The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington

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THE FEDERAL RULES OF EVIDENCE: A MODEL FOR IMPROVED EVIDENTIARY DECISIONMAKING IN WASHINGTON

Robert H. Aronson*

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I. INTRODUCTION

At the outset, I should make my bias "perfectly clear": I am an unabashed supporter of the Federal Rules of Evidence. That is not to say that the Federal Rules contain no inconsistencies, ambiguities, or dysfunctional aspects. At present, however, they represent the best available effort to define a set of basic rationales for the admissibility of evidence and to establish rules that are consistent with those rationales. By focusing on the extent to which admission or exclusion would better serve the enunciated rationales, the Rules attempt to avoid decisions as to the admissibility of evidence based on semantic disagreements. In addition, there are good reasons for adopting a code of evidence, regardless of its substantive merit, because of the relatively greater predictability, uniformity, and opportunity for careful analysis under codified rules than under case-by-case decisions.1

This article discusses the underlying reasons for establishing rules of evidence, defines two unavoidable conflicts encountered in attempting to effectuate the purposes for adopting such rules, suggests that the Federal Rules of Evidence help resolve these conflicts by adhering to several clearly enunciated rationales, and, finally, indicates how the Rules recognize and accommodate important new scientific and social insights on the admissibility of evidence.

In formulating the Federal Rules of Evidence, the Advisory Committee,2 the United States Supreme Court, and Congress in many in-

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1. Except to the extent that these reasons affect the substantive bases for the Rules, they are outside the scope of this article. For example, predictability is achieved both by establishing a written code and by establishing individual rules defined to encourage more uniform and hence more predictable application by judges. It is the latter aspect of predictability which this article will address.

2. Appointed by the United States Supreme Court and composed of judges, practitioners and law professors, the Advisory Committee on Rules of Evidence published the original draft of the Federal Rules of Evidence in March 1969. The proposed rules were then subjected to extensive debate and amendment in both houses of Congress and the United States Judicial Conference. They were signed into law on January 2, 1975, and became effective on July 1, 1975. For a more detailed account of the progress of the Federal Rules through the various committees which considered them, see J J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE at vii–xi (1977) [hereinafter cited as WEINSTEIN].

Several states (for example, Nevada, New Mexico, and Wisconsin) adopted the proposed rules with relatively few changes, while they were being considered by the Supreme Court and Congress. At least 13 states (Arkansas, Florida, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, South Dakota, and Wisconsin) adopted the Federal Rules of Evidence with various modifications, and several other states (for example, Michigan and Colorado) are currently considering adoption with modifications. Id. at T-1 to T-2 (Supp.); 3 FEDERAL RULES OF EVIDENCE NEWS 78–85 (1978).
stances had to choose between two possible rules either of which would have effectuated the policies analyzed in this article, or which involved conflict between two or more valid policy considerations. This article does not attempt to evaluate such value judgments.

II. THE NEED FOR (ANY) RULES OF EVIDENCE

Although it is not entirely beyond dispute, the assumption that there is a need to establish rules governing the admissibility of evidence in civil and criminal trials has come to be accepted as a fact of legal life. The original reasons for not permitting the trier of fact to consider all evidence either party chooses to present are often ignored. Yet it is only by identifying those rationales that the validity of a particular rule providing for the admission or exclusion of evidence can be determined.

The three primary bases for the establishment of rules of evidence are practicality, distrust of juries, and need for acceptance by the litigants and the public of court decisions. Practicality requires some

3. For example, treating like things alike is a valid purpose of an evidence code. See text accompanying notes 104-12 infra. To the extent that present sense impressions are demonstrated to be as trustworthy as excited utterances, either the addition of a present sense impression exception to the hearsay rule or the deletion of the excited utterance exception would equally serve that purpose.

4. For example, the Advisory Committee proposed that the declarations against interest exception to the hearsay rule include declarations against "social interest": statements which so far tended "to make [the declarant] an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true." H.R. REP. No. 650, 93d Cong., 2d Sess. 15, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089. Congress disagreed and eliminated statements against "social interest" from the exception. See Fed. R. Evid. 804(b)(3). Deciding whether to adopt a declaration against social interest exception to the hearsay rule required balancing the policy of treating like things alike against the policy of avoiding waste of time and jury confusion. Fear of social disgrace often will be greater than fear of loss of a small amount of money. Indeed, people may be willing to pay a blackmailer large sums of money rather than have embarrassing facts made public. See United States v. Dovico, 261 F. Supp. 862, 872 (S.D.N.Y. 1966), aff'd, 380 F.2d 325 (2d Cir.), cert. denied, 389 U.S. 944 (1967). Thus, statements genuinely against social interest are as reliable as statements against pecuniary or proprietary interests and should be treated similarly.

Nevertheless, the difficulty in determining which embarrassing statements are sufficiently against interest to be reliable is much greater than similar determinations concerning statements against pecuniary, proprietary, or penal interests which are usually quantifiable. Id. at 874. Therefore, the danger of misleading the jury or wasting a great amount of time on preliminary admissibility questions, see Fed. R. Evid. 104(a), is also greater. Whichever rule eventually was adopted, then, would promote at least some of the values discussed in this article.

5. For this purpose, "evidence" must mean anything presented to the senses of the trier of fact, without regard to its eventual admissibility or weight.
limitation on the admissibility of evidence. Even if it would be rational to permit consideration of anything and everything in determining the outcome of a particular dispute, it would be impossible on a practical level. Otherwise, some cases would never be concluded and many would be excruciatingly lengthy and costly. The rules concerning relevancy, methods of proving character, and self-authentication effectuate this rationale.

In addition to serving practical necessity, rules of evidence attempt to prevent avoidable confusion, unfair prejudice, and extraneous considerations that may cause the trier of fact to decide on an improper basis. Although judges are not immune to such improper influences, the rationale is often seen as expressing a distrust of juries. Federal Rule 403 in particular, but also Rules 404.

6. Practical experience indicates that, for some reason, many lawyers do not consider a concise presentation to the trier of fact to be in their own self-interest. Indeed, obfuscation can be a potent weapon on behalf of a party with a weak case on the merits. 7. FED. R. EVID. 401, 403. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. 403. 8. FED. R. EVID. 405, 608, 609. Under the Federal Rules, "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked." Id. 608(a)(2). In explaining this provision, the Advisory Committee noted that "[t]he enormous needless consumption of time which a contrary practice would entail justifies the limitation." Id. 608, Advisory Comm. Note, Subdivision (a). 9. FED. R. EVID. 902. The accompanying Advisory Committee's Note indicates that "practical considerations reduce the possibility of unauthenticity to a very small dimension." Id. Advisory Comm. Note.

10. Such rules are promulgated because the rulemaker believes that just results are more likely to be attained by using general rules of evidence (whether common law or codified) to admit or exclude evidence than by admitting all evidence offered. The rulemaker, not the jury, decides what evidence would constitute a proper basis for deciding a particular case.

11. In one case the defendant's conviction was reversed because the trial judge had examined the defendant's criminal record during trial and commented, "You can tell more what kind of a snake you are dealing with if you can see his color." United States v. Hamrick, 293 F.2d 468, 469 (4th Cir. 1961). In another case the Supreme Court reversed the defendant's conviction because, in instructing the jury, the trial judge had said, "You may have noticed . . . that [the defendant] wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying. . . . I think that every single word that man said, except when he agreed with the government's testimony, was a lie." Quercia v. United States, 289 U.S. 466, 468 (1933).

12. The primary fear is that juries may fail to understand the misleading nature of offered evidence, but there is also the possibility that they may refuse to give effect to policies with which they disagree.

13. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403.

14. Rule 404 provides, with certain exceptions, as follows: Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.
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410, 15 411, 16 and 60917 promote this rationale. Although it is usually assumed that juries are able to ignore or give minimal weight to unhelpful or misleading evidence when given a limiting instruction, 18 certain categories of evidence are believed to be so prejudicial that the jury could not possibly give them the minimal weight they deserve.

Finally, since trials serve to promote values in addition to truth, 19 including orderly and fair dispute resolution, rules of evidence ensure

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... Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. FED. R. EVID. 404. In explaining the limitation on character evidence, the Advisory Committee quoted from the California Law Revision Commission, Report, Recommendations & Studies 615 (1964):

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Id. Advisory Comm. Note, Subdivision (a).

15. Rule 410 provides, "[E]vidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere ... is not admissible in any civil or criminal proceeding against the person who made the plea or offer." FED. R. EVID. 410.

16. Rule 411 provides, "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully." Id. 411. The Advisory Committee's Note states that the most important basis for the rule is "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." Id. 411, Advisory Comm. Note. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 201 (2d ed. E. Cleary 1972).

17. Rule 609 provides that evidence of conviction of a crime can be used to impeach a witness only if the crime "(1) was punishable by death or imprisonment in excess of one year ... and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement." FED. R. EVID. 609(a). "[I]f a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date," the conviction is not admissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Id. 609(b).

18. E.g., id. 105 (evidence admissible for one purpose but not for another purpose may be admitted with a limiting instruction). The Advisory Committee's Note explains:

In Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968) [sic], the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Id. Advisory Comm. Note. The citation to Bruton provided by the Advisory Committee is to the memorandum grant of certiorari. The opinion of the Court appears at 391 U.S. 123 (1968).

that these additional values will not be ignored in deciding individual cases. Henry Hart and John McNaughton have stated:

In judging the law's handling of its task of fact-finding in this setting, it is necessary always to bear in mind that this is a last-ditch process in which something more is at stake than the truth only of the specific matter in contest. There is at stake also that confidence of the public generally in the impartiality and fairness of public settlement of disputes which is essential if the ditch is to be held and the settlements accepted peaceably.\(^{20}\)

Therefore, even in those instances when it would be rational to trust the trier of fact to ignore irrelevant or improper evidence, exclusionary rules help to convince the litigants that the merits of the dispute have been fairly tried. For example, even if it would be reasonable to allow the trier of fact to give whatever weight was proper to hearsay evidence, rules which admit only the most reliable hearsay tend to make trials appear fairer, thereby increasing respect for the legal system.\(^{21}\)

In addition, some rules of evidence promote values extrinsic to the particular dispute involved. Such values include the desirability of taking subsequent remedial measures,\(^{22}\) attempting to compromise disputed claims,\(^{23}\) obtaining liability insurance,\(^{24}\) establishing certain confidential relationships,\(^{25}\) and discouraging police misconduct.\(^{26}\) Many recently adopted rules of evidence are intended in part to promote the smooth and efficient operation of business enterprises by

\(^{20}\) Hart & McNaughton, Some Aspects of Evidence and Inference in the Law, in EVIDENCE AND INFERENCE 53 (1958) (the Hayden Colloquium on Scientific Concept and Method) (emphasis in original).

\(^{21}\) That is not to say that litigants today believe the rules of evidence ensure fairness. A frequent criticism of the legal system is its proliferation of rules, resulting in victory for the attorney who can best manipulate them. Nonetheless, one of the original purposes of the rules was to reassure the parties that misleading and unfairly prejudicial evidence would not be a factor in the ultimate decision. To the extent that the rules of evidence fail in effectuating this goal, the rules need to be modified, not eliminated altogether.

\(^{22}\) FED. R. EVID. 407 and accompanying Advisory Comm. Note.

\(^{23}\) Id. 408 and accompanying Advisory Comm. Note.

\(^{24}\) Id. 411.

\(^{25}\) Rule 501 provides that "privilege . . . shall be determined in accordance with State law." Id. 501. Washington has established privileges protecting, among others, the following relationships: attorney-client, WASH. REV. CODE § 5.60.060(2) (1976), physician-patient, id. § 5.60.060(4), psychologist-patient, id. § 18.83.110, and clergy-penitent, id. § 5.60.060(3).

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recognizing the necessity of certain business practices to the economy. These rules include the business records exception to the hearsay rule,27 expanded admissibility of photocopies, computer printouts and electronic re-recordings,28 and self-authentication of trade inscriptions,29 commercial paper,30 and certified copies of public records.31

III. TWO UNAVOIDABLE CONFLICTS IN EFFECTUATING THE RATIONALES SUPPORTING RULES OF EVIDENCE

In determining what an evidence code should contain in order to best effectuate the rationales enunciated above, it is useful to consciously analyze two fundamental concepts: formal versus nonformal decisionmaking and faith in versus fear of juries.

A. Formal Versus Nonformal Decisionmaking

One concept inherent in all decisionmaking has been described by Professor William Powers as the conflict between formal and nonformal decisionmaking.32 The former is characterized by well-defined, easily applied rules and by strict adherence to those rules. At the risk of oversimplification, such rules have the advantage of uniform and consistent application, and therefore predictability and stability; they have the disadvantage of inflexibility and inability to accommodate either unforeseen but relevant factors or scientific and socio-psychological advances.33 Nonformal decisionmaking, often appearing in le-

27. FED. R. EVID. 803(6)-(7).
28. Id. 1001(3)-(4); 1003. Computer printouts present not only best evidence problems but also hearsay problems. The term "original" is defined to include computer printouts, thus resolving the best evidence problems in favor of admissibility. Id. 1001(3). The Advisory Committee's Note explains that "practicality and usage confer the status of original upon any computer printout." Id. 1001, Advisory Comm. Note, Paragraph (3). The hearsay problems have increasingly been resolved in favor of admissibility using either the business records exception, see King v. State, 222 So. 2d 393, 398 (Miss. 1969), or some other mechanism, see Roberts, A Practitioner's Primer on Computer-Generated Evidence, 41 U. CHI. L. REV. 254, 272-74 (1974).
29. FED. R. EVID. 902(7).
30. Id. 902(9).
31. Id. 902(4).
33. Professor Powers describes formal decisionmaking as follows: Formal decisions derive both their benefits and detriments from their rigidity
gal decisions as a balancing test, permits the consideration of all relevant factors in each case, and thereby avoids unjust results due to the inflexibility of strictly applied rules. Nonformal decisionmaking, however, is time-consuming, subject to the biases of the judge in each case, and therefore less consistent or predictable.34

An example of this conflict and a recurring problem in the law of evidence is the definition and application of the hearsay rule.35 Some out-of-court statements are so unreliable that they should not be considered by the trier of fact; other statements, although made out of court, are reliable and helpful to the trier of fact. A strict rule, either admitting or excluding all hearsay, would be predictable and easy to apply and would promote uniform application. Admission of all hearsay, however, would undermine the three rationales for establishing rules of evidence: unreliable and prejudicial statements would mislead or confuse the jury, would cause lengthy and costly trials, and would often cause the litigants to believe the ultimate jury determination to be improper and unfair.36 Exclusion of all hearsay, on the other hand,
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might reduce the length of the trial\(^3\) and avoid jury confusion,\(^3\) but would not create respect for the decision by litigants (or for the legal system by the public) if the excluded hearsay were considered important and trustworthy.\(^3\)

An alternative approach to the problem, and the one adopted by the majority of jurisdictions, is to exclude all hearsay except that which fits into several narrowly defined exceptions. However, as an increasing number of hearsay statements appeared to be both reliable and important to the proper resolution of particular cases, the exceptions threatened to swallow the rule. Dean McCormick suggested that the hearsay rule simply provide, "'Hearsay is inadmissible except where the judge in his discretion finds it needed and trustworthy.'"\(^4\)

This suggestion clearly raised the conflict between formal and nonformal decisionmaking in the hearsay area.\(^4\)

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37. This result is not so clear. Assuming that the information contained in the out-of-court statement was important to the offering party, exclusion would require a more elaborate method of getting the evidence before the jury. Apparently the business records exception to the hearsay rule was adopted primarily for this reason. In explaining the history of the Federal Rule concerning business records, Fed. R. Evid. 803(6), the Advisory Committee noted, "These reform efforts . . . concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type." Id. 803, Advisory Comm. Note, Exception (6).

38. But note that in those instances where an alternate, more elaborate means of introducing the evidence contained in the hearsay statement must be employed, see note 37 supra, the possibility of jury confusion would likely be increased.

39. E.g., 4 J. Wigmore, Evidence § 1078 at 166 n.2 (Chadbourne rev. 1972). Wigmore discusses Rankin v. Brockton Public Market, 257 Mass. 6, 153 N.E. 97 (1926) in which the plaintiff, a customer in a store, had been hit on the head. The court excluded the saleslady's admission that she had tossed the item of store equipment which had struck the plaintiff because the saleslady had no authority to bind the defendant storeowner. "[Y]et she had authority to sell goods and make a profit for defendant; then why not an authority to say how she sold them? Such quibbles bring the law justly into contempt with laymen." 4 J. Wigmore, supra § 1078 at 166 n.2.


41. This conflict was repeated when Congress considered whether to adopt a residual hearsay exception and what form such an exception should take. The result is the following exception which appears in both Rule 803 and Rule 804:

The following are not excluded by the hearsay rule . . . :

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the
Specifically enumerated, clearly defined, and strictly applied hearsay exceptions have all the advantages of formal rules suggested by Professor Powers. They permit individuals and businesses to plan activities and keep records based on the clear predictability of their admissibility. Predictable rules also permit attorneys to prepare adequately for trial. Application of clearly defined hearsay exceptions should be easier than weighing the trustworthiness and the need for each out-of-court statement. The "bright line" provided by specifically enumerated exceptions gives appellate judges the means (other than the nebulous "abuse of discretion") to review trial court evidentiary rulings. This result is particularly important since, regardless of the quality of trial court decisions under ideal conditions, hearsay rulings are usually made "in the heat of the battle," with little opportunity to reflect upon the bases and purposes for the hearsay rule and its exceptions.

Narrowly defined and applied hearsay exceptions, however, also possess the defects of formal rules. Their easy application is occa-

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Statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. Fed. R. Evid. 803(24) (similar language in 804(b)(5)). The Advisory Committee originally provided for more wide-ranging discretion. In its proposed draft, the Committee included an exception which would have given a trial court power to admit evidence which, though not covered by any of the other exceptions, displayed "comparable circumstantial guarantees of trustworthiness." H.R. Rep. No. 650, 93d Cong., 2d Sess. 5, reprinted in [1974] U.S. Code Cong. & Ad. News 7075, 7079. In its review of the Rules, the House Judiciary Committee rejected the wide discretion offered by the residual exception and deleted it from the Rules because it injected "too much uncertainty into the law of evidence and impair[ed] the ability of practitioners to prepare for trial." Id. If new hearsay exceptions were to be created, "they should be by amendments to the Rules, not on a case-by-case basis." Id. The Senate Judiciary Committee, on the other hand, feared that without the residual exception, the rigidity of the specific exceptions in the face of trustworthy but technically inadmissible hearsay evidence would cause the specifically enumerated exceptions [to be] tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact. S. Rep. No. 1277, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7065. See generally Imwinkelried, The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence, 15 San Diego L. Rev. 239 (1978).

42. See note 33 supra.

43. For example, a prosecutor seeking a dying declaration from the victim of an assault can ensure eventual admissibility only if the prerequisites are clearly defined and understood.

44. See Powers, supra note 32, at 30-32. Professor Powers discusses these defects
sionally at the expense of considerations relevant to the particular case but not anticipated by the drafters of the rule. A rule that in the vast majority of cases will best effectuate the policies deemed most important may least promote those policies in an individual case. A particular out-of-court statement may be trustworthy and needed yet not fall within any of the formal exceptions, or a particular statement may not be trustworthy and needed yet fall within an exception. Also, it is the nature of formal rules that the language of the rules, rather than the policies underlying them, dictates their application in individual cases. For example, if the declaration against interest exception to the hearsay rule does not provide for admission of a declaration against penal interest, such a declaration will be excluded, even if the rationales behind admitting statements against pecuniary interest apply with greater force to a particular statement against penal interest.

as “mapping” and “freezing” problems. The former “occurs because rules do not always translate (map) perfectly the policies which generated them into results in individual cases.” Id. (footnote omitted). For example, if the primary defects of hearsay statements are that they possess great potential for insincerity, faulty memory, and faulty perception on the part of the declarant because not subject to oath, cross-examination, or observation of demeanor by the trier of fact, the hearsay exceptions are believed to provide substitutes for the oath, cross-examination, and observation of demeanor which make the statements sufficiently reliable to be considered by the trier of fact. Fed. R. Evid., art. VIII, Advisory Comm. Note, Introductory Note: The Hearsay Problem. Many recognized exceptions, however, are based on erroneous or outmoded beliefs concerning reliability. For example, the reliability of dying declarations is certainly open to question. See, e.g., id. 804, Advisory Comm. Note, Subdivision (b), Exception (3); H.R. REP. No. 650, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089. Also, Robert Hutchins and Donald Slesinger have totally undermined the factual assumptions underlying the supposed reliability of excited utterances. Hutchins & Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclama-
tions, 28 COLUM. L. REV. 432 (1928).

To the extent that these rigidly defined exceptions have improperly effectuated the rationales for admissibility, they also fail to promote the bases for establishing any rules of evidence. Since judges must admit evidence under these unreliable exceptions (indeed one purpose of formal rules is to restrict trial judge discretion), improper mapping results in injustice in a certain number of cases.

A “freezing” problem occurs “when formal rules freeze the decisionmaking process into a set of rules that reflect values of one era which are no longer held in the next.” Powers, supra note 32, at 31. In a broader sense, freezing slows the process of recognition not only of changing social values, but also increased scientific and psychological knowledge. Examples include the slow recognition of computer-generated evidence and advances in photocopying under the hearsay and best evidence rules, the refusal to include psychologists and psychiatric social-workers within the psychotherapist-patient privilege, and the unavailability of a present sense impression or similar exception to the hearsay rule.

46. For an extreme case, see Chambers v. Mississippi, 410 U.S. 284 (1973) (exclusion of third-party testimony of the witness's confession because against penal, not pecuniary, interest held in part responsible for depriving defendant of a fundamentally fair trial.)
This tension between the desirability of formal and nonformal evidentiary rules exists in all cases—not just with respect to the hearsay rule—and manifests itself on at least two levels: a code versus case-by-case determination by appellate courts, and strictly defined rules (whether defined by a code or by case law) versus loosely defined guidelines and greater trial court discretion, reviewable only for abuse thereof. 47

B. Faith in Juries Versus Fear of Juries

A second conflict which must be considered before the content of a rational evidence code can be determined is the extent to which evidentiary decisions should be left to the jury. Historically, the law of evidence has wavered schizophrenically between faith in the fairness and reliability of the jury system and lack of faith in individual jurors’ ability to ignore misleading scientific or technical evidence 48 and appeals to emotion. 49 The interest in avoiding unduly long trials mandates that at least some evidence be kept from the jury, and some evidence is unquestionably misleading. The extent to which the trial judge should screen out evidence of questionable relevance or which is potentially misleading or unduly prejudicial is a determination that

47. In fact, these levels and alternatives present a continuum from the least flexible—a formal code containing strict rules—to the most flexible—great trial court discretion determined on a case-by-case basis.

48. The California Supreme Court has held that the prosecution’s use of the law of probabilities “establishing” the chances of defendant’s innocence to be one in twelve million was reversible error. “Undoubtedly the jurors were unduly impressed by the mystique of the mathematical demonstration but were unable to assess its relevancy or value.” People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 41, 66 Cal. Rptr. 497, 505 (1968). Another leading case in the area is State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962) (admissibility of polygraph evidence) (cited with approval in State v. Ross, 7 Wn. App. 62, 68, 497 P.2d 1343, 1347, petition for review denied, 81 Wn. 2d 1003 (1972). See also Highleyman, The Deceptive Certainty of the “Lie Detector,” 10 HASTINGS L. REV. 47 (1958).

49. One authority has written: Recognizing the trial as an adversary proceeding taking place under the dramatic conditions of emotional disturbance, with defiance, antagonism, surprise, sympathy, contempt, ridicule and anger permeating the atmosphere of the entire proceeding, and with members of the jury chosen from the public at large, with no required experience in determining controversial issues of fact under such circumstances, the courts at an early date excluded logically relevant circumstantial evidence when the risks involved in the above policy considerations were found to be so out of proportion to the probative value of the offered evidence as to constitute a clear basis of exclusion.

Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 VAND. L. REV. 385, 392 (1952) (emphasis in original).
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has caused extensive litigation in courts and debate among legal commentators. It is not a question which is easily analyzed, empirically or otherwise. Even years of experience with numerous juries is likely to leave a practitioner or a judge with only a vague feeling of how he believes the question should be answered.  

To make matters worse, policy considerations extrinsic to the determination of a particular case often call for exclusion of arguably relevant evidence.

IV. THE FEDERAL RULES OF EVIDENCE—A SIGNIFICANT STEP IN THE RIGHT DIRECTION

Resolution of the two conflicts discussed above is essential to a rational definition of relevancy, delineation of trial judge decisions as opposed to those left to the jury, and determination of policy considerations justifying exclusion of otherwise relevant evidence. The Federal Rules of Evidence represent a significant effort to resolve the conflicts between formal versus nonformal and judge versus jury decisionmaking. Some degree of conflict is resolved simply by adopting a code—any code. It is the thesis of this article, however, that the Federal Rules of Evidence have value far beyond the mere fact that they have been incorporated into a code. Primary advances include elimination of decisions based on semantics, systematic adherence to several clearly defined and enunciated rationales with an eye toward the proper functioning of the law of evidence as a whole, and recognition and accommodation of advances in scientific, technical, and socio-psychological knowledge.

A. Elimination of Decisions Based on Semantics

At least in part because evidence rules have traditionally developed on a case-by-case basis in each jurisdiction, evidentiary rulings have not been uniform, and thus have been difficult to predict. In an at-

50. For example, an instruction to the jury to disregard portions of a confession which implicated the defendant was held to be constitutionally deficient, in part because "the risk that the jury will not, or cannot, follow instructions is so great ... that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). The dissent believed the instruction was sufficient. "I believe juries will disregard the portions of a codefendant's confession implicating the defendant when so instructed." Id. at 142 (dissenting opinion) (White, J.).

51. See text accompanying notes 22–31 supra.
tempt to avoid the ensuing confusion, many jurisdictions created narrowly defined rules which were then strictly applied. This super-formal decisionmaking procedure, however, often resulted in decisions based on placing an offered piece of evidence within or without a particular category. For example, a witness’s opinion was not admissible if it went to the “ultimate issue.” The “ultimate issue” category was originally intended to reflect the underlying policies for allowing only certain kinds of lay witness opinions. But years of decisions defining and redefining what constitutes an “ultimate issue” and determining which testimony goes to an “ultimate issue” drew the analysis further and further away from the policies that were the basis for the rules. In addition, semantic debates engendered otherwise unnecessary litigation and confusion, and often served merely as “a trap for the unwary.”

52. E.g., Warren Petroleum Co. v. Thomasson, 268 F.2d 5 (5th Cir. 1959) (opinion on legal liability); Grismore v. Consolidated Products Co., 232 Iowa 325, 5 N.W.2d 646 (1942) (dictum) (opinions on guilt, negligence, and reasonable cause).

53. In specifically abolishing the so-called “ultimate issue” rule, the Advisory Committee stated:

The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 WIGMORE [EVIDENCE] §§ 1920, 1921 [(3d ed. 1940)]; MCCORMICK [supra note 16] § 12. The basis usually assigned for the rule, to prevent the witness from “usurping the province of the jury,” is aptly characterized as “empty rhetoric.” 7 WIGMORE [supra] § 1920, p. 17.

FED. R. EVID. 704, Advisory Comm. Note. Weinstein discusses the unpredictability and confusion engendered by the rule requiring testimony as to “facts” but not “opinions” as follows:

The inability to consistently draw a line between fact and opinion led to numerous appeals and reversals and a decline in the predictability of a law suit’s outcome. In the first edition of his Treatise in 1904, Wigmore declared that the opinion rule “has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling.” [3 J. WIGMORE, EVIDENCE § 1929 at 2563 (1st ed. 1904)].

54. S. REP. No. 1277, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7057. The Advisory Committee originally recommended that statements made during compromise negotiations, as well as offers of compromise themselves, be inadmissible. FED. R. EVID. 408, Advisory Comm. Note. The House Judiciary Committee, however, sought to continue the common law practice of not excluding admissions of fact, even though made during settlement negotiations, unless the statements were in hypothetical form or were prefaced with a disclaimer. H.R. REP. No. 650, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081. The Senate Judiciary Committee reinstated the exclusion of statements made during compromise negotiations, because (among other reasons) the House version, “by protecting hypothetically phrased statements,... constituted a preference for the sophisticated, and a trap for the unwary.” S. REP. No. 1277, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7057. The Federal Rules also eliminate the trap that caught the prosecution in People v. King, 101 Cal. App. 2d 500, 225 P.2d 950 (1950). In that case, the police had taped a conversation, recorded the original tape onto a magnetic disc, and then erased the original tape under police department customary procedures. The court held that the conversation recorded on the disc violated
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To the extent possible, the Federal Rules define admissibility in terms of the rationales that support the rules, and eliminate decisions based on semantics. For example, under Rule 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Thus, debates over what is an "ultimate issue" are mooted. But what of the legitimate concerns that led to the original ban on opinions concerning the ultimate issue? In a personal injury action, can a witness now testify that the defendant was negligent, or, in a medical malpractice action, that the doctor's conduct caused the plaintiff's injuries? Before determining how these questions are answered under the Federal Rules of Evidence, it is useful to analyze the policy bases for excluding any opinion evidence and for not excluding all opinion evidence. Then testimony concerning negligence or causation can be measured against the pertinent federal rule and the policies supporting it.

Briefly stated, opinions, being abstractions, are much less reliable than observations or other sense perceptions that form the basis for those opinions, because "with each abstraction by the witness the possibility of error increases." Requiring the witness to be specific exposes flaws in his memory for "[i]f a witness has had a hazy perception or if his recollection has been dulled over a period of time, it would be much easier for the witness to testify in terms of inferences than to give a detailed account." Although thorough cross-examination can often reveal erroneous abstractions, "[m]isconceptions of the witness can be exposed much more easily by examining the raw data on which he grounded his conclusion than by challenging the conclusion itself." However, despite the value in most cases of requiring the raw data as opposed to the opinions or inferences drawn from that data, "[w]itnesses often find

the best evidence rule because the proponent had intentionally, although in good faith, destroyed the original tape. Federal Rules 1001(4), 1003, and 1004 would change this result.

55. FED. R. EVID. 704.
56. 3 WEINSTEIN, supra note 2, ¶ 701[01], at 701-8.
58. 3 WEINSTEIN, supra note 2, ¶ 701[01], at 701-9.
difficulty in expressing themselves in language which is not that of an opinion or conclusion."

Rule 701 has attempted to effectuate the above, sometimes contradictory, considerations by limiting lay opinions and inferences to those "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." For example, in most cases, rationally based opinions as to speed, identity, size, weight, distance, etc., would be more helpful to a clear understanding of the testimony than would be attempts to break them into more elemental sense perceptions.

We return, then, to the question whether opinions on negligence or causation are admissible under the Federal Rules. A conclusion as to negligence is the result of a combination of factual and legal determinations. The legal aspects of such a conclusion would be based on the witness's view of the law and thus would not be rationally based on sense perceptions. Furthermore, an opinion as to negligence could

59. Fed. R. Evid. 701, Advisory Comm. Note. Of course, all testimonial facts are, in reality, opinions of varying degrees of abstraction. See McCormick, supra note 16, § 11; W. King & D. Pillinger, Opinion Evidence in Illinois 3–4, 8 (1942). A commonly cited example is identification. A witness who testifies that she saw "the defendant" leave the scene of the accident is really summarizing a series of observations—the size of his nose, his height, weight, eye color, and others. Attempts to force the witness to break the identification into its elemental components would leave the witness "tongue-tied." Rather, if there is some aspect of the identification which defense counsel desires to question, he may do so on cross-examination. In most cases, on cross-examination counsel will prefer to test the manner and accuracy by which the witness arrived at a particular opinion instead of the underlying sense impression. Thus, if a witness states that the defendant was "doing at least 65 miles per hour," cross-examination probably should test the witness's ability to judge speed in general and explore any particular circumstances that would make the estimate in question unreliable. It would be a wasteful and futile exercise to require the witness to state the "facts" underlying her testimony that the speed was 65 miles per hour.

60. Fed. R. Evid. 701. The rule thus "recognizes that necessity and expedience may dictate receiving opinion evidence, but that a factual account insofar as feasible may further the values of the adversary system." 3 Weinstein, supra note 2, ¶ 701[02], at 701–9.

61. "The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts." Weinstein, supra note 2, ¶ 701[02], at 701–11. Such opinions are sometimes referred to as shorthand renditions of fact. See, e.g., M. McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 248 (1970). If a witness personally observed a speeding car or a defendant's facial features for a sufficient length of time, an opinion as to the speed of the car or the identity of the person would be rationally based on these perceptions. See note 59 supra.

62. In the everyday meaning of the words, the testimony that the defendant was negligent or that the doctor caused the subsequent abnormal reaction would appear to be based on sense perceptions. But if the witness thought that the defendant was negligent because he failed to check his brakes, it is the failure to check that was based on observation; the characterization of this failure as negligent could be accomplished only after
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normally be broken down into more elemental sense perceptions of the events in question and therefore would usually be less helpful to the trier of fact than the underlying perceptions themselves. An opinion on causation, however, is usually based on the witness’s perception (unless expert knowledge is required), is more difficult to break down into elemental sense perceptions, and, assuming adequate opportunity for cross-examination by opposing counsel to rectify any misleading aspects, is helpful to and easily understood by the jury. In short, Rule 701 would rarely permit an opinion on negligence and would more frequently permit an opinion on causation.

Under the Federal Rules approach, then, the trial judge is given great discretion to admit or exclude a particular opinion by considering the extent to which the policies served by the rule would best be promoted. He is no longer directed to consider semantic distinctions between “facts,” “conclusions,” “opinions,” and “ultimate facts.” As Judge Weinstein has aptly stated:

Basically, Rule 701 is a rule of discretion. It replaces the orthodox rule of exclusion with a rule that requires the trial judge, on the basis of the posture of the particular case before him, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result. Different judges may reach different determinations in the same situation because of diverse views on the need for concrete testimony and the desirability of allowing parties to introduce evidence in their own way. In construing Rule 701, however, they should bear in mind that the aim of the rule is to eliminate time-consuming quibbles over objections that would not affect the outcome regardless of how they were decided. The emphasis belongs on what the witness knows and not on how he is expressing himself.

In a number of other areas, the Federal Rules have avoided the instruction by the judge in order to be rationally based. Likewise, for the statement “injection of the wrong serum caused the plaintiff’s paralysis” to be rationally based on the witness’s perceptions, observations plus medical or legal standards must be applied. This can be done only by a medical expert (see Fed. R. Evid. 702, 703) or by the trier of fact following detailed instruction.

63. Because it is the function of the trier of fact to apply the legal principles to the facts, a statement that the defendant was negligent would not be as helpful as the observation that the defendant failed to check his brakes.

64. In addition, the likelihood that the jury and the witness will have widely divergent views of causation is much smaller than the likelihood that they will understand the term “negligence” differently.

65. 3 Weinstein, supra note 2, ¶ 701 [02] at 701–17.
common law use of semantic categorization by defining evidentiary rules in terms of underlying policy bases. For example, no longer must a preferred item of evidence be labeled a "writing" and then classified as an "original," a "duplicate," or a "duplicate original" in order to determine its admissibility; instead, the best evidence rule is

66. Objects bearing a number or inscription, such as a policeman's badge or an engagement ring, have been defined as "writings." C. McCORMICK, EVIDENCE § 199, at 411 (1st ed. 1954). Additionally, Wigmore has suggested that "it is conceivable that upon occasion the particular features of an uninscribed chattel may be so open to mis

construction and may become so material to the issue that it would be proper to require production." 4 J. WIGMORE, supra note 39, § 1181, at 420–21. He illustrated this statement with an English case compelling production, for comparison purposes, of the plaintiff's and the public bushel measures. Id. § 1181, at 421 n.2.

The principle should not be carried to ridiculous extremes. In Davenport v. Ourisman-Mandell Chevrolet, Inc., 195 A.2d 743 (D.C. 1963), the number of miles on an automobile service sticker was in dispute. The appellate court ordered a new trial on the ground that a witness's offer to testify to the numbers he had transcribed from the car, which was parked outside the court, was inadmissible. Detaching the sticker would have opened the witness to the charge that the sticker could have come from anywhere, and a photograph would have been secondary evidence. As one authoritative source has said, "One does not have to uproot a tombstone to prove in court the inscriptions which it bears . . . ." J. MAGUIRE, J. WEINSTEIN, J. CHADBOURNE & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 189 n.1 (5th ed. 1965). See also 5 WEINSTEIN, supra note 2, ¶ 1001(1)(01).

67. See 64 HARV. L. REV. 1369 (1951). For an excellent summary of the development and use of these definitions, see MCCORMICK, supra note 16, §§ 229–36. Professor McCormick states that the basic premise justifying the requirement of introducing the original of a writing under the best evidence rule is the great importance of the exact wording in duplicate instruments "where a slight variation of words may mean a great difference of rights." Id. § 231. See also E. MORGAN, BASIC PROBLEMS OF EVIDENCE 385 (1962). Because "there is substantial hazard of inaccuracy in many commonly utilized methods [of] making copies of writings," the preference for original documents is usually justified. MCCORMICK, supra note 16, § 231. In addition, some courts and legal commentators have pointed to the possibility of misrepresentation or fraud as an ancillary justification for the rule. See, e.g., United States v. Manton, 107 F.2d 834 (2d Cir. 1938); 1 S. GREENLEAF, EVIDENCE 93 (1842); Rogers, The Best Evidence Rule, 20 Wis. L. REV. 278 (1945). And in Toho Bussan Kaisha, Ltd. v. American Pres. Lines, Ltd., 265 F.2d 418 (2d Cir. 1959), the possibility that the proponents would introduce only selected portions of a comprehensive set of writings to which the opposing party had no access was cited as a basis for the rule.

Because copies or duplicates were originally transcribed by hand or letter-press, the likelihood of error, intentional or unintentional, was great and the preference for the original was justified. See MCCORMICK, supra note 16, ¶ 236, at 567 & n.62.

As technological advances produced first carbon copies and then photocopies, however, the pressure to admit such counterparts to the same extent as the originals resulted in a new category—"duplicate originals." See, e.g., Parr Constr. Co. v. Pomer, 217 Md. 539, 144 A.2d 69 (1958). Since a "duplicate original" was defined so that it must be simultaneously executed, or at least intended by the parties to be equally effective as embodying the transaction, see MCCORMICK, supra note 16, § 235, at 567. first carbon copies (e.g., Lockwood v. L. & L. Freight Lines, 126 Fla. 474, 171 So. 236 (1936)), and then photostatic copies (e.g., Cox v. State, 93 Ga. App. 533, 92 S.E.2d 260 (1956), were held to be secondary evidence, inadmissible unless the original was lost or destroyed. Although the effort to admit reliable copies to the same extent as the originals was natural and desirable, basing the determination regarding admissibility on semantic distinctions between the various categories engendered confusion and decisions unrelated to the purposes of the best evidence rule.
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defined in terms of its purposes. Although the distinction between
originals and duplicates is maintained, duplicates are admissible to
the same extent as originals unless the rationales for preferring the
original (possibility of intentional or unintentional mistranscription) exist, i.e., "(1) a genuine question is raised as to the authenticity of the
original or (2) in the circumstances it would be unfair to admit the
duplicate in lieu of the original." Furthermore, the confusing and in-
ternally contradictory "duplicate original" has been eliminated. The
best evidence rule, like the opinion rule, must be applied under the
Federal Rules with a view toward rationales rather than strictly de-
defined common law categories.

B. Enunciation of Primary Policy Rationales for Determining Close
Cases

The Federal Rules represent a code in its best sense. Formerly, evi-
dentiary decisions concerning hearsay or relevancy were made with-
out regard to the resolution of privilege or opinion issues. If some
consistent, unifying principle did develop, it was usually by accident.
In drafting the Federal Rules, the Advisory Committee chose to treat

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68. The Federal Rules provide:
(3) Original. An "original" of a writing or recording is the writing or recording
itself or any counterpart intended to have the same effect by a person executing or
issuing it. An "original" of a photograph includes the negative or any print there-
from. If data are stored in a computer or similar device, any printout or other out-
put readable by sight, shown to reflect the data accurately, is an "original".
(4) Duplicate. A "duplicate" is a counterpart produced by the same impression
as the original, or from the same matrix, or by means of photography, including en-
largements and miniatures, or by mechanical or electronic re-recording, or by
chemical reproduction, or by other equivalent techniques which accurately repro-
duces the original.
FED. R. EVID. 1001(3)-(4). The definition of duplicate also eliminates most debates
over what is or is not a duplicate. It allows "any type of reproduction, made regardless
of purpose, to be labelled a duplicate so long as it is produced by a technique designed
to insure an accurate reproduction of the original." 5 WEINSTEIN, supra note 2, ¶
1001(4)[02], at 1001-76.
69. See note 67 supra.
70. See note 67 supra.
71. See McCormick, supra note 16, § 235, at 567 n.58.
72. A similar result has been dictated by elimination of the term "res gestae." Em-
ployed as a catch-all, permitting introduction of hearsay evidence without an applicable
exception and also without any clearly defined standards or uniform application, res
gestae has been held to apply at different times to the following hearsay exceptions now
embodied in the Federal Rules: present sense impressions, Fed. R. Evid. 803(1); excited
utterances, id. 803(2); declarations of mental, emotional, or physical condition, id.
803(3). See McCormick, supra note 16, § 288; Morgan, The Law of Evidence, 1941-
1945, 59 HARV. L. REV. 481, 586 (1946). It has also been applied to some nonhearsay,
the law of evidence as a whole by giving primacy to several specific rationales and policies. The result is beneficial to both judges and attorneys because these basic principles may be applied to resolve close issues whenever they arise under the Federal Rules. Resort to basic principles leads to more uniform and predictable decisions within each area of evidence (for example, hearsay, opinion, authenticity), and evidentiary decisions in one area are rendered more consistent with decisions in other areas. In this section, four of these basic principles will be identified and briefly analyzed.\(^3\)

1. "All relevant evidence is admissible, except . . . ."

A provision for excluding irrelevant evidence is "a presupposition involved in the very conception of a rational system of evidence,"\(^4\) and Federal Rule 402 provides, in part, that "[e]vidence which is not relevant is not admissible."\(^5\) Rule 402, however, also clearly indicates that once testimony or a document is determined to be relevant, the burden is on the party opposed to its admission to demonstrate that a limiting rule or countervailing policy considerations nonetheless dictate exclusion.\(^6\) Placing the burden on the party opposed to

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\(^{73}\) The four principles considered here are not presented as an exhaustive list. They merely exemplify the advantage of resort to underlying principles in deciding close cases concerning admissibility of evidence.

\(^{74}\) J. Thayer, Evidence 264-65 (1898).

\(^{75}\) FED. R. EVID. 402.

\(^{76}\) "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Id. 402. See also id. 801 (defining nonverbal conduct as a "statement" subject to exclusion as hearsay only if it was intended as an assertion). The Advisory Committee's Note to Rule 801 provides:

When evidence of conduct is offered on the theory that it is not a statement, and
admission thus provides a means of deciding close evidentiary questions. In close cases, any limiting policy or rule should be construed narrowly and relevant evidence should be admitted unless the countervailing policy considerations are sufficiently strong.\textsuperscript{77}

The Advisory Committee apparently regarded the principle of Rule 402 as a basic premise for the entire code.\textsuperscript{78} The principle that relevant evidence should be admissible unless there is good ground for exclusion influenced not only Rule 402; the principle was also a major influence in the formulation of other rules of evidence. For example, the many exceptions to the exclusionary hearsay rule reflect the preference for admitting relevant evidence. In addition, the Advisory Committee decided not to adopt a number of common law rules which excluded evidence because it found the policy considerations favoring exclusion to be insubstantial or unsubstantiated.\textsuperscript{79}

2. \textit{Probative value of relevant evidence is to be weighed against the danger of unfair prejudice or misleading the jury}

As a result of the bias in favor of admitting relevant evidence and the lenient standard for determining relevancy,\textsuperscript{80} some method by
which the trial judge may exclude cumulative, misleading, or prejudi-
cial evidence is required by the interest in eliminating unduly long tri-
als and improperly based decisions and the interest in maintaining
confidence in the fairness of the system. Rule 403 provides a general
policy basis for such exclusion.81 In addition, some evidence, al-
though relevant and not unfairly prejudicial, must be excluded for
policy reasons external to any individual case. Rules 404–411 deal
with several specific, frequently occurring situations requiring such
exclusion.82

The specific rules provide for formal decisionmaking (as previously
defined83) in both senses: they are clearly defined within a code (as
opposed to case-by-case appellate court definition) and they severely
limit trial court discretion. Rule 403, on the other hand, provides for
the exclusion of any evidence, albeit relevant and not subject to an-
other more specific basis for exclusion, if admitting the evidence
would either waste time or promote a decision on an improper basis.
The number of times Rule 403 is cited as a check on abuses otherwise
possible under certain specific rules84 demonstrates that the drafters
of the Federal Rules intended it to operate as an underlying principle
to be considered in decisions under all other rules. Rule 403 allowed
the Advisory Committee to omit a number of rules and sections of
rules which would have excluded relevant, reliable evidence due to
the possibility of undue prejudice that exists in that general class of

81. Rule 403 provides, “Although relevant, evidence may be excluded if its proba-
tive value is substantially outweighed by the danger of unfair prejudice, confusion of the
issues, or misleading the jury, or by considerations of undue delay, waste of time, or
needless presentation of cumulative evidence.” Id. 403. For a thorough analysis of the
theoretical bases and practical application of Rule 403, see Dolan, Rule 403: The Preju-

82. The Advisory Committee’s Note to Rule 403 provides, “The rules which follow
in this Article are concrete applications evolved for particular situations. However, they
reflect [t]he policies underlying the present rule, which is designed as a guide for the
handling of situations for which no specific rules have been formulated.” FED. R. EVID.
403, Advisory Comm. Note. The rules following Rule 403 thus deal with conduct or
statements with a very high probability for unduly prejudicing the jury, id. 404, 405
(character and “other crimes” evidence), and conduct or statements which have an inde-
pendent value to society that “substantially outweighs” their probative value, id. 407
(subsequent remedial measures); id. 408 (compromise and offers to compromise); id.
409 (payment of medical expenses); id. 410 (offers to plead guilty or nolo contendere);
and id. 411 (liability insurance).

83. See note 33 and accompanying text supra.

84. E.g., FED. R. EVID. 105, Advisory Comm. Note; id. 404, Advisory Comm. Note,
Subdivision (b); id. 407, Advisory Comm. Note; id. 608, Advisory Comm. Note. Subdi-
vision (b); id. 704, Advisory Comm. Note.
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evidence. At the same time, by specifically enumerating policies which justify the exclusion of otherwise admissible evidence, Rule 403 provides a basis for objection to opinion or hearsay evidence that is technically admissible under strict application of the rule or exception, but lacks the reliability or helpfulness which those rules were intended to ensure.

3. The primary function of evidentiary rules is to ensure trustworthiness of admissible evidence

In most instances, once evidence is found to be relevant and not unduly prejudicial, its weight and trustworthiness are determinations for the trier of fact. Nevertheless, given the primary objectives of rules of evidence (avoidance of waste of time, decisions on improper bases, and public distrust for the legal system), the overriding rationale for further exclusionary rules must be the lack of trustworthiness of an offered document, physical object, or statement. The Federal Rules and the Advisory Committee's Notes repeatedly refer to trustworthiness in defining hearsay exceptions, acceptable methods of authentication, and provisions for greater admissibility of opinion and character evidence. The result is a significant number of deletions, additions, or amendments of common law rules to better effectuate the trustworthiness rationale. In addition to the expanded admissibility of duplicates under Rule 1003 and the enumeration of certain documents as self-authenticating under Rule 902, the hearsay rule (with its exceptions) is an especially important example of deviation from the

85. Hence, the rule barring testimony expressing an opinion embracing the ultimate issue was omitted despite the real danger of waste of time in some instances. Fed. R. Evid. 704. If the time wasted in a particular case would substantially outweigh the probative value, Rule 403 provides for exclusion; otherwise, there is no valid basis for excluding an opinion merely because it touches on the ultimate issue. See note 53 and accompanying text supra.

86. E.g., Fed. R. Evid. 803(24), 804(b)(5) (residual hearsay exceptions); id. 803, Advisory Comm. Note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."); id. 902, Advisory Comm. Note (evidence presumed to be self-authenticating "because practical considerations reduce the possibility of unauthenticity to a very small dimension"); id. 1003, Advisory Comm. Note (expanded admissibility of duplicates because they are defined to be "the product of a method which insures accuracy and genuineness").

87. See notes 66–70 and accompanying text supra.

88. See notes 121–23 and accompanying text infra.
common law as a result of careful re-evaluation of the trustworthiness of the various categories of hearsay. The emphasis that the authors of the Federal Rules placed on trustworthiness is illustrated by the way in which the Rules resolve a difficult hearsay question—whether to admit or exclude evidence of nonassertive conduct.

Since hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted, courts were forced very early on to determine whether and under what circumstances conduct would be considered a statement. Clearly, conduct intended as the equivalent of a verbal assertion (for example, shaking one's head in answer to a question) is subject to all the hearsay dangers of an out-of-court statement. The difficulty arises in classifying nonassertive conduct—conduct not intended to assert anything, or at least not intended to assert the proposition for which it is offered at trial. A traditional example is the conduct of a ship captain in inspecting a ship and then setting sail in it with her family. When such conduct is offered as evidence of the seaworthiness of the ship, the conduct is nonassertive because the ship captain did not inspect the boat and set sail for the purpose of asserting its seaworthiness; we must infer the captain's belief from her conduct.

At common law, nonassertive conduct was considered hearsay when offered as proof of the inference derived from the conduct. As Professor Edmund Morgan once stated:

If objective conduct is used to prove a state of mind, it is in fact merely circumstantial evidence of an assertion which the actor is mak-

89. The astute attorney should understand and be prepared to argue the trustworthiness (or lack thereof) of any item of potential hearsay, regardless of whether it technically fits within an enumerated exception. To do so, the attorney must understand the basic objections to hearsay evidence (namely, inability to observe demeanor and lack of oath and cross-examination) and the dangers sought to be avoided by generally excluding hearsay (namely inaccurate memory and perception and lack of sincerity). He can then be prepared to argue the specific aspects of the particular offered hearsay which overcome these objections and dangers. With respect to statements not covered by the enumerated exceptions, this procedure is dictated by Rules 803(24) and 804(b)(5). Decisions involving borderline cases, possibly falling within an enumerated exception, and proposed extensions or limitations of an enumerated exception should follow similar guidelines.

90. E.g., Fed. R. Evid. 801(c); McCormick, supra note 16, § 246.

91. The Advisory Committee's Note to Rule 801 explains conduct not intended to assert the proposition for which it is offered as follows: "[N]onverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred." Fed. R. Evid. 801, Advisory Comm. Note, Subdivision (a).

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...ing in words or symbols to himself silently instead of in an audible soliloquy. Thus the proponent in such a case is offering the evidence for a purpose which requires an assumption that the person whose conduct is offered had made to himself a statement, and is asking the trier of fact to find the truth of the matter so stated.83

Under this reasoning, the ship captain silently asserted to herself that the boat was seaworthy and, to the extent her conduct is offered at trial to prove the truth of that assertion, it presents the hearsay dangers of verbal assertions. It is unnecessary to join in the rather lengthy and heated debate as to whether or not nonassertive conduct should be classified as classic hearsay.94 The more pertinent question (and the focus of the Advisory Committee95) is whether there are alternative indicia of reliability sufficient to insure trustworthiness, despite the absence of oath, demeanor, and cross-examination, so that nonassertive conduct normally should be admissible.

Inaccurate memory is virtually never an issue with respect to nonassertive conduct; the ship captain was in little danger of misremembering the seaworthiness of the boat before setting sail. Further, “[t]he situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.”96 Because there is by definition no intent to assert anything, there is small probability of fabrication (purposeful deception). Also, the strength of the ship captain’s belief is indicated by the great risk taken in reliance on that belief,97 and the actor’s belief in the truth of the inferred assertion—not the truth of the assertion itself—is all that would be assured by in-court testimony. Thus, when the assertion was unintended and when the conduct from which the belief in the assertion is inferred involved risk of loss to the actor, trustworthiness is assured and the basis for exclusion as hearsay disappears.

94. For a list of the major articles, see 4 Weinstein, supra note 2, ¶ 801(a)[01], at 801-47 n.5.
96. Id.
97. See Falknor, The “Hear-Say” Rule as a “See-Do” Rule, 33 Rocky Mt. L. Rev. 133, 137 (1961). “[T]he absence of the danger of misrepresentation does work strongly in favor of by-passing the hearsay objection, at least where the evidence of conduct is cogently probative. And it will be, where the action taken was important to the individual in his own affairs . . . .” Id.
The very real dangers that the conduct involved insufficient risk or was ambiguous and therefore unreliable absent cross-examination, are obviated by Rules 104(a) and (b), 401, and 403. These rules require that before such evidence can be deemed admissible, the trial judge must make a preliminary determination that the nonassertive conduct is relevant and that its relevance is not outweighed by the possibility of misleading the jury. Likewise, insufficient opportunity for personal observation or knowledge of the matters which the conduct tends to establish would be a proper basis for exclusion in an individual case. Thus, if the ship captain's husband set sail but had not inspected the ship, or was in a hurry and knew nothing of the ship's safety, or had suicidal tendencies, the evidence of his conduct should be excluded—not because it is hearsay, but because it is untrustworthy (lacks probative value sufficient to outweigh the risk of unfair prejudice, confusion, or waste of time).

Nonassertive conduct is not the only aspect of the hearsay rule that has been reconsidered in light of the emphasis on trustworthiness rather than technical definition. Rules 803(24) and 804(b)(5) specifically permit admission into evidence of hearsay statements not within any of the enumerated exceptions "but having equivalent circumstantial guarantees of trustworthiness." Also, requirements or limitations contained in prior common law rules that do not significantly

98. Fed. R. Evid. 104(a)-(b), 401, 403; see Falkner, supra note 97, at 138.
99. Professor John Maguire envisioned the procedure as follows:
Since hearsay on the whole is an inferior vehicle of communication, persuasive argument can be offered for affirmative proof or perception by persons whose behavior gives rise to [inferences relevant to the matter being proved]. Also, with the purpose of protecting jurors from the misleading potentialities of purely conjectural evidence, interlocutory findings by the trial judge may properly be prerequisites for admission. It seems sufficiently cautious, however, to require normally only a judicial finding—embodied, if practicable, in pretrial proceedings—that the individual with respect to whose behavior evidence is offered had adequate opportunity for personal perception of the matters which the behavior tends to establish as having occurred or existed. Up to this point, the burden of preliminary proof will naturally be on the proponent of the evidence. At some stage, though, his primary obligation should end. If, for instance, the objecting party challenges the normal consequences of opportunity by asserting neglect to observe or lack of qualification to observe understandingly, it is suggested that the burden at least of going forward with the unusual new issue can properly fall on the objector.

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affect trustworthiness have been eliminated in the Federal Rules. Examples include defining a dying declaration as one during which the declarant believed his death to be imminent, but not requiring that he actually die,\textsuperscript{101} adding a present sense impression exception,\textsuperscript{102} and including declarations against penal interest in the declarations against interest exception.\textsuperscript{103}

4. For purposes of consistency and predictability, like things should be treated alike

The principle that "like things should be treated alike" is fundamental to virtually all legal analysis and is equally applicable to the law of evidence. Common law evidentiary decisions, however, were often directed at only the category of evidence under consideration and were made without an effort to promote consistency among the various categories. As a result, evidence might be excluded in one trial yet similar evidence might be admitted in another trial simply because the latter evidence was, for some reason, placed in a different category. Occasionally the differences were wholly semantic;\textsuperscript{104} at other times, the decision whether to admit or exclude failed to take into account all relevant policy considerations, such as indicia of reliability which might substitute for traditionally required conditions.\textsuperscript{105} In most instances, however, the failure to maintain consistency was due to a mode of analysis that gave low priority to uniform application of underlying rationales. The Federal Rules, by treating evidentiary

\textsuperscript{101} FED. R. EVID. 804(b)(2). See id. 804, Advisory Comm. Note, Subdivision (b), Exception (3). The actual death of the declarant does not affect the reliability of the statement since whatever reliability exists depends on sincerity in the face of imminent death. Similarly, the need for the information arises whenever the declarant is unavailable, whether due to death or some other reason listed in Rule 804(a).

\textsuperscript{102} FED. R. EVID. 803(1). For an analysis of the greater reliability of such statements over excited utterances, see Hutchins & Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928).

\textsuperscript{103} FED. R. EVID. 804(b)(3). The Advisory Committee's Note explains: The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. . . .

\textsuperscript{104} Id. 804, Advisory Comm. Note, Subdivision (b) Exception (4).

\textsuperscript{105} See Part IV-A supra.

\textsuperscript{105} See Part IV-B supra.
rules as interrelated and the law of evidence as a unified whole, constitute a conscious attempt to treat like things alike. Several examples are discussed below.

As previously indicated, the Federal Rules have attempted to redefine or eliminate rules that did not adequately effectuate the original values (primarily trustworthiness) supporting them. A necessary by-product of this process was that the rules became more consistent. For example, if the basis for excepting declarations against pecuniary interest from the hearsay exclusion is "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true," then a statement subjecting the declarant to a severe criminal penalty is at least as trustworthy and should be as admissible as a statement subjecting her to pecuniary loss. And if statements of present sense impressions are as reliable (and, in fact, may have fewer perception problems) as excited utterances, they should be equally admissible. This principle is also evident, outside of the hearsay area, in the Federal Rules' provisions permitting opinion as well as reputation character evidence, permitting comparison by the trier of fact of authentic handwriting exemplars with an offered disputed document, and excluding evi-

108. See Hutchins & Slesinger, supra note 102.
110. FED. R. EVID. 405(a), 608(a). The Advisory Committee's Note explains:
If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.
Id. 405, Advisory Comm. Note. Wigmore favored the use of opinion over "the second-hand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'" 7 J. WIGMORE, EVIDENCE § 1986, at 244 (Chadbourn rev. 1978). At least a witness's expression of personal opinion can be tested on cross-examination with respect to its underlying bases. The reputation witness can be asked only what others have said about the defendant—an unreliable and virtually untestable basis for determining character. Furthermore, the use of reputation but not personal opinion in proving character opens the trial to the possibility of great abuse since a reputation witness may be asked if he has heard about otherwise inadmissible (even nonexistent) instances of misconduct by the defendant. This procedure, although not unconstitutional, has been criticized by the Supreme Court. Michelson v. United States, 335 U.S. 469, 473–77 (1948).
111. FED. R. EVID. 901(b)(3). The Advisory Committee's Note explains:
[T]he reservation to the judge of the question of the genuineness of exemplars and
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dence of payment of the opposing party’s medical expenses as an ad-
mission of fault.112 Given this emphasis on treating like things alike,
attorneys should be prepared to support or oppose admissibility of a
document or testimony by comparing it to categories of evidence
whose underlying rationales for admissibility can be applied to the ev-
idence under consideration.113

C. Accommodation of Advances in Scientific or Socio-
Psychological Knowledge

As previously indicated, the Federal Rules have attempted to define
rules of evidence in terms of their underlying principles, with empha-
sis on trustworthiness and treating like things alike. Often, however,

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the imposition of an unusually high standard of persuasion are at variance with the
general treatment of relevancy which depends upon fulfillment of a condition of
fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g.,
ballistics comparison by the jury, [citation omitted] or by experts, [citation omit-
ted] and no reason appears for its continued existence in handwriting cases. Con-
sequently Example (3) sets no higher standard for handwriting specimens and
treats all comparison situations alike, to be governed by Rule 104(b).

Id. 901, Advisory Committee’s Note, Subdivision (b), Example (3). Further, most juris-
dictions permit one “familiar” with the handwriting of the alleged author to identify a
disputed document. See MCCORMICK, supra note 16, § 221. And yet,
[1] he infrequency of a lay witness’s opportunity to acquire his knowledge of an-
other person’s handwriting is immaterial as regards the admissibility of his testi-
mony. One observation (either of the act of writing or only of the writing itself)
satisfies the requirement of admissibility. Likewise, the proximity or remoteness of
such an opportunity or opportunities, in point of time to the occasion of his testi-
mony, does not affect the admissibility of the evidence.

(footnotes omitted).

It would seem that visual comparison by the jury of the exemplars and the disputed
handwriting would be at least as trustworthy as comparison from memory by a witness
who has seen the alleged author’s handwriting once or twice, possibly many years previ-
ously.

112. FED. R. EVID. 409. Note that Rule 408 excludes statements made during offers
of compromise as well as the offers themselves. Although it is just as desirable to encour-
age payment of medical expenses occasioned by an injury (without necessarily
admitting fault) as offers of compromise, it may not be as necessary to the underlying
rationale (or to avoid a trap for the unwary) to exclude accompanying statements. The
Advisory Committee thus stated:

Contrary to Rule 408, dealing with offers of compromise, the present rule does
not extend to conduct or statements not a part of the act of furnishing or offering or
promising to pay. This difference in treatment arises from fundamental differences
in nature. Communication is essential if compromises are to be effected, and con-
sequently broad protection of statements is needed. This is not so in cases of pay-
ments or offers or promises to pay medical expenses, where factual statements may
be expected to be incidental in nature.

Id., Advisory Comm. Note. An obvious corollary to treating like things alike is that like
treatment ceases when dissimilarities relevant to policy objectives are found to exist.

113. See note 89 supra.
our understanding of reliability and of similarities between categories of evidence is increased by advances in scientific technology, psychology, and sociology. Also, societal values vary over time and often such changes should be reflected by changes in the rules of evidence to avoid promoting outdated goals. The Federal Rules have accounted for those advances known at the time of their enactment and have provided for accommodation of future developments. The result has been to ameliorate the "freezing" problem of formal decisionmaking.\textsuperscript{114} Several examples of this receptivity to scientific advances follow.

Recent technological advances in photocopying and electronic recording have helped to make the strict common law rules governing the admissibility of copies obsolete. The Federal Rules approach the admissibility of copies by treating duplicates as originals whenever they possess equivalent indicia of trustworthiness. Photocopies and electronic recordings are generally as trustworthy as originals and thus, in most situations, are equally admissible under Federal Rules 1001 and 1003.\textsuperscript{115} The Rules define "writings" and "recordings" to include "typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation."\textsuperscript{116} Thus, the Federal Rules give specific guidance concerning present methods of data compilation and also, along with the Advisory Committee's Notes, provide for similar treatment of future developments.\textsuperscript{117} By explicitly recognizing that change will occur, the Rules have attempted to obtain the advantages of formal decision-making, but without the freezing problems normally associated with formal rules.\textsuperscript{118}

\textsuperscript{114} See note 44 supra.
\textsuperscript{115} Rule 1001(4) defines a "duplicate" as a "counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." FED. R. EVID. 1001(4). Rule 1003 provides, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Id. 1003.
\textsuperscript{116} Id. 1001(1). The Advisory Committee's Note provides, "Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments." Id. 1001, Advisory Comm. Note, Paragraph (1) (emphasis added).
\textsuperscript{117} Id.
\textsuperscript{118} See notes 33 & 44 supra.
Likewise, an “original” is functionally defined, using several examples from photography and current computer technology, but also anticipating future developments which relate to the underlying rationale for the rule. Finally, the definition and treatment of duplicates reflect this accommodation of known scientific advances coupled with guidance for treatment of future developments.

Authentication, like the hearsay and best evidence rules, is designed to ensure that offered evidence is what it purports to be, is at least minimally reliable, and is unlikely to mislead the fact finder. Again, the rule is framed in general terms focusing on the underlying rationale, followed by a number of specific illustrations. Wherever appropriate, the Advisory Committee's Notes have clearly indicated the intent to include modern practices and developments. Thus, the Note to the federal rule concerning authentication of public records or reports specifically extends authentication “by proof of custody, without more . . . to include data stored in computers and similar methods, of which increasing use in the public records area may be expected.”

The Federal Rules have also enabled federal courts to analyze difficult admissibility issues, such as impeachment of a witness by means

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119. Rule 1001(3) provides:
An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original". Fed. R. Evid. 1001(3). The Advisory Committee's Note further indicates that "[w]hile strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout." Id., Advisory Comm. Note, Paragraph (3).

120. See notes 115–16 supra.

121. Rule 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a).

122. Although ten illustrations are provided in Rule 901, "[t]he examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law." Id. 901, Advisory Comm. Note, Subdivision (b).

123. Id., Example (7) (citations omitted). The Advisory Committee's Note also indicates that the rule concerning authentication of ancient documents was extended to include data stored electronically due to "the widespread use of methods of storing data in forms other than conventional written records." Id., Example (8). Furthermore, the Note accompanying Rule 901(b)(9) (authenticating "a process or system used to produce a result") makes reference to computers and X-rays. Id., Example (9).
of psychiatric testimony\textsuperscript{124} or lie detector results.\textsuperscript{125} The utilization of modern scientific and psychological techniques to produce and evaluate evidence, when coupled with adequate reliability safeguards, is essential to a rational code of evidence.\textsuperscript{126} It is anticipated that use of such techniques will greatly increase under the Federal Rules.

V. CONCLUSION

Until now, this article has extolled the virtues of the Federal Rules of Evidence as a rational, comprehensive, progressive codification of the law of evidence. The obvious implication is that Washington should adopt the Proposed Washington Rules of Evidence that were taken, with very few alterations, from the Federal Rules. The Washington Judicial Council’s Proposed Rules pamphlet,\textsuperscript{127} however, lists a number of deviations from the Federal Rules,\textsuperscript{128} despite the recognition “that substantial uniformity of the state and federal rules would make it easier for counsel to try cases in both judicial systems, and . . . that departures should not be made from the federal version unless there were substantial reasons for the departure.”\textsuperscript{129}

Although a detailed analysis of the proposed departures is beyond the scope of this article, it should be noted that several of the federal rules analyzed herein as examples of useful and well-reasoned advances over their common law counterparts, have been modified or deleted from the Washington Proposed Rules.\textsuperscript{130} In addition, the fed-

\textsuperscript{124} 3 Weinstein, supra note 2, \textsection 607 \textsuperscript{[04]}, at 607–40 to 607–49.


\textsuperscript{126} Wigmore has stated, “If courts will open their minds to the realization that science can be applied to the judgment of testimonial credit, regardless of rules arising before the days of modern science, they will readily follow a liberal practice.” 3 J. Wigmore, Evidence \textsection 990, at 626 (3d ed. 1940). See Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53, 68 (1965) (“the law should be flexible enough to make use of new resources”).


\textsuperscript{128} Id. at xv.

\textsuperscript{129} Id. at xiv.

\textsuperscript{130} The following rules have been altered or deleted by the Judicial Council. Rules 405 and 608 were changed so as not to permit proof of character by testimony in the form of an opinion. Proposed Wash. R. Evid. 405, 608. See note 110 and accompanying text supra. The residual hearsay exceptions, although included in the Proposed Rules, id. 803(24), 804(b)(5), were subsequently deleted by vote of the Washington Judicial Council. Washington Judicial Council, Minutes of the June 16, 1978 Meeting 12–
eral rule concerning the use of prior convictions to impeach criminal defendants, the departure from the federal rule concerning admissions by agents, and the failure to re-evaluate and codify state rules regarding privilege are analyzed elsewhere in this volume of *Washington Law Review*131 Where deviations from the Federal Rules undermine the principles that rules should be based on underlying rationales (with emphasis on trustworthiness) rather than on semantics and that rationally equivalent categories should be treated uniformly, it is suggested that the Washington Supreme Court adopt the federal, rather than the proposed Washington rule.

Regardless of the dysfunctional amendments and deletions proposed by the Judicial Council, the Proposed Washington Rules are sufficiently similar to the Federal Rules to promote the underlying bases for establishing any rules of evidence and to resolve as effectively as possible the two "unavoidable conflicts" addressed in Part III of this article.132 Both codifications enhance formal decisionmaking, with its concomitant uniformity and predictability, by affording guidance to appellate and trial courts and by eliminating rulemaking on a case-by-case basis. They also promote uniformity and predictability by providing illustrations and examples of the proper application of specific rules. Additional explanations and examples are provided in the Advisory Committee's Note to each rule. Wherever an overly narrow definition of a rule might cause decisions based on semantic distinctions, the Rules are defined in terms of their guiding principles or policies and therefore permit some measure of predictability and meaningful review in close cases.

On the other hand, emphasis on nonformal decisionmaking is apparent in those rules providing for extensive trial court discretion in

13 (on file with *Washington Law Review*). See note 41; note 100 and accompanying text supra. Rule 901 was altered to provide that the court, rather than the jury, may initially determine the authenticity of a document by comparison with a document of known authenticity. PROPOSED WASH. R. EVID. 901. See note 111 and accompanying text supra.


132. With respect to the conflict between faith in and fear of the jury, Rules 103 and 104 define and distinguish the roles of judge and jury. PROPOSED WASH. R. EVID. 103, 104. Also, since the Rules make use of explicitly enunciated rationales rather than semantics, and emphasize admissibility except when evidence is unreliable or misleading, they provide guidance as to what evidence should be kept from the jury.
the major areas of relevancy, hearsay, and opinion testimony. Non-
formal decisionmaking is also promoted by language which permits
recognition and accommodation of future developments in science,
technology, sociology, and psychology.

The result is a carefully drafted code that provides substantial guid-
ance to trial judges (and uniformity and reviewability to their deci-
sions) regarding admissibility, yet permits discretion to modify the
rules in particular cases if the modification is supported by several
policy considerations clearly enunciated throughout the code. Wash-
ington's adoption of the Federal Rules of Evidence—even with, but
particularly without, the modifications suggested by the Judicial
Council—would constitute a significant modernization and clarifica-
tion of the law of evidence in Washington.