381, at 484 (1980).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* § 5382, at 493-94 n.6-8.

162. *Id.* at n.11.

163. WRIGHT & GRAHAM, *supra* note 157, at n.14 (citing 14 Weekly Compilation of Presidential Documents 1902 (Nov. 6, 1978)).

164. *Id.* § 5382, at 530 n.23.

165. See *id.* § 5412, at n.1; see generally David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995). While Rules 413 and 414 deal with sexual assault and child molestation prosecutions, Rule 415 concerns allegations of such misconduct in civil actions. FED. R. EVID. 413-415.

Evidence 404-05 codify the traditional prohibition forbidding the prosecution from using an accused's bad character as circumstantial proof of the accused's conduct on the charged occasion.¹⁶⁶ Hence, in most cases, the prosecutor cannot argue simplistically, "[h]e did it before, therefore he did it [again]."¹⁶⁷

However, just as the political alliance of feminists and prosecutors led to the adoption of Rule 412, the national campaign against child and sexual abuse targeted the application of the character evidence prohibition in child molestation and sexual assault cases. In 1991, the first Bush Administration proposed legislation which would have carved out exceptions to the prohibition in those two kinds of prosecutions.¹⁶⁸ The proposed provisions allowed the government in those types of cases to introduce evidence of an accused's prior, similar crimes and to argue that the uncharged crimes showed that the accused had a disposition or propensity for committing the charged offense.¹⁶⁹ However, the proposed rules died in committee during the Bush Administration.¹⁷⁰

The controversy did not go away. The proposals were resubmitted during the Clinton Administration.¹⁷¹ One commentator gives the following account of what transpired at that time: "During the summer of 1994, the presidency of Bill Clinton was floundering, and President Clinton and the Democratic leadership desperately sought to enhance their public standing. The vehicle they settled on was a crime bill."¹⁷² However, the bill initially failed.¹⁷³ At that point, though, Republican Representative Susan Molinari indicated that she and several of her Republican colleagues had voted against the bill primarily because it did not include the proposed revision of the character evidence prohibition.¹⁷⁴ The story continues:

As the Democratic leadership faced increasing pressure to pass a crime bill prior to the August recess, they looked to Representative Molinari and . . . other Republicans for the votes necessary to secure passage [T]he Democratic leadership

166. See FED. R. EVID. 404-405.

167. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19, at n.3 (rev. 2010).

168. *Id.* § 2:23, at 2-131 nn.10-11.

169. *Id.*

170. *Id.* § 2:23, at 2-132 nn.13-15.

171. *Id.* at n.24.

172. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U.L. REV. 153, 179-80 (2008).

173. *Id.*

174. *Id.*

gave into Rep. Molinari's demand to include Federal Rules 413-415 in the Crime Bill. Though many Democrats considered the proposed rules unconstitutional and "ridiculous," they included the new rules in the Crime Bill, a piece of legislation they felt had to be passed for political reasons.¹⁷⁵

The Judicial Conference took the extraordinary step of going "on record as opposing" the legislation.¹⁷⁶ The American Bar Association (A.B.A.) lent its support to the Judicial Conference's position.¹⁷⁷ Yet, in the end, Congress rebuffed both the A.B.A. and the Judicial Conference, and Rules 413-15 took effect on July 9, 1995.¹⁷⁸ When Congress initially voted on the rules, it was already so clear that the Judicial Conference strongly opposed the rules that Congress deferred the effective date of the legislation for 150 days to allow the Conference to submit a report to Congress on the legislation.¹⁷⁹ The conference submitted the report that expressed its opposition in no uncertain terms.¹⁸⁰ Congress simply ignored the report.

The history of draft Article V, Rule 412 and Rules 413-15 exposes the naïveté of the ingenuous notion that evidentiary doctrines are merely "apolitical" procedural rules.¹⁸¹ Evidentiary rules often have profound political implications, and rule drafters are likely to encounter stiff political resistance if they are blind to that reality. Even before the Court submitted the draft Federal Rules to Congress, Senator John McClellan, the powerful chair of the Judiciary Committee's Subcommittee on Criminal Laws and Procedure, was so adamantly opposed to some of the proposed rules that he sponsored legislation which would have restricted

175. *Id.* at 180; see also Bryan C. Hathorn, *Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go From Here*, 7 TENN. J.L. & POL'Y 22, 48 (2011) ("When the rules were passed, the Clinton Presidency was 'floundering,' and 'the Democratic leadership in Congress desperately sought to enhance their public standing'"); Comment, *The Policies Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 980 (1998) ("Why did Congress single out sexual assaults from other serious crimes like murder, kidnapping, and narcotics distribution? [T]he motives seem to be political").

176. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 167, § 2:23, at 2-141.

177. Myrna Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343 (1995).

178. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra* note 167, § 2:23, at 2-152.

179. *Id.* § 2:23, at 2-142.

180. *Id.* § 2:23, at 2-142 to 2-151 (setting out the entire report entitled "Report of the Judicial Conference on the United States on Admission of Character Evidence in Certain Sexual Misconduct Cases" (Feb. 1995)).

181. WRIGHT ET AL., *supra* note 11, § 5006, at 177 nn.35-36.

the Supreme Court's rule-making power.¹⁸² Although Congress eventually approved a version of the Federal Rules, the legislative package included a provision depriving the Court of the power to promulgate privilege rules, the subject of draft Article V.¹⁸³ Privilege rules can take effect only with the affirmative approval of Congress.¹⁸⁴ Thus, the price of the rule makers' occasional naïveté has been the curtailment of the federal judiciary's power to promulgate court rules.

III. CONCLUSION

We have not yet attained the ideal code that the committee described in its 1961 report. What is more, we have not eliminated all indeterminacy from federal evidence law. Not only have we not achieved that ideal; we must reconcile ourselves to the fact that we shall never realize that ideal. Moreover, there have undeniably been setbacks along the way during the past half century. Some problems were caused by shortsightedness, and others were precipitated by the drafters' insensitivity to the political context of the rule-drafting process. Nevertheless, as we reflect on the golden anniversary of the Committee's report, we must be impressed by the progress realized since 1961. In 2011, a federal judge or practitioner facing an evidentiary issue enjoys many advantages over his or her counterpart fifty years ago. There is now greater assurance that there will be an evidentiary rule in point, it is easier to find that rule, that rule is more permanent in character, it is safer to rely on the text of the rule, and the rule is frequently stated in plainer, more comprehensible language. To be sure, subsequent developments—in particular, the advent of textualism and the restyling of the Federal Rules—have contributed to creating those advantages. However, a large measure of credit should go to the Committee which had the foresight to forcefully state a half century ago that it was both feasible and advisable to “develop uniform rules of evidence for the United States courts.”¹⁸⁵

182. IMWINKELRIED, *supra* note 34, § 4.2.1(e).

183. *Id.* § 4.2.2(e), at 220.

184. *Id.*

185. The Preliminary Study, *supra* note 1.