Analyzing the Politics of (Evidence) Rulemaking

Eileen A. Scallen
Analyzing "The Politics of [Evidence] Rulemaking"

by

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We, the Advisory Committee on the Rules of Evidence, have been referred to as everything from a bunch of 19th century antiques on the one hand, to the "Hippies of the Law" on the other.¹

Introduction

Without the footnote, it would be impossible to tell whether the statement above was made in 1974 or 2002. For those of us who participated in "The Politics of [Evidence] Rulemaking panel on January 5, 2002, Professor Edward Cleary's comment, made during the 1974 Congressional hearings on the Proposed Federal Rules of Evidence, sounds oddly familiar—except that one generally doesn't call them "Hippies" anymore.

As the 2001 Chair of the Evidence Section of the American Association of Law Schools, I was responsible for organizing the panel on "The Politics of [Evidence] Rulemaking." The creation and interpretation of evidence rules is a burgeoning area for evidence scholarship.² It is also a timely topic, for recent changes to federal

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evidence law, such as the addition of rules on the admissibility of a defendant's prior sexual conduct, and the amendments to the rules regarding expert testimony, have highlighted the political and controversial aspects of procedural rulemaking. So, taking a deep breath, I put together a panel consisting of former members of the Federal Advisory Committee on the Rules of Evidence and its most vocal critic. I asked them to address the following questions: who should make the evidence rules—the judiciary, the legislature, the executive? What role should the practicing bar, law professors and the general public play in the creation of the rules of evidence? What is the proper function of the Federal Rules of Evidence Advisory


3. Judge Fern Smith is a Federal District Court Judge for the Northern District of California. She served as a member of the Federal Rules of Evidence Advisory Committee from its re-inception in 1993, serving as Chair from 1996 to 1999, when she assumed her current duties as the Director of the Federal Judicial Center. Professor Kenneth Broun and Mr. Gregory P. Joseph also served as members of the Advisory Committee from 1993 to 1999. Professor Broun now serves the Advisory Committee as Consultant to the Subcommittee on Privileges. In addition to his service on the Advisory Committee, Mr. Joseph has served as the Chair of the Litigation Section of the American Bar Association and as the ABA advisor to the Uniform Rules of Evidence Committee of the National Conference of Commissioners on Uniform State Laws. Professor Laird Kirkpatrick recently served as the Department of Justice representative to the Advisory Committee and has had experience in the development of state evidence rules in Oregon. Professor Paul Rice, who is the Director of the Evidence Project at American University, has been a persistent critic of the Federal Rules Advisory Committee and the current federal rulemaking process. See Paul R. Rice, Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future? 53 HASTINGS L.J. 817 (2002) [hereinafter Rice, Advisory Committee]; Paul R. Rice & W. Delker, Federal Rules Advisory Committee: A Short History of Too Little Consequence, 191 F.R.D. 187 (2000); Paul R. Rice, The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary—Introduction, 171 F.R.D. 330 (1997).
Committee—to codify case law, to develop rules and amendments to respond to criticism of existing case law, or to develop solutions to evidentiary problems unforeseen by the original drafters? Are there special considerations that apply to evidence law that do not apply at least to the same degree, to other civil or criminal rules of procedure?

Although some of these questions could be directed at any procedural rulemaking process (i.e., the Civil Rules, the Criminal Procedure Rules, the Bankruptcy Rules) and could be directed both at state or uniform rulemaking as well as federal rulemaking, my colleagues and I decided to focus on the Federal Rules of Evidence as our point of departure, and allow panelists and audience members to bring the other issues into the discussion by comparison. Part I of this article provides the context for the panel discussion—describing the development of the Federal Rules of Evidence to date and, in the process, revealing the growing contentiousness surrounding the Rules. Part II discusses the issues presented by the panelists as well as the articles by the Professors Rice and Broun.

I. The Difficult Development of the Federal Rules of Evidence

Although the current climate of evidence rulemaking seems contentious, the Federal Rules of Evidence were troublesome from their inception. In contrast, the Federal Rules of Civil Procedure have seen their fair share of politics, their initial promulgation and their subsequent treatment—until the 1980's—was relatively benign. The following history is only a brief account, designed both to put the AALS Evidence Section panel in context and to illustrate the pervasive political quality of the Evidence Rules.


7. That is, to demonstrate once again, there is nothing new under the sun.
Though the possibility and desirability of a uniform set of Evidence Rules for use in the federal courts was recognized from the outset of the "Golden Age" of rulemaking, no one was eager to assume the task. Congress gave the Supreme Court the power to promulgate rules of practice and procedure, including rules of evidence, in the Rules Enabling Act of 1934. Nevertheless, the original Advisory Committee charged with drafting the Federal Rules of Civil Procedure dodged evidence issues to the degree that it could, promulgating only two "makeshift" rules touching on evidence law—what are now Civil Rules 43 and 44. In all fairness, commentators have argued that the task of developing a body of evidence rules from scratch was enormous, especially since there were no ready models to examine in 1937. Professors Wright and Graham suggest that the restraint shown by the original drafters of the Civil Rules may have been a "superb stroke of practical politics," because, of the six changes the Supreme Court made to the draft of the original Civil Rules, three eliminated provisions dealing with evidence, thus suggesting that the "Court was in no mood to tinker with the law of

8. See Bone, supra note 5, at 897-99 (referring to the 1950s and 1960s as "the golden age of court rulemaking").
9. 28 U.S.C. §§ 2072, 2075 (1988); 18 U.S.C. §§ 3402, 3771-72 (1988). The Enabling Act grants the Supreme Court the power to promulgate rules regarding the practice and procedure of the federal courts, but prohibits the Court from abridging, enlarging, or modifying any substantive right.
10. In a 1937 Note to the Supreme Court, the Civil Rules Committee stated: The first impression of the Committee was against touching the field of evidence. It later became clear that on account of the union of law and equity there would be doubt as to the rules of evidence to be applied. We think it is essential to deal with the subject at least to the extent expressed in subdivision (a) of [Civil Rule 44, now Rule 43]. Having gone that far the Committee made the further provisions in subdivision (b) of this rule and summarized in [Civil Rule 45, now Rule 44] the law on proof of official records now scattered through many Federal statutes. Advisory Committee Note, quoted in 10 Moore, supra note 6, § 5[5], at 30. Civil Rule 43 was created to deal with admissibility of evidence, presentation of evidence through examination and cross-examination, examination, oath or affirmation of witnesses, making a record of excluded evidence and evidence on motions. As originally drafted, Civil Rule 43 set forth a general principle of "inclusion and, speaking broadly, tended to put admissibility on the basis of relevancy and materiality." Id. § 6[1-3], at 36. Evidence was admissible if the evidence would be admissible under a federal statute, under the rules of evidence as applied in federal courts of equity, or the rules of evidence of any state court. Id. at 36-37. If a state law excluded the evidence and no federal law admitted it, the evidence was generally excluded. Id. at 37. Rule 44 created a rule on proving an official record. Id. § 5[5], at 30.
11. 10 Moore, supra note 6, § 5[1], at 14; 21 Wright & Graham, supra note 6, § 5002, at 40-42.
However, by the time the Civil Rules Advisory Committee considered the first set of amendments to the Civil Rules in 1946, it had the American Law Institute Model Code of Evidence to examine. Still, the Committee declined to wander into the thorny field of evidence law reform noting that while something should be done about the rules of evidence, some other committee ought to do it. The original Criminal Rules Advisory Committee, promulgating Criminal Rules that went into effect in 1946, also avoided drafting specific rules of evidence. The Committee adopted the theory that the federal courts would create a uniform body of evidence law in criminal cases through the development of the common law. Professor Moore notes that, "while alluring and promising like a spring breeze, not too much came of [this approach] due in large measure to the fact that it is difficult to structure a rational and comprehensive system of evidence on a case by case development."

Efforts outside of the federal context to create a uniform body of modern American evidence law were similarly troubled. From the earliest codification efforts of Wigmore to the latest draft of the Uniform Rules of Evidence, the "progress" of codification of Evidence Rules has been slow and marked more by dissension than cohesion. In the early twentieth century, the Commonwealth Fund Evidence Committee was formed, chaired by Edmund Morgan, and composed of evidence scholars and judges, to reform the law of evidence. The Commonwealth Fund's report, published in 1927,

12. 21 WRIGHT & GRAHAM, supra note 6, § 5002, at 42.
13. The Chairman of the original Civil Rules Advisory Committee, Attorney-General William D. Mitchell, stated in commenting on the original set of Civil Rules: There was tremendous pressure brought on the advisory committee by those familiar with the subject of evidence insisting that there was a need for reform which we did not meet, and some advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court. 10 MOORE, supra note 6, § 5[2], at 15. The 1946 Advisory Committee said: "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task." Id.
14. 10 MOORE, supra note 6, § 9, at 40 (noting that the Criminal Rule 26 was drafted to allow the rules of evidence in criminal cases to develop by the common law method, culminating in a uniform body of evidence law). The Criminal Rules were promulgated in 1944 and became effective in 1946. Id. § 9, at 41.
15. 10 MOORE, supra note 6, § 9, at 40-41.
16. JOHN HENRY WIGMORE, CODE OF EVIDENCE (1910).
17. UNIFORM RULES OF EVIDENCE (1999).
18. 21 WRIGHT & GRAHAM, supra note 6, § 5005, at 77 n.92. Dean Wigmore was also a member of this group.
although resting on "spurious empiricism," sounds oddly contemporary, especially in light of developments in rules of scientific expert testimony:

The conclusions of the Commonwealth Fund Committee can be seen to rest on the familiar axioms of the Progressive procedural ideology. The trial is a scientific search for truth, not a political method of resolving disputes. As such it should be firmly under the control of the only unbiased expert in the courtroom—the trial judge. The role of the jury and the power of lawyers must be curtailed, if not eliminated. Truth is the great value to which all other forensic goals must be subordinated and the best way to reach a true result is to admit more evidence.

Although the proponents of the Commonwealth Fund project attributed opposition to their report "to inertia, ignorance and sheer perversity on the part of lawyers," their failure was, in the eyes of one commentator, due to their refusal "to admit they were tampering with vested interests." The Commonwealth Fund project based many of its recommendations on "empirical" evidence, which consisted of "a totally unscientific opinion survey of practicing lawyers." Many of these lawyers, one will be shocked to learn, "responded to the Committee's questionnaires ... in terms of how they thought the proposed rule would affect the interests of their clients." However, the members of the project refused to acknowledge this problem: "If procedure was a question of competing values and interests, it was a political problem and the dogmatic solutions of Wigmore had no greater claim to validity than the existing system." The only surviving contribution of the Commonwealth Fund Evidence project appears to be its influence on the modern business records exception to the hearsay rule.

The procedural reform movement picked up speed when the Rules Enabling Act of 1934 was passed and the Civil Rules Advisory Committee commenced drafting the Federal Rules of Civil Procedure. In 1938, the American Bar Association Committee on Improvements in the Law of Evidence issued its Report. This

19. Id.
20. 21 WRIGHT & GRAHAM, supra note 6, § 5005, at 79.
21. Id. at 80, 81.
22. Id. at 78.
23. Id. at 80. The treatise quotes one respondent, "identified as 'a member of a prominent firm in the south,'" who opposed a proposed rule allowing judges to comment on the evidence: "'Juries do not convict criminals when they should, and they render outrageous verdicts against corporations when they should not.'" Id. at 80 n.10 (quoting Commonwealth Fund questionnaire respondent).
24. Id. at 81.
25. Id. at 78.
Committee, chaired by Wigmore, openly acknowledged that "changes in the law of evidence are sought or opposed on the basis of economic self-interest" but condemned such legislation as "injurious to the whole morale of the system." Wigmore's Committee, however, continued to view itself as a nonideological body of experts on evidence law. The ABA Committee ultimately endorsed many of the proposals of the Commonwealth Fund Report, but added a wide range of new proposals, such as restricting the law of privileges and protecting the interests of witnesses.

In 1939, the American Law Institute began work on its project to create a Model Code of Evidence. Professor Edmund Morgan of Harvard was appointed Reporter; Dean Wigmore had to be content with the title of "Chief Consultant." The in-fighting began almost at once, with the primary battle being whether the Code should be a very brief set of rules, such as those favored by Judge Charles E. Clark, the primary draftsman of the Federal Rules of Civil Procedure, or the very detailed (over five hundred pages) evidence code, advocated by Dean Wigmore. Professor Morgan offered a compromise between these extremes, which ultimately prevailed with the membership of the ALI in 1940. However, when the Model Code was finally published in 1942, the opposition became loud and fierce, led by Dean Wigmore who criticized the discretion the Model Code gave to trial judges and complained that the Model Code did not address all the areas of evidence law (as his code would have), raising the problem of whether the common law aspects of evidence law that were not included would still exist or had been repealed by implication. A committee of the California Bar Association said that the Code sought "to destroy the foundation upon which our structure for the administration of justice is founded." The common explanation for the failure of the Model Code is the degree of discretion put into the hands of the trial judge. However, Professors Wright and Graham suggest an additional explanation, focusing on the poor salesmanship of the Reporter Morgan:

Most lawyers were probably scared to death by a series of articles in the American Bar Association Journal by Professor Morgan,

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26. Id.
27. Id. at 83 n.30.
28. Id. at 83.
29. Id. at 85-86.
31. 21 WRIGHT & GRAHAM, supra note 6, §5005, at 89 (quoting Report of Committee on Administration of Justice on Model Code of Evidence, 19 CAL. ST. B.J. 262, 281 (1944)).
32. Id. at 88.
which were revised and published as a Foreward to the Model Code. What Morgan did was to make vividly explicit those aspects of the Progressive value-system that had only been hinted at by earlier writers. . . . Morgan not only refused to state what the Model Code did in terms that would have been more palatable, he stated aspirations for further reform that were well calculated to curl the hair of even moderate lawyers. For example, he pondered the fate of the attorney-client privilege in terms that suggested its ultimate abolition. Arguments in support of the other privileges were dismissed as “mere sentiment” and “rhetoric” while the privileges of the government were strengthened. It is not surprising that in 1942 many lawyers regarded this blunt statement of Progressive values as fascistic, or worse.39

Professor Ariens argues that the Model Code failed for an additional reason: Professor Morgan’s “explicit disavowal of truth as the goal of the American system of adjudication.”34 While Dean Wigmore remained true to the Progressivist belief that the improvement of evidence law would lead to trials that could reveal the truth, Professor Morgan moved toward a legal realist position: “Morgan’s view . . . was, ‘A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants.’”35 Professor Ariens argues that Professor Morgan chose “a middle ground between the ‘truth’ theory of Dean Wigmore and those who concluded that the trial was irrational,” just a battle between litigants, with the result going to the stronger.36 According to Professor Ariens, this middle-of-the-road position, along with its corollary that a trial was not just a rational performance, plus the reasons advanced by Professors Wright and Graham, resulted in the failure of the Model Code—not a single state adopted it.37 In 1951, Professor Morgan, sounding somewhat bewildered, pondered how his Model Code could possibly have failed:

It might have been supposed that proposal sponsored by a body which is composed of representative judges, lawyers, and law teachers would meet with general approval, especially in view of the standing of the lawyers and judges who compose its Council,

33. Id. at 86-87. The treatise also suggests that the Model Code failed because of perceptions that it reflected an East Coast elitist bias. Id.
35. Id. at 235 (quoting Edmund M. Morgan, The Code of Evidence Proposed by the American Law Institute, 27 A.B.A. J. 539, 539 (1941)).
36. Id. at 236.
37. Id. at 244.
and who are responsible for proposals put to the Assembly, and whose work is subject to a veto by the Assembly.\textsuperscript{38}

But Professor Morgan failed to calculate, as many academic lawyers do, the inherently conservative nature of the judiciary and the bar. His "radical" reform of the law of evidence was, at least in terms of structure, not so terribly "radical" but was well before its time.

The Model Code of Evidence, however, did become the basis for the National Conference of Commissioners on Uniform State Laws' ("NCCUSL") efforts to draft a body of Uniform State Laws on Evidence, beginning in 1949.\textsuperscript{39} However, the NCCUSL redirected the goals of this code to "acceptability and uniformity" rather than "reform."\textsuperscript{40} Not surprisingly, the Uniform Rules, which were passed by the NCCUSL in 1953,\textsuperscript{41} failed to excite the imagination of jurisdictions seeking to codify their evidence law. Only Kansas, New Jersey and Utah adopted the 1953 version of the Uniform Rules:\textsuperscript{42}

Elsewhere the reformers encountered the Catch-22 first devised in the campaign against the Model Code. If the rules were advocated because they would change the law, then opponents would object to the changes; if the reformers insisted the Rules simply restated the existing law, the other side replied: "then who needs them?" The idea that enactment of the Rules would bring uniformity among the various states may have appealed to teachers at national law schools and lawyers at large law firms, but the average lawyer could not care less what the law was on the other side of the state line. Thus, the advocates of the Uniform Rules hoped that the Supreme Court would adopt them for use in the federal courts. Then it would be possible to argue that the states should adopt them so local lawyers did not have to learn two sets of rules, i.e., the argument would be intra-state rather than inter-state uniformity.\textsuperscript{43}

It is difficult to measure the success of subsequent revisions of the Uniform Rules of Evidence because until very recently the Uniform Rules have essentially followed the Federal Rules of Evidence. In 1974, a new set of Uniform Rules were promulgated, patterned after the draft of the Federal Rules of Evidence then under consideration in the House of Representatives; the Uniform Rules were updated in 1986 to incorporate the changes in the Federal


\textsuperscript{39} Ariens, \textit{supra} note 34, at 245.

\textsuperscript{40} \textit{Id.} at 246. The motto of the drafters of the Uniform Rules seemed to be "sensible change without shock." Spencer A. Guard, \textit{The Uniform Rules of Evidence}, 31 TUL. L. REV. 19, 23 (1956), \textit{quoted} in Ariens, \textit{supra} note 34, at 246 n.200.

\textsuperscript{41} Ariens, \textit{supra} note 34, at 246.

\textsuperscript{42} 21 WRIGHT & GRAHAM, \textit{supra} note 6, § 5005, at 91-92.

\textsuperscript{43} \textit{Id.} at 92.
Rules. The 1999 version of the Uniform Rules, however, does differ from the Federal Rules in significant ways.

Although the 1953 Uniform Rules posed one possibility for the codification of evidence law reform, the eyes of the scholarly community and the bar remained fixed on the Supreme Court and the possibility that it would promulgate a uniform set of Federal Evidence Rules. However, the Supreme Court did not exactly jump at the first opportunity to do so. Instead, in 1961, the Judicial Conference of the United States approved the appointment of a Special Committee on Evidence to prepare a report on the advisability and feasibility of developing uniform rules of evidence for the federal courts. Two years later, the Special Committee submitted its final report to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, and, not surprisingly, concluded that it was both feasible and desirable to promulgate uniform federal rules of evidence. The Judicial Conference approved the report and adopted the Standing Committee's recommendation that "an advisory committee on rules of evidence be appointed by the Chief Justice, consisting of approximately 15 members broadly representative of all segments on

44. Id. § 5005, at 2 (Supp. 2001).
45. UNIF. LAWS ANNOTATED, UNIF. RULES OF EVIDENCE, TABLE OF JURISDICTIONS WHEREIN RULES HAVE BEEN ADOPTED (West 2001).
46. C. Arlen Beam, Symposium: The Uniform Rules of Evidence: Introduction, Background, and Overview, 54 OKLA. L. REV. 443, 444 (2001) (the Drafting Committee established in 1995 was given a new charge: "the assignment was to conduct a comprehensive review and revision of the Uniform Rules without any controlling reference to the language in the Federal Rules"). One of the most significant differences in the 1999 Uniform Rules is the rejection of the rules regarding the prior sexual conduct of criminal defendants under Federal Rules of Evidence 413-415.
47. 21 WRIGHT & GRAHAM, supra note 6, § 5006, at 92-93. The report produced by the Special Committee is generally referred to as the first Advisability and Feasibility Study. Professors Wright and Graham note that the Special Committee's work appears to have been unnecessary, since the Judicial Conference had already approved the concept of promulgating federal rules of evidence. Moreover, the Chair, Professor James William Moore, and the Reporter, Professor Thomas F. Green, Jr., of the Special Committee had already clearly stated their views that federal rules were both desirable and feasible. Id. at 93. The authors speculate that "Perhaps the Special Committee mechanism was designed as a trial balloon to test professional reaction to the idea before the difficult work of drafting rules was begun." Id.
48. Id. at 97.
the profession, with special emphasis on trial lawyers and trial judges.

Chief Justice Earl Warren took almost two years to put the Advisory Committee together, finally appointing Albert E. Jenner, Jr. as Chairman, and Professor Edward W. Cleary as Reporter. Professors Wright and Graham point out that, despite being "drawn from all parts of the country" and being "carefully balanced in terms of litigation speciality—prosecutor and criminal defense lawyer, personal injury lawyer and insurance company lawyer, big city lawyer and small town lawyer," it was an essentially conservative group—one, quoting Chairman Jenner, not "inclined to give the family jewels away or tip or rock the laws of evidence."

The Preliminary Draft of the rules was created in three-and-one-half-years, with the bulk of the work performed by Professor Cleary. The Advisory Committee produced a Revised Draft in 1970, based on the comments and suggestions it received on the Preliminary Draft. The Judicial Conference approved the Revised Draft and sent it to the Supreme Court for the rules to be promulgated in accordance with the Rules Enabling Act. "It was then that the Supreme Court made the fateful decision," Professors Wright and Graham suggest; instead of sending the rules on to Congress, the Supreme Court sent the Revised Draft back to the Judicial Conference in 1971, to be published for comment before being officially promulgated.

It sought comment and comment it received. The first warning shot from Congress came in August, 1971, from the Senate, where seven "conservative" Senators introduced a bill to restrict the Supreme Court's rulemaking power, apparently in response to several provisions dealing with the prosecution of criminal cases. The objections continued to mount from the Department of Justice as it pressed for change after change in the Revised Draft—a majority of the changes were implemented. On November 20, 1972, the Supreme Court approved the Evidence Rules and authorized the Chief Justice to transmit them to Congress, but over the dissent of

50. The original Evidence Rules Advisory Committee, including its Chair and Reporter, consisted of nine lawyers (all identified as "trial lawyers" except for the Chief of the Appeals and Research Section of the Criminal Division of the United States Department of Justice), four law professors and three federal judges (two district court judges and one appellate court judge). Id. at 98 n.27.
51. Id. at 99 (quoting testimony of Chairman Albert E. Jenner).
52. Id. at 100-101.
53. Id. at 101. The Revised Draft was published at 51 F.R.D. 315 (1971).
54. 21 WRIGHT & GRAHAM, supra note 6, § 5006, at 102.
55. Id. at 102-104.
Justice Douglas, who argued that the substance of the rules violated the Rules Enabling Act.\(^\text{5}\)

Timing, they say, is everything, and 1972 was not a good year for Congress to be considering the newly promulgated Federal Rules of Evidence. The Watergate scandal unfolded, with President Nixon asserting broad executive privilege at the same time Congress was considering the proposed Evidence Rules which contained proposals for expanded governmental privileges.\(^\text{7}\) Moreover, the concessions made in the Revised Draft to appease the Justice Department began to draw unfavorable attention from members of Congress who were discovering misconduct by members of that Department.\(^\text{8}\) Potential problems caused by the interference of the Justice Department in the Rules Enabling Act was avoided when Congress enacted a statute that provided that the Evidence Rules could not take effect until they were expressly approved by Congress.\(^\text{9}\) The focus then turned to the content of proposed rules, particularly the proposed rules of privilege, which were the subject of intense lobbying.\(^\text{60}\) After several modifications,\(^\text{61}\) Congress enacted the Rules, and President Ford signed them into law on January 3, 1975.\(^\text{62}\) For a topic that has the driest of connotations, the process and politics of making the Federal Rules of Evidence was anything but dull.

Shortly after the Rules went into effect, Professor Friedenthal predicted that Congress' active role in the creation of those Rules "may have spelled the end of the autonomous role held by the Supreme Court for the past 40 years."\(^\text{6}\) Professor Friedenthal's prediction has come true. Since 1974, the process of promulgating changes to federal procedural rules has become increasingly removed from the judicial sphere and into the hurly-burly of the political process.

Following submission of the proposed rules to Congress, the Supreme Court disbanded the Advisory Committee on Evidence.\(^\text{64}\) Despite numerous calls to reconstitute the Evidence Advisory

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56. Id. at 104.
57. Id.
58. Id. at 104, 106.
60. 21 WRIGHT & GRAHAM, supra note 6, at 106-107.
61. The House and Senate each passed different versions of the rules. A Conference Committee produced the final version.
Committee, the Advisory Committee was not reestablished until 1992. Two years after it was reestablished, the Committee published a “Special Request For Comments On Certain Federal Rules of Evidence.” The Advisory Committee announced that it had engaged in “a comprehensive review of all of the Evidence Rules, and it has now completed an initial assessment of a substantial number of the rules” and had decided not to amend twenty-five of the Rules.

Since the Evidence Rules were adopted in 1975, the following substantive changes have been made to the rules: Rule 103 has been amended once (2000); Rule 404 has been amended twice (1991 and 2000); Rule 407 has been amended once (1997); Rule 410 has been amended once (1975) and then completely revised (1980); Rule 412 was added (1978) and amended twice (1988, 1994); Rules 413-415 were added (1995); Rule 609 was amended once (1990); Rule 701 was amended once (2000); Rule 702 was amended once (2000); Rule 703 was amended once (2000); Rule 704 was amended once (1984); Rule 705 was amended once (1993); Rule 801(d)(2) was amended once (1997); Rule 803(6) was amended once (2000); Rule 804(b)(6) was added (1997); Rule 807 was adopted to replace both Rules 803(24) and 804(b)(5) (1997); Rules 902(11) and 902(12) were added (2000); and all of the Rules were examined and altered, where necessary, to be gender-neutral (1987), but some of them had to be corrected again the following year for clarification.

The most controversial of the recent Evidence Rule changes was the addition of Rules 413-415, which allow the admission of certain evidence of defendant’s past sexual conduct for any purpose, in sexual assault and child sexual abuse criminal cases and in civil cases growing out of such criminal acts. These rules were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, but

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67. Id.
68. The dates in parentheses indicate the effective date of the amendments. See also 21 WRIGHT & GRAHAM, supra note 6, § 5008 (Supp. 2001) (partial list of amendments).
69. Runner-up for most controversial rule proposal would go to the revision of the rules regarding expert testimony. FED. R. EVID. 702-703. Several pieces of legislation were introduced on this issue, but were not successful. The Congressional efforts were suspended when the Evidence Advisory Committee took over the project.
similar proposals had been floating around the Department of Justice for some time. As enacted, the Violent Crime Control bill contained a provision that the effective date of Rules 413-415 would be delayed to give the Judicial Conference a chance to respond to those rules. The Judicial Conference issued a forceful—and negative—response to Rules 413-415. The Judicial Conference urged Congress to reject the changes or, at a minimum, allow judges more flexibility to exclude this evidence. The American Bar Association House of Delegates also passed a resolution opposing Rules 413-415. Nevertheless, Congress did not act on these recommendations. Rules 413-415 took effect as initially enacted.

As the history of the Evidence Rules shows, they have been a continual source of controversy since their inception. But what is also telling are the themes running throughout the story of efforts to create a uniform body of evidence law: the deep desire for stability and powerful resistance to change; the need for clarity but the desire for flexibility; the power of judges versus the power of legislators. And sometimes, a deep suspicion or skepticism about the role of academics in the rulemaking process. The next section of this article reveals these themes within the 2002 AALS Evidence Section panel and the articles by Professors Broun and Rice.

II. Current Problems in Federal [Evidence] Rulemaking

Given the contentious history of the Evidence Rules, it is not surprising that the panelists disagreed on a number of points. This part of the article analyzes several of those points of contention.

A. Professor Paul Rice: Are the Federal Rules of Evidence Rules Really Broken?

Professor Rice expresses his exasperation with the attitude of the Evidence Rules Advisory Committee, as he perceives it, summarized as "if it ain't broke, don't fix it." Professor Rice is undeniably correct when he asserts that there is a growing body of case law that

75. Rice, Advisory Committee, supra note 3, at 823.
diverges from or even contradicts the text of the Federal Rules.\textsuperscript{76} Even the current Reporter to the Evidence Rules Advisory Committee, Professor Daniel J. Capra, identifies over twenty-one different instances where federal case law contradicts the text of an Evidence Rule and eleven instances where federal courts have developed common law rules of evidence when the Evidence Rules are silent.\textsuperscript{77} Thus, one question is whether this is conclusive evidence that the Evidence Rules are "busted?" The second question is assuming that these instances of divergence are proof that the Evidence Rules need fixing, who has responsibility for fixing them—the Advisory Committee, the Judicial Conference, the Supreme Court, Congress? Or, looking at it from Professor Rice's perspective, who is to blame for not fixing them?

Are the Evidence Rules "broken?" Professor Rice, both here and in his previous articles,\textsuperscript{78} makes a good argument that there are several rules that could stand clarification or outright change. However, some of his examples are better than others. By "better," I mean "practical"—in the sense that the proposals would both cure the problems identified and that the proposals might actually be implemented—either through the Rules Enabling Act Committee process or directly, by Congress.

At one end of the spectrum, for example, Professor Rice makes a sensible suggestion that Rule 602 should be amended, applying the requirement of "personal knowledge" to the hearsay exemption for the vicarious admissions of agents under Rule 801(d)(2).\textsuperscript{79} Some members of the Department of Justice undoubtedly would oppose such an amendment, because it might preclude prosecutors from using some statements of unnamed, unindicted co-conspirators, unless the prosecution could show a basis for the declarant's knowledge of the facts stated. But would it be so outrageous to require prosecutors to present testimony from a declarant who has first-hand knowledge of what he or she is talking about? This kind of suggestion for change

\textsuperscript{76} Id.
\textsuperscript{79} Rice, Advisory Committee, supra note 3.
at least does deserve serious discussion and consideration, which is the central goal of Professor Rice's Evidence Project.80

Some of Professor Rice's other suggestions are at the opposite end of the spectrum of practicality. For example, it is probably not a matter of major significance that the hearsay exceptions for "ancient documents"81 and "forfeiture by wrongdoing"82 are categorized under Rules 803 and 804, rather than categorized as nonhearsay in Rule 801(d).83 It is true that the ostensible rationale for exceptions under Rules 803 and 804 is, at least in part, based on reliability. It is also true that the decision to admit hearsay as "ancient documents" or due to "forfeiture by wrongdoing" is not primarily based on the reliability of those statements. However, many of the 803 and 804 exceptions have dubious reliability rationales,84 but have nonetheless become commonly and widely accepted as workable solutions to recurring evidentiary problems. Until more of our evidentiary empiricists obtain funding and design reality-based research projects, the root of the real problem—the lack of reliability of many types of hearsay—will go unchallenged.85 Until there is better evidence to

80. Rice, The Evidence Project, supra note 78, at 7 ("a broad and vigorous debate is fundamental to the continued vitality" of the Rules of Evidence).
81. FED. R. EVID. 803(16). Actually, an even greater problem with the "ancient documents" rule is its title. It is always good for a cheap laugh to point out to students that by the measure of this rule, which creates a hearsay exception for documents older than twenty years, they are all "ancient." Although I take less delight in this joke the older I get, I would fiercely oppose an amendment to this rule on the grounds that I'd run short of stand-up material.
82. FED. R. EVID. 804(b)(6). Rule 804 exceptions are driven primarily by necessity concerns rather than reliability concerns. As a threshold matter, the declarant must be "unavailable" as defined by Rule 804(a), for any of the Rule 804 exceptions to apply.
83. Rice, Advisory Committee, supra note 3, at 820 n.9.
84. The reliability rationale for "excited utterances," Rule 803(1), would be laughable, if it were not for the serious problem that such evidence is commonly admitted under this exception in criminal cases, despite the obvious potential defects with the declarant's ability to perceive, recall, and communicate correctly. And of course, there is no longer a federal confrontation clause issue in these cases, since the United States Supreme Court has conflated that issue with the evidentiary concerns of reliability, making the constitutional language superfluous. See White v. Illinois, 502 U.S. 346, 354-56 (1992) ("excited utterances" constitute reliable hearsay because they fall under a "firmly rooted hearsay exception"); Eleanor Swift, Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires A New Look at Confrontation, 22 CAP. U.L. REV. 145, 154 n.38 (1993) (collecting social science research discrediting the reliability of "excited utterances"); Eileen A. Scallen, Constitutional Dimensions of Hearsay Reform: Toward a Three Dimensional Confrontation Clause, 76 MINN. L. REV. 623 (1993) (discussing the limited utility of the reliability or evidentiary dimension of Confrontation Clause analysis). Now that's a real problem.
85. For recent scholarship applying heavily theoretical approach to evidence law, see Symposium, New Perspectives on Evidence, 87 VA. L. REV. 1491 (2001).
counter the pull of the "wisdom" of tradition, there simply is no reason to believe the Advisory Committee can change the tide.

Finally, many, if not most, of Professor Rice's Evidence Project suggestions, could be placed more in the middle of the spectrum of practicality. These suggestions may have some merit, but ignore the political and practical implications of the amendments. For example, Professor Rice suggests an amendment to Rule 704(b) to clarify its application. Rule 704(b) is commonly referred to as "The Hinckley Amendment" because it was passed by Congress as part of the Insanity Defense Reform Act of 1984 shortly after John Hinckley, Jr. was found not guilty by reason of insanity in his criminal trial for shooting President Ronald Reagan, Press Secretary James Brady, and two others. Rule 704(b) expressly precludes experts from testifying that a criminal defendant had a particular mental state necessary to commit a crime or which constitutes a defense. However, as Professor Rice notes, the drafting of Rule 704(b) is ambiguous. Who is encompassed by the term "experts?" Professor Rice wonders whether lay witnesses are also prevented from testifying on a criminal defendant's mental state, although lay witnesses are not expressly mentioned in Rule 704(b). Other commentators agree with Professor Rice that Rule 704(b) is poorly drafted, but differ as to the nature of the ambiguity, concluding that the real problem is whether the rule was intended to constrain only mental health experts. One of these commentators is Professor Dan Capra, the current Reporter to the Evidence Rules Advisory Committee and one of Professor Rice's targets. Professor Capra has pointed out the difficulty the courts have had applying Rule 704(b) in cases where law enforcement experts will testify that a criminal defendant possessed narcotics with intent to distribute them rather than for personal use. As Professor Capra and others have

87. FED. R. EVID. 704(b) provides:
   (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
88. Rice, Advisory Committee, supra note 3, at 820 n.9.
89. Id. at 839, 842 n. 61.
90. Capra, Case Law Divergence, supra note 77, at 8 (citing United States v. Gastiaburo, 16 F.3d 582, 587-88 (4th Cir. 1994) (Rule 704(b) does not apply to bar the testimony of an expert law enforcement agent)); United States v. Williams, 980 F.2d 1463, 1466 (D.C. Cir. 1992) (allowing the prosecution to avoid the Rule 704(b) problem by having the law enforcement expert testify about the intent of a hypothetical defendant, matching the facts of the actual case). See also Dana R. Hassin, Note, How Much is Too Much? Rule 704(b) Opinions on Personal Use v. Intent to Distribute, 55 U. MIAMI L. Rev.
pointed out, there are really two problems with Rule 704(b), its
application beyond mental health experts and, more seriously, that
the Rule "requires the jury, as the finder of fact, to reach a
conclusion as to the defendant's mental state without the benefit of
the most useful testimony the expert could offer." These concerns
seem far more serious than Professor Rice's concern over lay
witnesses testifying on a criminal defendant's mental state; many trial
judges would exclude lay witness testimony on the mental condition
of a criminal defendant as beyond the personal knowledge of a lay
person. In his larger work, The Evidence Project, Professor Rice and
his associates do note the problem of law enforcement expert
testimony on criminal intent that Professor Capra discusses, but the
Evidence Project's solution is just to eliminate Rule 704(b) because:

The Hinckley amendment to current Rule 704(b) was an over-
reactive, ill- conceived, political response to what some might find
an embarrassing moment in our criminal jurisprudence. The
solution to that problem lay in judicial restrictions on the
presentation of psychiatric testimony, not the resuscitation of an
outmoded common law doctrine that was never fully understood or
consistently applied. Accordingly, Revised Rule 704 abolishes
subsection (b)—returning the Rule to its original content.

Professor Rice's "solution" overlooks the fact that this provision
was promulgated and added directly by Congress, by-passing the
Court's rulemaking process. How realistic is it that the Federal
Rules of Evidence Advisory Committee, even if supported by the
Standing Committee, the Judicial Conference and the United States
Supreme Court, could effectively tell Congress to go where the sun
never shines? Professor Rice appears to have forgotten that under
the rulemaking process his revisions would be required to follow,
Congress has the final word.

A similar criticism about the lack of sensitivity to political and
practical considerations can be leveled at the Evidence Project's
suggestion that Rules 413-415, admitting a criminal defendant's prior

667, 667 (2001) ("It is not altogether clear that Rule 704(b) was meant to apply beyond
mental health experts.").

91. Daniel J. Capra, A Recipe for Confusion: Congress and the Federal Rules of
Evidence, 55 U. MIAMI L. REV. 691, 694 (2001) [hereinafter Capra, Congress and the
Federal Rules of Evidence] (quoting Hassin, supra note 90, at 671).
92. FED. R. EVID. 602, 701.
93. Rice, The Evidence Project, supra note 78, at 592-94.
94. Id. at 361.
95. See Hassin, supra note 90, at 670 n.18 ("Note that [Rule 704(b)] was initially
adopted by Congress with the Advisory Committee only being given the right to
2057)).
sexual conduct in cases of child sexual abuse or rape, simply be eliminated:

The new character evidence rules, Current Rules 413-15, are without precedent. They were enacted over the express disapproval of the Federal Rules of Evidence Advisory Committee, without empirical evidence of the enhanced reliability of this type of character evidence over other similar character evidence for which no specific rules have been enacted, and without demonstrated need in light of existing rules and practices. Current Rules 413-15 have been deleted, leaving the admissibility of all predisposition evidence on the question of guilt to the character evidence provisions of Revised Rules 404 and 405.96

This is all true. Moreover, there is more sustained and thoughtful criticism of Rules 413-415 in the Evidence Project's discussion of proposed revisions to Article Four of the Evidence Rules.97 Nevertheless, these kinds of arguments "stink of the lamp" of impractical legal scholarship. If all the logical, legal arguments and, perhaps more important, the persuasive power of the credibility of the Advisory Committee and the Judicial Conference could not stop Congress from directly passing Rules 413-415, how can we conclude that Congress would "overlook" an effort to eliminate those rules? Although the exact composition of Congress will always change, there is no basis for concluding that Congress would be receptive to eliminating a provision intended to get tough on crime. Defendants who are accused of heinous crimes have a poor lobby in Washington. Thus, this is not just a critique of the substance of the Evidence Project's proposals; it is a critique of the method in which the Evidence Rules are made and amended—the essence of Professor Rice's argument here and in his earlier critique of the Federal Rules of Evidence Advisory Committee.98

Eliminating rules passed directly by Congress, such as Rule 704(b) or Rules 413-415, is an impractical and impolitic suggestion. There are, however, ways of working through the problem. These methods may not be perfect. They may not eliminate all problems. They will not satisfy all the critics. But they are pragmatic and politically sensitive. For example, Professor Capra suggests that the problem of Rule 704(b) be handled by an amendment that would limit its application to "mental health" experts, while acknowledging that the Rule will still exclude potentially helpful expert testimony. In other words, the problem of overbreadth is solved, but the Rule

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96. Rice, The Evidence Project, supra note 78, at 364.
97. Id. at 473-90.
98. Rice, Advisory Committee, supra note 3; Rice & Delker, supra note 3.
still prevents the trier of fact from hearing potentially helpful testimony. Professor Capra argues:

The reason this proposal is more "politically" palatable is because it can be pitched as an amendment that restores Rule 704(b) to its originally intended scope, i.e., as a limit on psychiatric testimony such as that in the Hinckley case. As such, it is not such a slap in the face of Congress. It can even be pitched as correcting the courts' misinterpretation of what Congress must have, in its infinite wisdom, intended.°

Here, Professor Capra illustrates the problem of the practical evidence scholar, that is, one who would like to see his or her scholarship actually implemented. Professor Capra cannot afford the luxury of pure theorizing; he has to think about what can be "pitched." Moreover, as Reporter to the Advisory Committee, he has role constraints, ones that he has discussed candidly:

I am only the Reporter; I can't get the Advisory Committee to do anything. Issues for the Committee are generated by suggestions from judges, lawyers, and academics, and from the Advisory Committee members themselves. The Reporter's role is to assist the Committee with background research, to provide drafting alternatives, and to prepare the Advisory Committee Note. Reporters who conceive themselves as members of the Committee they serve usually do not serve very long.°°

We have no reason to doubt Professor Capra's view of his role. Nonetheless, I understand Professor Rice's frustration with Professor Capra's perspective. He would like to see the Reporter, and the rest of the members of the Advisory Committee, exercise influence and leadership to correct and strengthen the Evidence Rules. However, as Professor Capra can testify, Professor Rice is barking up the wrong tree. When change is viewed as necessary, the influence and leadership will have to come from the top—the Judicial Conference, the Supreme Court and those members of Congress who will listen to them.

I admire the amount of research and analysis Professor Rice and the other members of his Evidence Project have done, but sometimes it is more effective to pick one's battles than to try a full frontal assault, especially where one has an uphill fight with an inherently cautious judiciary making the key decisions on which rules to change. It is somewhat maddening to hear the circularity of the arguments. Professor Rice argues that changes to the rules through the rulemaking process are impossible unless the Advisory Committee is

100. Id.
101. Id. at 701-02.
willing to begin the process. The former Advisory Committee members point out that it is senseless to begin a change that will not be approved by the Judicial Conference.\textsuperscript{102} Professor Rice responds that there is no hope of a change unless the Advisory Committee tries to push for change with the Judicial Conference. Students of rhetoric know that when you want someone to take action, but that person just digs deeper in place, it is time for a new strategy.\textsuperscript{103}

\textsuperscript{102} As Judge Fern Smith pointed out, there are actually three judicial hurdles for the Advisory Committee, even when they agree that a rule change is essential—the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, the Judicial Conference and the Supreme Court. Transcript, Symposium, \textit{The Politics of [Evidence] Rulemaking}, 53 HASTINGS L.J. 733, 738 (2002).

\textsuperscript{103} Any Minnesotan understands this problem as the “stuck in the snowbank” scenario. If your car is stuck in a snowbank, you only hurt yourself by hitting (or “gunning”) hard on the gas pedal. You hear a terrible whine as you sink your car deeper and deeper into whatever rut you are in. The best way to deal with the problem is to get out of the car and provide some additional traction under the wheel in the rut—a blanket, sand, kitty litter (yes, people do use it) whatever you can find that might work. Then, back in the car, gently “rock” the car by slowly and cautiously alternating between gentle surges on the gas pedal. Soon you will nudge yourself out of the snowbank. If there are other Minnesotans around, you can ask them to help rock the car out of the rut. You must still be gentle with the gas pedal, or you will spew dirty snow in the faces of your helpers. It is good to enlist help; you might be freed faster than if you work alone. I'm certain that this parable is clear without further explanation.

There is an odd link, actually, between the state of Minnesota and the law of evidence. Some of the greatest evidence scholars and teachers have Minnesota ties. Edmund M. Morgan, a member of the original Civil Rules Advisory Committee and the Reporter to the ALI Model Rules of Evidence project practiced law in Duluth, Minnesota for seven years before joining the Law Faculty at the University of Minnesota. \textit{See} Mason Ladd, \textit{Edmund M. Morgan—In Memoriam}, 79 HARV. L. REV. 1546 (1966). Other evidence “greats” who have taught at the University of Minnesota include Ronan Degnan, Arthur Miller, Roger C. Park, Maynard Pirsig and Charles Alan Wright. Professor Daniel J. Capra, the current Reporter to the Federal Rules of Evidence Advisory Committee, grew up in Minnesota, as did Gregory P. Joseph, evidence scholar, litigator and former member of the Advisory Committee. The link becomes even stranger if one considers Minnesota as part of a “Midwestern School of Evidence:” John Henry Wigmore (WIGMORE’S CODE OF EVIDENCE; Dean, Northwestern University Law School); James William Moore (MOORE’S FEDERAL PRACTICE; Chair of the 1961 Study of Federal Evidence Rules Advisability and Feasibility Study; J.D. University of Chicago); Professor Edward Cleary (Reporter, Original Federal Rules Advisory Committee; University of Illinois); and Professor Mason Ladd (Professor, University of Iowa Law School).

Professor Michael Ariens has traced the linkage between legal Progressivism (characterized by the values of efficiency, expertise and progress) and the development of evidence rules. Ariens, \textit{supra} note 34, at 222-23. \textit{See also} 21 WRIGHT & GRAHAM, \textit{supra} note 6, § 5005, at 77-89 (tracing the Progressivist roots of the ALI Model Code). It would be an interesting project to trace the influence of Progressivism, which had its roots in the Midwest, on the work of these evidence scholars. Then again, there could just be something in the water.
Professor Rice, while understandably frustrated by his inability to persuade the Advisory Committee of the need for change, turned to Congress for the solutions to these evidentiary problems but believes that he was frustrated there by Congress’s lack of interest in the rulemaking process.\footnote{104} However, as the discussion of Rule 704(b) and Rules 413-415 demonstrate, the problem is not Congress’s lack of interest in rulemaking. Congress clearly has an interest in the evidence rules when it suits a political constituency.\footnote{105} Indeed, the essential problem with Congressional involvement in rulemaking is that the judicial branch does not appear to have the influence it ought to have with Congress on the subject of federal rules of practice and procedure, as it does with the rules of evidence.

Professor Robert Bone has examined similar problems with the rulemaking process from the perspective of the Civil Rules. Using research on public choice theory, he argued that the legislative process makes it an especially difficult place for procedural rulemaking:

In public choice theory, legislators further their own self-interest and respond to interest groups insofar as those groups make credible promises or threats to reward or punish, such as promising campaign support or threatening to support opponents. Interest groups have conflicting interests, however, and one common way legislators manage the conflict is through logrolling. The typical logrolling scenario involves a deal between two legislators, each eager for the other to support a project that benefits politically powerful constituents.

Logrolling is not necessarily inefficient, but it becomes so when collective action problems prevent some interested groups from organizing and thus participating in the legislative bargain. Under those circumstances, externalities often plague policy decisions, because organized groups with political power have incentives to secure legislation that benefits themselves at the expense of unorganized and less powerful groups.\footnote{106}

Professor Bone notes that the kind of constituencies involved in procedural rulemaking are the most susceptible to the problems presented by the legislative process:

For example, plaintiffs have strong interests in procedure, but they are extremely difficult to organize. Transaction costs and free-rider

\footnote{104} Transcript, supra note 102, at 741-42.
\footnote{105} Another recent example of Congressional “interest” in rulemaking has been Congressional efforts to amend Rule 702 on expert testimony. In one of the few recent victories for the Rules Committee process, these Congressional efforts were headed off, at least for the time being, by the Advisory Committee’s proposals to amend Rules 701, 702, and 703, which were approved April 17, 2000, and became effective on December 1, 2000.
\footnote{106} Bone, supra note 5, at 922.
problems create substantial obstacles for a group so widely dispersed. Moreover, prospective plaintiffs who have not yet been injured have little incentive to invest in securing procedural rules that would benefit them only in the event of serious injury. And because most plaintiffs are one-shot litigants, even those with lawsuits pending are not likely to care much about rule reform, as their suits will probably terminate before any rule change takes effect.

It is true that there are organized groups that represent plaintiffs. But those groups tend to focus selectively on particular kinds of litigation, such as civil rights, and their interests do not necessarily match the interests of all their constituents. Bar groups, such as the American Trial Lawyers' Association, represent the interests of plaintiffs to some extent, but lawyer incentives are sufficiently different from client incentives that bar groups cannot be trusted always to represent plaintiffs faithfully. Because of these collective action problems, therefore, legislative rulemaking is likely to be plagued by inefficient logrolling.\(^{107}\)

Professor Bone's analysis looks only to the Federal Rules of Civil Procedure. The collective action problems become compounded in the evidence context, where rules are not only expected to be transubstantive within the civil realm, but also between the civil and the criminal realms. For example, Congressional efforts to amend Rules 702 on expert testimony were clearly "stacked" toward the interests of civil defendants. Commentators were highly critical of a House bill that was part of the 1992 Republican "Contract With America" tort reform package; the House bill would have limited the admissibility of expert testimony in civil cases, but not criminal cases.\(^{108}\)

Professor Jonathan Macey argues that court rulemaking is no less distorted by public choice considerations.\(^{109}\) Professor Bone responds

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107. Id. at 922-923.
108. Nancy S. Farrell, Comment, Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert v. Merrell Dow Pharmaceuticals, Inc., 13 J. CONTEMP. HEALTH L. & POL'Y 523 (1997); David L. Faigman, Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony, 35 WASHBURN L.J. 401, 404 (1996) (criticizing the 1995 House Bill [H.R. 988]'s for limiting scrutiny of scientific evidence to civil cases, thus allowing prosecutors to use "junk science"). Although H.R. 988 was introduced in the Senate, it was not considered during the session. Subsequent legislation to amend Rule 702 was reintroduced in both the House (Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 903, 105th Cong. §4 (1997) and Senate (Civil Justice Fairness Act of 1997, S. 79, 105th Cong. § 302), but no action was taken on these provisions while the Evidence Rules Advisory Committee drafted amendments to Rules 701, 702 and 703 that were approved by the Judicial Conference, promulgated by the Supreme Court, and went into effect untouched by Congress, effective December 2000. .
that, although some logrolling can be expected because, Congress has the last word under the Rules Enabling Act,\textsuperscript{110} the degree of inefficiency is much lower under the court rulemaking and should be far less than under a pure legislative model of rulemaking:

[I]nefficient logrolling is less likely in a court-based rulemaking process which relies on a committee system. Because the Advisory Committee has control over a limited range of subject matter, court rulemaking involves a much narrower policy space and thus a smaller region over which trades can be made. Moreover, vigorous logrolling is likely only if rulemakers are strongly allied with distinct constituencies—an unlikely scenario for a committee composed mainly of federal judges. To be sure, interest groups can trade with one another directly. A corporate group, for example, might agree not to oppose a class action amendment favored by a civil rights group in return for the civil rights group agreeing not to oppose a strict sanctions rule. But here too, opportunities for compromise are limited by the confined policy space as well as by the more limited opportunities for agenda manipulation.\textsuperscript{111}

Professor Bone concludes that public choice analysis does not, however, produce a "ringing endorsement" of court rulemaking because:

The conditions that frustrate logrolling in the committee setting—rulemaker incentives and a limited policy space that together make compromise difficult—are also a recipe for stalemate. In addition, rulemakers who seek to satisfy interest groups will tend to focus on rules capable of garnering consensus. As we have seen, these rules often include highly general discretionary standards that give

Professor Macey argues that federal judges will adopt rules that maximize their private utility, understood as a function of preferences for leisure time, prestige, and power to make decisions that advance private conceptions of the public good. Macey predicts that judge-rulemakers with these incentives will support procedural rules that maximize trial judge control over litigation, because rules of this sort provide numerous opportunities for advancing judicial self-interest in individual cases. The resulting procedure, he concludes, is likely to be inefficient because of externalities.

\textit{Id.} at 923.

\textsuperscript{110} \textit{Id.} at 923 (citing Macey).

[A] public choice analysis should treat court rulemaking as a strategic game among the Advisory Committee, Congress, and the various interest groups. Self-interested rulemakers faced with the threat of congressional intervention should be willing to make concessions to powerful interest groups in order to maintain some control over the rulemaking process. Thus, interest groups should have influence over rulemaking, though their influence will be limited by the costs of successful lobbying in Congress.

\textit{Id.} at 924.

\textsuperscript{111} \textit{Id.} at 924-925.
competing interest groups a chance to wage their battles in individual suits.\footnote{112}

Although he sees the committee rulemaking system as flawed, Professor Bone concludes that it is the best of the procedural rulemaking options.\footnote{113} An analysis of the most appropriate rulemaking process is beyond the scope of this Article, but Professor Bone's application of the insights of public choice theory to procedural rules suggests some rather compelling reasons why Professor Rice should not look to Congress to solve the problems he identifies.

**B. Professor Kenneth Broun: To Codify or Not to Codify (Federal Privileges)?**

Professor Kenneth Broun, an experienced member of the rulemaking process, discusses a very different problem with federal rulemaking than the issues raised by Professor Rice. As noted in Part I of this Article, the law of privilege was left to the federal courts to develop under the common law system. Professor Broun has generated an eloquent argument on the many good reasons it may now be time to codify the federal law of privilege.\footnote{114} However, as Professor Broun notes, the Rules Enabling Act, as amended, expressly provides for a unique twist regarding the creation of privilege law; instead of having the obligation to act affirmatively to amend or reject rules promulgated by the Advisory Committee, the Judicial Conference and the Supreme Court, those committees and the Court serve merely as drafting agents of proposed legislation, which Congress must then enact. This raises two issues for Professor Broun: 1) is codification still desirable under this system and 2) if so, are there lessons to be learned from the past that can aid the process of this codification?

As discussed in Section A above, Congress has not been good to the Evidence Rules and this bodes ill for Professor Broun's project. During the panel discussion, Panelist and former Evidence Rules Advisory Committee member Gregory P. Joseph expressed a well-founded concern about opening the door to Congress to codify privilege law.\footnote{115} He suggested that members of Congress are likely to stuff the Evidence Rules with privileges favored by all sorts of special

\footnote{112. \textit{Id.} at 925.}
\footnote{113. \textit{Id.} at 925-26. He suggests clarifying the norms underpinning the rulemaking process as a means to developing professional standards to guide rulemaking in the future. \textit{Id.}}
\footnote{115. Transcript, \textit{supra} note 102, at 755.}
interest groups. Although there are probably worse things than creating an “aromatherapist-client” privilege at the urging of a particular special interest group, one can reasonably ask whether we would be better off with a federal common law of privilege? Should we just leave the development of privilege law to “be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience?”

The question of a common law formulation versus a codification of evidence law is an old one, dating back to the earliest efforts at codifying American evidence law. However, the essential problem is, as Professors Wright and Graham noted, a Catch-22: “If the rules were advocated because they would change the law, then opponents would object to the changes; if the reformers insisted the Rules simply restated the existing law, the other side replied: then who needs them?” Professor Broun’s codification project will face the same objections. Will a code of privilege law actually present fewer bases for interpretation, argument, and the resulting uncertainty? Although codification offers the chance for clarity and uniformity, could not well-drafted federal judicial opinions offer the same benefits?

There is no question that the common law rulemaking process moves even more slowly and conservatively than the rule-amendment process, but there have been strong arguments made that the rulemaking process should move slowly. Indeed, although Professor Rice believes that the rulemaking process moves too slowly, some have argued that it is moving too fast. Moreover, there will be an uphill battle to counter Professor Capra’s point regarding rule amendments: “If the courts are surviving with [a] rule as they appear to be, however unhappily, the benefits of a rule change are unlikely to outweigh the costs. This is not to speak of the costs of upsetting settled expectations that come with any rule change.” Professor Broun argues that codification is especially important in the context of privilege law because the certainty and predictability of a code

116. Id.
117. FED. R. EVID. 501.
118. The title of this section is a variation on Barbara Salken’s fine history of New York’s efforts to break away from a common law system of evidence. Barbara C. Salken, To Codify or Not to Codify—That Is The Question: A Study of New York’s Efforts to Enact an Evidence Code, 58 BROOK. L. REV. 641 (1992).
119. 21 WRIGHT & GRAHAM, supra note 6, § 5005, at 92.
120. Capra, Case Law Divergence, supra note 77, at 531.
121. 21 WRIGHT & GRAHAM, supra note 6, § 5009, at 11 n.13 (Supp. 2001) (observing that amendments to the Evidence Rules are coming along as often as the swallows to Capistrano).
supports the societal value of confidentiality underlying most privileges.\textsuperscript{123} He notes that: "The more predictable one's entitlement to privacy is, the more secure one can feel in exercising that privacy."\textsuperscript{124} If, as Professor Broun points out, Congress "likes privileges, better than do the courts,"\textsuperscript{125} and is ready to listen to its constituents on proposed specific privileges,\textsuperscript{126} we might expect that changes to privilege law could happen far more often than is advisable given the costs of unsettled expectations and unpredictability.

On the positive side, it is possible that public choice theory would support the privilege codification project, whereas it does not tend to support the efficiency of judicial rulemaking through the Rules Enabling Act process. As Professor Broun notes, privilege rules would have to be passed and amended as most other types of legislation because of the requirements of the Rules Enabling Act.\textsuperscript{127} Thus, the awkward three-way dance among Congress, the Judicial Conference, and interest groups, which contribute to the inefficiency of judicial rulemaking, is eliminated when the judiciary's power is taken out of the equation, except as potential drafters of proposed legislation. Moreover, the wide range of substantive interests reflected by privilege law allow for far more effective Congressional "logrolling" of conflicting interests.\textsuperscript{128}

Nevertheless, despite many of these same issues and objections, the Federal Rules of Evidence were eventually and successfully codified. The problems noted above with the privilege codification project are not insurmountable, practically or politically. One of the key components of its success, however, is the stewardship of someone like Professor Broun, who not only has the scholarly intellect to accomplish the project but also has substantial experience in the rulemaking context, adding the power of his personal experience to the mix. For example, contrast his approach in the article in this issue of the Hastings Law Journal—a modest and solid argument that it is time to build on the strengths of the previous treatment of federal privilege law while avoiding the pitfalls of the last effort at codification—with Professor Morgan's announcement to the Bar of the "radical" reform posed by the Model Code.\textsuperscript{129} Like Professor Capra, Professor Broun understands that he must softly

\begin{align*}
123. & \text{Broun, supra note 114, at 797.} \\
124. & \text{Id. at 798} \\
125. & \text{Id. at 778} \\
126. & \text{Id.} \\
127. & \text{Rules Enabling Act, 28 U.S.C. 2074.} \\
128. & \text{Bone, supra note 5, at 922.} \\
129. & \text{Ladd, supra note 103.}
\end{align*}
"pitch" reform—not shove it down the throat of the decision-makers. Professor Broun understands the constraints of his role and has floated this proposal for codification to test the waters. He is the right person for the job, even if the job is a difficult and thankless task.

C. Gregory P. Joseph: Are the Evidence Rules Especially Substantive Rules of Procedure?

Panelist, former Evidence Rules Advisory Committee member, litigator, and trial lawyer Gregory P. Joseph argued that the Evidence Rules have drawn more flak than other rules of procedure, probably because the Evidence Rules are more substantive than other procedural rules. Mr. Joseph suggested that even some rules, such as Rule 407, which prohibits evidence of subsequent remedial measures when offered to prove negligence, are not concerned with the law of privilege. He pointed out that the Evidence Rules are heavily outcome-determinative and do, in fact, affect substantial rights of litigants. Thus, the Advisory Committee is simply not going to jump at every chance to amend the Evidence Rules, and alter or upset those expectations. He stressed that the Advisory Committee takes the limitations imposed by the Rules Enabling Act responsibility quite seriously. This process of careful deliberation bears out Professor Ronan E. Degnan’s suggestion that the federal courts have upheld the validity of the federal rules not "because wise men made them, but because wise men thought carefully before making them."

As discussed in Part I of this article, it was in part concern over the legitimacy of the proposed Evidence Rules under the Rules Enabling Act that led to Congress’s intervention and affirmative adoption of the original Evidence Rules as legislation. Professors Wright and Graham suggest that had the Evidence Rules been adopted through the Rules Enabling Act process, they would have been susceptible to challenge on whether they exceeded the authority of that statute. This is due to the special substantive quality of rules

130. Broun, supra note 114.
131. Transcript, supra note 102, at 750-51.
132. Id. at 750.
134. Justice Douglas dissented from the Supreme Court’s transmittal of the proposed Evidence Rules on the grounds that the rules were beyond the Court’s rulemaking power. See 21 WRIGHT & GRAHAM, supra note 6, § 5006, at 104, 109 n.96 (“If the Rules had been adopted by the Supreme Court, they would be open to challenge on whether they exceeded the Enabling Act.”). See Hanna v. Plumer, 380 U.S. 460 (1965) (“Since they were adopted by Congress, they can only be attacked on constitutional grounds.”). Where
of evidence. Indeed, there are cases holding that a state rule of evidence, rather than the federal Evidence Rule, must be applied in a federal court sitting under diversity of citizenship jurisdiction because of countervailing state substantive policies. These cases may be open to criticism under the Supreme Court's decision in *Hanna v. Plumer*, holding that where an arguably procedural federal rule is in direct conflict with a state rule of procedure, the federal rule must be applied unless the federal rule is unconstitutional. Professors Wright, Miller, and Cooper take a rather black or white approach to the problem, stating that:

The Evidence Rules are not subject to the Rules of Decision Act or (unlike the Rules of Civil Procedure) to the Rules Enabling Act. Their validity is governed solely by the Constitution, but since all of the Rules of Evidence can be viewed rationally as rules of procedure (the constitutional standard announced in *Hanna v. Plumer*), they all clearly are constitutional.

This statement is correct as far as the original "package" of Evidence Rules goes. However, several Evidence Rules, including Rule 407, have been amended pursuant to the Rules Enabling Act process since the rules were originally legislated by Congress. If these amendments are viewed as encroaching on significant state substantive policies, their validity may not be as clear. Moreover, the treatise authors note that sometimes there is ambiguity as to whether a federal rule conflicts with the state rule:

potential tension between federal and state policy appeared especially strong, Congress specifically stated that state evidence law should apply on presumptions (Rule 302), privilege (Rule 501), and competency (Rule 601) when state law provided the rules for decision.

135. See Hottle v. Beech Aircraft Corp., 47 F.3d 106 (4th Cir. 1995) (holding that in a products liability action, defendant's internal manuals were properly excluded under Virginia evidence law even though the manuals would be admissible under the Federal evidence rules); Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990) (holding that Massachusetts rule authorizing the admissibility of evidence of out-of-court settlements is substantive and thus must be applied over the contrasting approach of FED. R. EVID. 408). See also Milbrand v. DaimlerChrysler Corp., 105 F. Supp. 2d 601 (E.D. Tex. 2000) (holding, on an issue of first impression, that Texas statute prohibiting defendant from introducing evidence of seat belt nonuse in civil trials is substantive, rather than procedural, and thus, must be applied in diversity case; granting plaintiff's motion to strike testimony of defense expert on consequences of nonuse of seat belt; evidence of nonuse of seat belt by driver was not admissible even for limited purpose of proving causation or negating proximate cause); Morton v. Brockman, 184 F.R.D. 211 (D. Me. 1999) (holding that Maine statute excluding evidence of nonuse of seat belts is substantive, not procedural, and applies in diversity cases over relevant federal evidentiary rules).


the decision between state and federal evidence rules in diversity cases is more complicated when no Federal Rule of Evidence explicitly addresses the issue at hand. For instance, when state law would exclude evidence that the Federal Rules would admit, it is more difficult to identify a controlling provision of federal law.\(^{138}\)

The treatise concludes that Rule 402, the general principle that all relevant evidence is admissible unless the Constitution, an Act of Congress, or a rule of procedure excludes the evidence, is such a controlling provision and should be applied rather than a state evidence rule.\(^{139}\) However, the treatise also acknowledges the broad and general scope of Rule 402.\(^{140}\) It seems plausible that if faced with a diversity of citizenship action in which there is a state evidence rule on point embodying a substantial state policy, as well as a very general federal rule, a federal court might find a way to apply the state evidence rule—whether it argues that it must (under *Erie* or *Hanna*) or it argues that it makes good sense to do so, given concerns for federalism.

The special "substantive" quality of the Evidence Rules, however, suggests a slightly different question: if there are limits to what the Advisory Committee, the Judicial Conference and the Supreme Court can do in terms of creating and amending the Evidence Rules, are there limits to what Congress can do in directly legislating such rules? The only limit appears to be the Constitution, but it is hornbook law that a rule of procedure, properly enacted under the Rules Enabling Act, has never been held unconstitutional.

But this could change. It is also hornbook law that "neither Congress nor the federal courts can, under the guise of formulating rules of decision for the federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law."\(^{141}\) We may have seen a sneak preview of problems to come. In 1994, the Advisory Committee drafted an amendment to Federal Rule of Evidence 412, commonly called "the Rape Shield statute," which precludes the admissibility of evidence of prior sexual conduct by a sexual assault complainant except under certain conditions and certain procedural safeguards. The 1994 amendment applied the exclusionary provisions of Rule 412 in civil cases, as well as criminal cases.\(^{142}\) Rule 412 was not part of the original "package" of Evidence Rules passed by Congress,

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138. *Id.*
139. *Id.*
140. *Id.*
142. *Fed. R. Evid.* 412(a), (b)(2), advisory committee's notes.
and was directly enacted by Congress in 1978, three years after the original rules went into effect. Although the amendment extending Rule 412 to civil cases was approved by the Standing Committee and the Judicial Conference, the Supreme Court refused to transmit it to Congress, stating that it feared the provision would alter the substantive rights of litigants. Congress nevertheless reinserted the provision as drafted by the Advisory Committee as part of the Violent Crime Bill. Thus, the Supreme Court dodged the question of whether the provision was within its powers under the Rules Enabling Act. But what is the constitutional ground upon which Congress could enact a provision such as Rule 412? If the rule is so substantive that the Supreme Court believes it would not have the power to promulgate it as a rule of procedure, can it really be said to be "Necessary and Proper" to carry out Congress's power to "To constitute Tribunals inferior to the supreme Court?" Does Article III, § 2, which gives the federal courts the power to hear cases between citizens of different states, also carry the power to determine the rules of evidence that apply in those cases? Or is this the kind of substantive provision, unjustifiable under an enumerated constitutional power, that is "reserved to the States" under the tenth amendment? The Supreme Court has been focused on the constitutionality of its own conduct since its decision in *Erie Railroad Company v. Tompkins*. If Congress gets carried away in its enthusiasm to directly enact rules of evidence that are "especially substantive," perhaps the Court will be willing to scrutinize the constitutional basis for such legislation. But then again, maybe not. In the meantime, Mr. Joseph's comments raise a legitimate and serious rationale for the Advisory Committee's preference to act slowly and cautiously in altering any of the Evidence Rules.

**D. Laird Kirkpatrick: Problems of "Representation" in the Rulemaking Process**

Professor Laird Kirkpatrick provided powerful insights into problems of "representation" in the rulemaking process. As a former representative of the Department of Justice to the Evidence Rules Advisory Committee, he understood that representation does not necessarily come with the luxury of speaking with one voice on behalf of one's constituency. Professor Kirkpatrick revealed substantial division of opinion in the Department of Justice on various issues before the Evidence Rules Advisory Committee. Although the study

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145. *Id.*
of the rulemaking process tends to focus on the Advisory Committee, the Judicial Conference, the Supreme Court and the Congress, we tend to forget that the Executive Branch has a strong voice, but it can be muffled by internal conflicts over proposed rules or amendments. The history of the Evidence Rules reveals that the Department of Justice has had a very powerful influence on the development of the Rules, one that is likely to continue, given the Department's significant amount of civil and criminal litigation.

E. Judge Fern Smith: The Buck Stops Here With a Trial Judge

Judge Smith, a former member and Chair of the Evidence Rules Advisory Committee, was an interesting figure on the panel. No one on the panel, even veteran trial lawyer Greg Joseph, has participated in more trials or dealt with more evidence issues than Judge Smith, who has served as a trial judge on the California Superior Court and the United States District Court for the Northern District of California. She embodies the kind of intelligence, balance and practicality that one hopes to find in the judiciary, both federal and state.

Trial judges are the infantry soldiers of the judiciary. They tend to be predominantly cautious, conservative—preferring to follow orders rather than striking out on their own. They are on the front lines, dealing with new and unforeseen problems before anyone else has an opportunity to think them through. But they are grounded in realities of modern life—and in court, that means the need to render speedy but fair evidentiary rulings, even when the Evidence Rules are not perfect.

Judge Smith is certainly not a "Hippie" (or the modern day equivalent—a "crit," I suppose), but nor is she a judge out of the "law as a brooding omnipresence" school of legal formalism. She is a realist. She is from the Hart & Sacks Legal Process school of "reasoned elaboration." Adherents of "reasoned elaboration" understood that the application of a general legal principle, embodied in a rule or statute, meant negotiating the path between "the rigors of a perfected rule, on the one hand, and the looseness of unbuttoned

146. I have a former colleague, who shall go unnamed for his protection, who always advises his students to aim for federal appellate clerkships. He promises the thrill and excitement of working on "the cutting edge of the law." He has never satisfactorily responded to my observation that trial judges work on "the cutting edge." Courts of appeal at least have the trial court's solution to the problem to ponder.

discretion, on the other." In declining to endorse a slavish adherence to the "plain meaning" approach to interpreting evidence rules, Judge Smith acknowledged that English, even the carefully considered language of the Evidence Rules, is seldom plain. However, she also consistently stressed the importance of avoiding the creation of additional interpretative problems by altering the language of rules—unless there is a demonstrated need for change and a practical solution to be found. In other words, when Judge Smith argues, "if it ain't broke, don't fix it," I do not understand her to say, as some apparently do, that she thinks the Evidence Rules are perfect as they are. I understand her to say that perfection is not the point (except, perhaps, in the eyes of law professors). I hear her say that the goal of the evidence rulemaking process is to produce a reasonably clear set of Evidence Rules that can generally be applied with some flexibility but with as little confusion and as much consistency as is possible in the human and imperfect world of the trial.

In order to allow a trial judge such as Judge Smith to do her job, Professors Hart and Sacks argued, she must be given ample discretion. "Discretion is a vehicle of good far more than of evil. It is the only means by which the intelligence and good will of a society can be brought to bear directly on the solution of hitherto unsolved problems." She understands that the drafters of the Evidence Rules built a substantial amount of discretion into those rules in order to "empower," in the cliche of today's world, trial judges to deal with the new or unforeseen or case-specific problems they encounter. The job function of the trial judge is to use that discretion wisely.

And Congress needs to let trial judges do their jobs without undue interference. However, there is a disturbing development in the politics of evidence law that needs to be discredited if trial judges are permitted to use their discretion properly. Federal courts are well into the struggle to apply new Evidence Rules 413-415, which permit the admission of evidence of a defendant's prior sexual conduct, for any purpose, in criminal sexual assault and child molestation cases and in civil cases raising such allegations. For a time, there was some question whether Rules 413-415 mandated the admissibility of this evidence, or whether it is subject to exclusion under Rule 403, when

148. Id. at 162.
149. See Transcript, supra note 102 at 767.
150. Id. at 767-68.
151. HART & SACKS, supra note 147, at 179.
152. Ariens, supra note 34, at 252-53 (arguing that reasoned elaboration, as the jurisprudential basis for the Federal Rules of Evidence, led the drafters to endow the trial judge with substantial discretion).
“the probative value of the evidence is substantially outweighed by
the danger of undue prejudice, confusion of the issues, or misleading
the jury, or by considerations of undue delay, waste of time, or
needless presentation of cumulative evidence.” All of the courts
that have considered this issue, have held that evidence falling under
Rule 413-415 may be excluded under Rule 403.

Nevertheless, there is a highly disturbing trend among the courts
of appeal to question whether Rule 403 should be applied “liberally”
to give effect to the strong congressional intent in Rules 413-415 to
allow evidence of a defendant’s prior sexual conduct.

One of the most recent and dramatic cases suggesting that Rule
403 should be applied differently when evidence is offered under
Rules 413-415 is Johnson v. Elk Lake School District. In this
opinion by the Chief Judge of the Third Circuit Court of Appeals,
Edward R. Becker, the court held that the trial court did not abuse its
discretion in excluding evidence of an alleged prior sexual assault by
the defendant. The plaintiff, a former high school student, sued her
former guidance counselor and the school administration under §
1983 and state tort law for allegedly sexually harassing and abusing
her. At the trial against the counselor, plaintiff attempted to offer
testimony from a former co-worker of the counselor. She would have
tested that on one occasion, the counselor had picked her up,
thrown her over his shoulder, and put his hand up her skirt, touching

153. FED. R. EVID. 403
154. See, e.g., Doe by Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)
(rejecting claim that Rule 415, which allows for introduction of prior sexual misconduct in
civil sexual assault or child molestation cases, eliminates balancing protections of Rule
403); United States v. Enjady, 134 F.3d 1427, 1430-35 (10th Cir. 1998) (Rule 403 applies to
evidence offered under Rule 413); United States v. Larson, 112 F.3d 600, 605-606 (2d Cir.
1997) (Rule 403 applies to evidence offered under Rule 414).
155. See, e.g., United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (“the courts
are to ‘liberally’ admit evidence of prior uncharged sex offenses” under Rule 414;
holding that based on legislative history, “there is no time limit beyond which prior sex
offenses by a defendant are inadmissible”) (citations to legislative history omitted); United
States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997) (reversing, as an abuse of discretion,
district court’s decision under Rule 403 to exclude evidence of prior sexual conduct by
defendant, “to give effect to the decision of Congress, expressed in recently enacted Rule
414, to loosen to a substantial degree the restrictions of prior law on the admissibility of
such evidence”); United States v. Withorn, 204 F.3d 790, 794 (8th Cir. 2000) (holding that
“the district court was obligated to take into account Congress’s policy judgment that Rule
413 was ‘justified by the distinctive characteristics of the cases it will affect,’ and that Rule
414 evidence is ‘exceptionally probative’ of a defendant’s sexual interest in children”).
156. 283 F.3d 138 (3d Cir. 2002).
157. Id. at 159.
158. Id. at 144.
The district court judge expressed concern that there was insufficient evidence that this prior act was intentional, which would be required to make it "an offense of sexual assault" under state law, thus making Rules 413(d) and 415 applicable. Rule 415 makes admissible in a civil case evidence of "a party's commission of another offense or offenses of sexual assault" as defined under Rule 413(d). Despite the district court's statements on the record about whether the prior conduct alleged would fall under the definition of a "sexual assault," the court of appeals concluded "that what the Court really did was to engage in a kind of balancing exercise" under Rule 403.

The court of appeals then engaged in an extensive discussion of the standards that apply when evidence is offered under Rules 413-415. After examining the legislative history of these rules, the court of appeals concluded that the trial court "may admit the evidence so long as it is satisfied that the evidence is relevant, with relevancy determined by whether a jury could reasonably conclude by a preponderance of the evidence that the past act was a sexual assault and that it was committed by the defendant" under Rule 104(b), following the United States Supreme Court decision in Huddleston v. United States. In a rather unusual argument, the court of appeals used, as evidence of legislative intent to follow Huddleston in interpreting Rules 413-415, a speech by David J. Karp, then a Department of Justice official and the author of Rules 413-415, delivered at the annual AALS Evidence Section meeting and later reprinted in a law journal! The court of appeals concluded that this speech/law review article could serve as legislative history because Representative Susan Molinari and Senator Robert Dole, the principle sponsors of Rules 413-415, "declared in their floor statements supporting the new rules" that the speech/law review article "was to serve as an 'authoritative' part of the Rules' legislative history." However, the court of appeals concluded that because the

159. Id. at 149.
160. Id. at 150.
161. Id.
163. Johnson, 283 F.3d at 154-55 (citing David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 CHI.-KENT L.REV. 15 (1994)). At the time he delivered his talk, Karp was then Senior Counsel at the Office of Policy Development at the Department of Justice. Id. at 150.
164. Id. at 154 (citing 140 CONG. REC. 23,602 (1994) (statement of Rep. Molinari); 140 CONG. REC. 24,799 (1994) (statement of Sen. Dole)). Chief Judge Becker noted that while "relying on the work of a non-legislator is a somewhat unusual method of establishing legislative history, it is not entirely unknown." Id. at 155 n.10. He cited two other instances, where law review articles have been used both as the basis for and to
district court had apparently decided to exclude the evidence of the prior act offered in this case under Rule 403 (even though the trial court never mentioned Rule 403, let alone *Huddleston*), the trial court properly dispensed with the *Huddleston* analysis.\(^{165}\)

But the court of appeals went further. Because he concluded that the district court had apparently ruled on Rule 403 grounds, Chief Judge Becker took the opportunity to set forth the appropriate approach a trial court should take in applying Rule 403 to Rules 413-415. He again turned to David Karp's speech/law review article "as part of the 'authoritative' legislative history of Rules 413-15."\(^{166}\) He cited Karp's work as evidence that when evidence is offered under Rules 413-415, Congress intended that the probative value of the evidence should normally not be outweighed by the considerations listed in Rule 403.\(^{167}\) However, Chief Judge Becker went on to refine Karp's analysis, because "in our view, this characterization of the role of Rule 403 is overly simplified."\(^{168}\) Chief Judge Becker concluded that in some cases, evidence offered under Rules 413-415 is entitled to a presumption of admissibility, but in other cases, it is not:

> We think that in cases where the past act is demonstrated with specificity and is substantially similar to the act(s) for which the defendant is being sued, it is Congress's intent that the probative value of the similar act be presumed to outweigh Rule 403's concerns. In a case such as this one, however, in which the evidence of the past act of sexual offense is equivocal and the past act differs from the charged act in important ways, we believe that no presumption in favor of admissibility is in order, and that the trial court retains significant authority to exclude the proffered evidence under Rule 403.\(^{169}\)

Chief Judge Becker concluded that this case, in which he repeatedly quotes the district court as expressing doubt about whether the prior act could even qualify as a "sexual assault" under Rules 413 and 415,\(^{170}\) is not a case where a presumption of admissibility should apply because the evidence regarding the prior

\(^{165}\) Id. at 157.
\(^{166}\) Id. at 155.
\(^{167}\) Id. at 156.
\(^{168}\) Id.
\(^{169}\) Id. at 144.
\(^{170}\) Id. at 158 n.17.
incident was "equivocal" and because the alleged prior assault differed from the alleged assault in the case at hand in at least three different ways.\textsuperscript{171} Thus, he concluded, the district court did not abuse its discretion in excluding testimony about the alleged prior assault.\textsuperscript{172}

I am hesitant to criticize an opinion by a judge as experienced and knowledgeable about the law of evidence as Chief Judge Edward R. Becker, who has done more perhaps than any other federal judge to reform the law of evidence.\textsuperscript{173} Nonetheless, the Johnson opinion is very troublesome because it diminishes the trial court's exercise of discretion under Rule 403 at the same time it purports to respect and uphold that discretion by discussing a "presumption" of admissibility of Rule 413-415 evidence that was not even at issue under the facts as discussed by the court of appeals.\textsuperscript{174} The Johnson opinion has done serious damage to the power of the trial court to weigh the individual circumstances of particular cases before it. Chief Judge Becker's refinement of Karp's proposal (arguing for a "presumption" of admissibility only in certain cases) demonstrates that Karp's analysis was not "authoritative," in the sense of "binding" on the court of appeals. The Chief Judge's analysis of the application of the
Huddleston standard implied that, although he would have preferred a different rule (Rule 104(a) rather than Rule 104(b)), he had little choice but to accept Karp's views. Although I agree with Chief Judge Becker that the legislative history shows that Karp and the main sponsors of Rules 413-415 wanted to remove as many obstacles to the admissibility of this evidence as possible, I do not agree that Chief Judge Becker was bound to follow that secondary interpretative material, if he could make a sound argument—as he did—that there are serious problems with such an approach. Putting aside the question of whether any kind of legislative history, let alone a law review article based on a convention talk, is “authoritative” rather than merely “persuasive,” Chief Judge Becker's analysis also ignored the express limitation of subsection (c) in the text of each of Rules 413-415; subsection (c) is identical in each rule, providing that the rule “shall not be construed to limit the admission or consideration of the evidence under any other rule.” The Chief Judge needed to explain why the legislative history deserved more weight than the text of Rules 413-415 themselves.

Moreover, it simply makes no sense to speak of a presumption of admissibility when Rule 403 is applied to evidence being considered under Rules 413-415. Rule 403 is already “tilted” in favor of admissibility; there is no need to graft on an additional “Congressional” presumption of admissibility in the context of Rules 413-415. Rule 403 specifically states that the evidence, whether offered under Rules 413-415 or otherwise, “may be excluded if its probative value is substantially outweighed” by the dangers listed under Rule 403. The word “substantially” tilts the balance of Rule 403 toward admissibility. The drafters of the 1990 amendment to Rule 609(a)(1) understood this when they altered the rule to create two balancing tests. As with Rules 413-415, evidence of a prior conviction used to impeach a witness is inherently prejudicial—there

175. Id. at 154.
177. FED. R. EVID. 413(c), 414(c), 415(c) (emphasis added).
178. FED. R. EVID. 403 (emphasis added).
179. The 1990 amendment was made to cure the ambiguity under former Rule 609, which was raised in Green v. Bock Laundry Machine Company, 490 U.S. 504 (1989). In that case, the plaintiff was a prisoner in a work-release project who was injured on the job. He brought a products liability action against the manufacturer of a dryer, but was impeached with his prior felony convictions because the prior version of Rule 609 only permitted balancing when the conviction was offered to impeach “the defendant.” If the case arose today, the plaintiff's prior conviction would be balanced under Rule 403, because he was a witness “other than the accused.”
is a danger that the jury will make a decision based solely on past acts rather than on the evidence in the case at hand. However, ordinary Rule 403 balancing applies when the witness to be impeached with a prior conviction is not the accused in a criminal action. A more protective balancing test applies to criminal defendants who take the stand; a prior conviction (of the sufficient seriousness) can only be used to impeach the accused if the probative value of the conviction outweighs its prejudicial effect.169

If Congress truly intended a special balancing rule for evidence offered under Rules 413-415, it could have said so. If Congress intended for evidence to be admissible under Rules 413-415 regardless of Rule 403, it could have said so. But Congress did nothing in Rules 413-415 to alter the normal application and interpretation of Rule 403. If, on reviewing the subsequent treatment of evidence offered under Rules 413-415, Congress believes the federal courts are not admitting this evidence when they should, I have no doubt that Congress will change the application of Rule 403.

Other appellate courts have also attempted to set forth guidelines for trial courts to consider in applying Rule 403 to evidence of prior sexual misconduct by a defendant. There is a palpable difference between these cases, however, and cases such as Johnson, in which the appellate court actually attempts to apply Rule 403 balancing on behalf of the district court.181 In United States v. LeMay,182 the Court of Appeals for the Ninth Circuit recently held that evidence of prior sexual misconduct admitted under Rule 414 did not violate the defendant's fundamental right of due process where the district court applied the Rule 403 balancing test "conscientiously" and on the record so as to permit "meaningful appellate review."183 The court set forth a number of factors that a

180. FED. R. EVID. 609(a)(1) (balancing tests apply "if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted"). Cf. United States v. Wong, 703 F.2d 65, 68 (3d Cir.), cert. denied, 464 U.S. 842 (1983) (no balancing of probative value and prejudicial effect is allowed when a conviction for a crime of "dishonesty or false statement" is offered under Rule 609(a)(2)).

181. See also United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (holding that: "In light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, we think the District Court erred in its assessment that the probative value of [evidence of an alleged prior act of misconduct by the defendant] was substantially outweighed by the danger of unfair prejudice."). The appellate court reversed the District Court for an abuse of discretion in applying Rule 403, despite the trial court's record of balancing the lack of similarity between the prior act and the charged offense and the remoteness and unfair prejudice of the other act. Id. at 770.

182. 260 F.3d 1018 (9th Cir. 2001), cert. denied, 122 S.Ct. 1181 (2002).

183. Id. at 1022. Accord United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) ("application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed
The trial court must consider when putting Rule 413-415 evidence under the "microscope" of Rule 403. Relying on its earlier decision in Doe by Rudy-Glanzer v. Glanzer, the LeMay court listed the following considerations:

1. "the similarity of the prior acts to the acts charged," 2. the "closeness in time of the prior acts to the acts charged," 3. "the frequency of the prior acts," 4. the "presence or lack of intervening circumstances," and 5. "the necessity of the evidence beyond the testimonies already offered at trial." We also stated that this list of factors is not exclusive, and that district judges should consider other factors relevant to individual cases.

Because the Ninth Circuit had not decided Glanzer at the time of LeMay's trial, the appellate court carefully reviewed the factors considered by the trial judge and concluded that "the record reveals that he exercised his discretion to admit the evidence in a careful and judicious manner." It is true that evidence of a party's prior sexual misconduct will generally be abhorrent to the average juror and may tempt the juror to decide the case at hand on improper grounds—such as raw emotion or a desire to avenge past acts—rather than on the evidence in the case at hand. These, of course, are only some of the reasons why members of the federal judiciary, bar, and legal academy fought so hard against Rules 413-415. Nonetheless, Rules 413-415 are now the law. But this does not mean that those Rules are entitled to special treatment under Rule 403. "Dangerous," "misleading," "confusing," or "time-consuming" evidence offered under Rules 413-415 may be excluded under Rule 403 only when it "substantially outweighs" the probative value of such evidence, which the proponents of Rules 413-415 suggest is generally significant. The crucial point is that this is the kind of case-specific, fact-intensive balancing process that the drafters of Rule 403 thought should be left to the one impartial expert in the courtroom—the trial judge. While he agreed with the LeMay majority's holding that Rule 403 balancing should apply to Rules 413-415, Judge Paez dissented from the majority's holding that the trial court did not abuse its discretion in

See also United States v. Enjady, 134 F.3d 1427, 1430-35 (10th Cir. 1998) (Rule 413 is constitutional if Rule 403 protection stays in place); United States v. Mound, 149 F.3d 799, 800-802 (8th Cir. 1998); United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000).
admitting evidence of a prior act of sexual misconduct, reminding the
majority of the limited role of the appellate court in reviewing
evidentiary decisions:

Although the majority undertakes a thoughtful Rule 403 analysis, I
believe that decision is better suited to the district court. Appellate
courts have long recognized that we should give great deference to
the evidentiary decisions of district courts. "The trial court in the
exercise of its discretion is more competent to judge the exigencies
of a particular case." (citation omitted) In this case, the district
court is in a far better position than we to assess the intangibles that
are not conveyed well by a cold transcript: the persuasiveness of
the young victims' testimony; the success of defense counsel's
efforts to undermine their credibility; and the probative value the
presentation of prior conviction would have had in the absence of
the mother's testimony.188

Judge Paez argued that the appellate court should have reversed and
remanded the case so that the trial court could consider and balance
the Glanzer factors on the record.189

Finally, the life-tenure of federal judges provides a powerful
reason why appellate courts should not usurp the trial court's
discretion under Rule 403 by recognizing a "presumption" of
admissibility under Rules 413-415, even if it applies only in some
cases.190 By not creating a special balancing test for Rules 413-415 or
prohibiting the application of Rule 403 balancing, it is plausible that
members of Congress realized that federal district court judges, who
do not have to run for re-election, would retain the discretion to make
the hard calls—the decisions to exclude evidence in situations where
it will be politically unpopular, but legally and practically correct to
do so. Congress did its work in passing Rules 413-415. The appellate
courts should respect the discretion of trial judges such as Judge Fern
Smith, leaving them alone to do what they do best.

Conclusion

The topic of "rulemaking" connotes a civilized discussion of
neutral principles. The topic of "politics" connotes a contentious and
vigorous battle between policy choices and personal perspectives.
The 2002 AALS Evidence Section panel on "The Politics of

188. Id. at 1034 (Paez, J., concurring and dissenting).
189. Id.
190. In Johnson, Chief Judge Becker argued that this presumption would apply only
"where the past act is demonstrated with specificity and is substantially similar to the
act(s) for which the defendant is being sued." Johnson v. Elk Lake Sch. Dist., 283 F.3d
138, 144 (3d Cir. 2002). Moreover, he recognized that "a policy of mandatory admission,
particularly in the criminal context, has been thought to raise serious constitutional
concerns under the Due Process Clause." Id. at 155 n.12 (citations omitted).
[Evidence] Rulemaking" captured, in my biased view, the best of both terms. The panelists vigorously disagreed on several points, based on personal or professional experience, philosophy, and policy preferences. Nonetheless, as willing as they were to engage each other in pointed discussion, the panelists maintained their civility: no blows were struck, no chairs were tossed, no "Jerry Springer" bouncers were required.

In listening to (or reading) the panel discussion, one sees that the process of confrontation—the heart of the adversary system for which the Evidence Rules were designed—does not need to be a destructive process and may have value independent of producing some kind of universal and objective "truth." I seriously doubt that any of the participants were persuaded by their opponent(s). I also doubt that many of the audience members were moved from the positions that led them to attend this particular panel. Nonetheless, the fact that these panelists took the time to put forth their critical differences in a public forum demonstrates respect for the rulemaking process in which they are involved. It is always easier to decline to speak, to walk away rather than to confront your opponent(s). No matter what substantive conclusions one draws from analyzing "The Politics of [Evidence] Rulemaking," one must concede that the participants in the process are first-class.