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Do We Really Need the Federal Rules of Evidence

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DO WE REALLY NEED THE FEDERAL RULES OF EVIDENCE?

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I. INTRODUCTION

The Federal Rules of Evidence have been in place for more than twenty years.[1] Since their inception, the Federal Rules have received some intense criticism. Within the past decade, the Litigation and Criminal Justice Sections of the ABA and a number of academics and judges have identified a wide range of developing problems with the Federal Rules of Evidence.[2] However, despite these problems, there has been no major overhaul of the rules, as has occurred, for instance, with the Federal Rules of Civil Procedure. Only six substantive amendments to the rules have been made.[3]

In response to some of the criticism, the United States Judicial Conference formed an Evidence Advisory Committee, consisting of respected judges, practitioners, and academics.[4] The committee has been charged with the responsibility of reviewing and recommending amendments to the Federal Rules of Evidence.[5]

A sufficient amount of time has elapsed since codification so that an assessment of the Federal Rules would now be appropriate. Have the Federal Rules worked as planned? Do we really need rules of evidence? Are there alternatives which would work better? This paper begins with a discussion of how the Federal Rules came into being. Next, the strengths and weaknesses of the Federal Rules are discussed. Several alternatives to the Federal Rules are then explored: 1) no rules of admissibility, the system which presently exists in France; 2) limited rules of admissibility,

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1. The Federal Rules of Evidence became effective on June 1, 1975. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 858 (1992).

2. *See* Becker & Orenstein, *supra* note 1, at 858-59.

3. *Id.* at 859.

4. The Advisory Committee on Evidence Rules was constituted in 1993. The chair of the committee is U.S. Circuit Judge Ralph K. Winter, Jr. The members of the committee are U.S. Circuit Judge Jerry E. Smith, U.S. District Judges Fern M. Smith and Milton I. Shadur, Court of Claims Judge James T. Turner, Chief Justice of the Supreme Court of Georgia Harold G. Clarke, Professor Kenneth Broun of the University of North Carolina School of Law, and practicing attorneys Gregory P. Joseph and James K. Robinson. The Committee also includes two liaison members, U.S. Magistrate Wayne D. Brazil and Professor Stephen A. Saltzburg. Information concerning the committee was provided by the committee's reporter, Professor Margaret A. Berger of the Brooklyn Law School.

5. This information was also provided by Professor Margaret Berger.

the system utilized presently by the Germans; and 3) evidence rules which are more detailed than the Federal Rules.

There will then be an assessment as to which of the four possibilities—no evidence rules, limited rules, more detailed rules, or the present system—is most desirable. Included in this assessment will be the views of some federal judges who were surveyed for this paper. Finally, some recommendations which may make the system more workable will be offered.

II. PRE-FEDERAL RULES HISTORY

Before the Federal Rules were codified, rules of evidence in both state and federal courts were created by judicial decisions.[6] This was due primarily to the fact that attempts at codification had failed and existing federal law was of little help in making evidence rulings.

There were numerous efforts to codify evidence law prior to the adoption of the Federal Rules. First, Dean Wigmore wrote an early code in 1909. His code proved to be unworkable because it was too detailed.[7] In 1939, the American Law Institute began work on the Model Code of Evidence which was published in 1942.[8] However, since the Model Code was highly technical and contained many radical changes to the existing law of evidence, such as giving great discretion to the trial judge,[9]

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6. *See* RONALD CARLSON ET. AL., EVIDENCE IN THE NINETIES 21 (3d ed. 1991).

7. *See* J. WIGMORE, CODE OF EVIDENCE (1909).

8. CARLSON, *supra* note 6, at 22.

9. In his foreword to the Model Code, Professor Edmond M. Morgan, the project's reporter, wrote that:

> [t]he proposed Code leaves no room for doubt as to the power of the trial judge. His historic role as master of the trial is restored. He has complete control of the conduct of the trial. . . . [H]e is to see to it that the evidence is presented honestly, expeditiously and in such form as to be readily understood: to this end he regulates in his discretion such matters as the order in which evidence is to be offered and witnesses are to be called, the number of witnesses to be called for a single term, the conduct of counsel in examining witnesses, the manner and scope of examination and cross-examination, the use of leading questions, of memoranda to refresh recollection, and of maps, models, diagrams, summaries and other devices for making testimony readily understandable, and production of available documents on demand. And he may of his own motion exclude evidence which would be inadmissible if a proper objection were made or a proper claim of privilege interposed.

AMERICAN LAW INST., MODEL CODE OF EVIDENCE 13-14 (1942).

opposition to it was fierce[10] and the Model Code was not adopted in any jurisdiction.[11]

Next, the National Conference of Commissioners on Uniform State Laws undertook an alternative code, and in 1953 the Conference unanimously approved the proposed Uniform Rules of Evidence.[12] Despite the fact that they were endorsed by the American Bar Association, the Uniform Rules met with only slightly greater success than the Model Code.[13] By 1971, the Uniform Rules had only been adopted in Kansas, New Jersey, and Utah.[14] Finally, in 1965, a fourth codification, the California Evidence Code was enacted by the California legislature.[15] It was generally considered a success and was used as a vehicle for making modifications in the common law tradition.[16]

As mentioned earlier, existing federal law was also of little help in determining the admissibility of evidence. In civil cases, the applicable provision was then Rule 43(a) of the Federal Rules of Civil Procedure which provided in pertinent part that:

> evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.[17]

This rule was unhelpful because there were few federal statutes governing the admissibility of evidence and it was difficult to determine the evidence rules in federal equity cases.[18] Federal courts, therefore, tended to follow the evidence law as it existed in the state in which it sat.[19]

In criminal cases, the situation was no better. Then Rule 26 of the Federal Rules of Criminal Procedure provided that "the admissibility of

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10. The following quote by the California Committee to the Governors of the State Bar is typical:

> [T]he Code seeks to destroy the foundation upon which our for the administration of justice is founded and substitute an entirely new theory . . . . The Code proceeds upon the theory that all the wisdom and learning of the past is to be discarded; that the rights of parties are no longer to depend upon settled rules of law of evidence but upon the view of the individual judge.

Stephen A. Saltzburg, *The Federal Rules of Evidence and the Quality of Practice in Federal Courts*, 27 CLEV. ST. L. REV. 173, 178 (1978).

11. *See* CARLSON, *supra* note 6, at 22.
12. *See id.* at 22.
13. *See id.* at 22-23.
14. *See id.* at 23.
15. *See* C. MUELLER & L. KIRKPATRICK, EVIDENCE UNDER THE RULES 4 (3d ed. 1996).
16. *Id.* at 4.
17. CARLSON, *supra* note 6, at 23-24.
18. *See id.* at 24.
19. *Id.*

evidence . . . shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[20] The standard set forth in Rule 26 also proved to be of little help in creating uniform and consistent rules of evidence. It merely encouraged the development of a reasoned body of federal law.[21]

III. CODIFICATION OF THE FEDERAL RULES

Chief Justice Earl Warren appointed a Special Committee on Evidence in 1961.[22] The committee was charged with the task of determining "whether uniform rules of evidence for the federal courts were advisable and feasible."[23] A year later, the Committee issued a preliminary report for review by the bench and bar.[24] The response was "favorable."[25] The Special Committee issued a final report, "concluding that federal evidence rules were feasible and desirable."[26]

The report was submitted to the United States Supreme Court for approval and in March of 1965, Chief Justice Warren announced the appointment of an Advisory Committee to prepare a draft of the rules of evidence.[27] The Committee's preliminary draft of the Federal Rules of Evidence was published and circulated to the legal profession for comment in March of 1969.[28] After receiving comments on the proposed rules, the draft was revised.[29] That draft was approved by the Judicial Conference and forwarded to the United States Supreme Court in 1970.[30] After some additional changes, the Supreme Court approved the rules on November 20, 1972 and authorized the Chief Justice to transmit them to Congress.[31]

As a result of congressional opposition,[32] the rules were not approved by Congress until December of 1974 and became law when the

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20. *Id.*
21. *Id.*
22. *Id.* at 23.
23. *Id.*
24. *Id.* at 24.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. 409 U.S. 1132 (1972). Justice William O. Douglas was the lone dissenter. He doubted whether rules of evidence were in the purview of the statute under which the Court had authority to submit rules. *Id.* at 1132. He was also concerned that the Court did not write the rules and was a mere conduit to Congress for their promulgation. *Id.* at 1133. Finally, he believed that the development of the law of evidence is best left to a "case-by-case development by the courts or by Congress." *Id.* at 1132.
32. CARLSON, *supra* note 6, at 25.

bill was signed by then President Gerald Ford.[33] The rules took effect on July 1, 1975.[34] However, to ensure that it would continue to have supervisory power over the rules, Congress also passed a law which gives either house of Congress veto power over the newly proposed rules.[35]

IV. CODIFICATION: THE CASE IN FAVOR

The most powerful argument in favor of codification of the Federal Rules is that they promote uniformity.[36] In addition to the federal courts, thirty-five states, Puerto Rico, and the armed services have adopted a version of the Federal Rules.[37] In construing their state codes, courts in these jurisdictions tend to interpret their own rules similar to the manner in which federal judges interpret the Federal Rules.[38] Even in the states that have not adopted a code, the rules are influential. For instance, the Federal Rules are sometimes treated as persuasive authority,[39] or a particular Federal Rule will be incorporated into a particular state's common law of evidence.[40]

Uniformity, according to the proponents of the Federal Rules, is crucial because it helps to promote justice. A major proponent of this view is Professor Stephen Saltzburg.[41] According to Professor Saltzburg,

> prior to the adoption of the Federal Rules of Evidence, every practicing lawyer knew that when he or she walked into a courtroom, having by lot drawn one particular judge, that judge's own set of evidence rules was likely to be employed. The same lawyer knew that when chance assigned another judge to a case, a different set of evidence rules might well be employed . . . . In some jurisdictions there were probably almost as many sets of evidence rules as trial judges.[42]

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33. *Id.* at 25-26.
34. *Id.* at 26.
35. *Id.*
36. *See* Margaret A. Berger, *The Federal Rules of Evidence; Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 258-59 (1984).
37. *See* MUELLER & KIRKPATRICK, *supra* note 15, at 3 n.2.
38. *See id.* at 27.
39. *Id.*
40. *Id.*
41. *See generally* Saltzburg, *supra* note 10.
42. *See* Saltzburg, *supra* note 10, at 189.

Professor Saltzburg believes that codification has largely rectified this problem.[43]

A second argument in favor of codification is that it has improved the quality of the bench and the bar.[44] According to the proponents:

> the bench has improved because codification has forced judges to talk to each other about rules of evidence and how they should be applied. As a result of discussion and thought about the Federal Rules, judicial rulings on evidence are likely to be better and more informed than in pre-codification days.[45]

Proponents also believe that the bar has improved as a result of codification.[46] Codification and the requirement by many states that lawyers receive Continuing Legal Education credit ensure that lawyers will continue to study the rules and will keep abreast of new developments concerning the Federal Rules. This has resulted in lawyers who are more knowledgeable about the evidence rules.[47]

Next, there is the "pocket bible" argument in favor of codification.[48] According to this argument:

> [N]o matter how well a lawyer prepares, in many situations points of evidence law will arise during trial and will not have been anticipated. When that happens, the lawyer needs to be able to research the point quickly, or at least to fall back on a body of law that is readily accessible,

given that during the middle of trial or deposition, there is little time for research or reflection.[49] The Federal Rules of Evidence is such a body of law and affords both the lawyer and judges easy access to the law.[50]

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43. Professor Saltzburg points out:

> What the Federal Rules of Evidence establish is that the words "Equal Justice Under Law," chiseled in stone on the front of the Supreme Court Building, are now chiseled into everyday reality in every federal trial court in the nation. No longer will there be two, three or ten sets of evidence rules depending on the number of judges that happen to sit on a given bench. To the extent that we can do it and make it work, there will be one set of evidence rules that will be applied uniformly throughout the United States . . . . Litigants rich or poor, wise or unwise, represented by retained counsel or by appointed lawyers, all will know that the same evidence rules apply to each of them. This is no small step in the march toward equal justice.

Saltzburg, *supra* note 10, at 190.

44. *See* Berger, *supra* note 36, at 258.
45. Saltzburg, *supra* note 10, at 186.
46. *Id.* at 186-87.
47. *Id.* at 186.
48. *Id.* at 184-85.
49. *Id.* at 184.
50. *Id.* at 184-85.

Finally, proponents argue that codification leads to better decisions because more evidence is made available to the trier of fact and the trial judge is given sufficient discretion to do justice in a particular case.[51]

V. CODIFICATION: THE CASE AGAINST

A. UNIFORMITY

In declining to adopt the Federal Rules of Evidence, the Supreme Judicial Court of Massachusetts concluded:

> [P]romulgation of rules of evidence would tend to restrict the development of common law principles pertaining to the admissibility of evidence. The valid objective of uniformity of practice in Federal and State courts would not necessarily be advanced because the Proposed Rules, in their present form, depart significantly from the Federal Rules of Evidence. Additionally, in the view of some of the Justices, the Federal Rules of Evidence have not led to uniform practice in the various Federal courts and are, in some instances, less well adapted to the needs of modern trial practice than current Massachusetts law.[52]

B. JUSTICE?

Opponents of codification question whether the Federal Rules really do promote justice as Professor Saltzburg so strongly asserts.[53] A case can certainly be made that the Federal Rules invest too much discretion in the trial judge,[54] and that as a result, litigants are no better able to predict the admissibility of evidence under the Federal Rules than they were able to do so prior to the Federal Rules.

Furthermore, certain classes of litigants face bias as a result of the Federal Rules. Almost every Federal Rule of Evidence grants discretion to the trial judge in admitting and excluding evidence. Several do so outright.[55] Others permit the trial judge to balance the probative value

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51. *See* Berger, *supra* note 36, at 269-70.

52. *See* MUELLER & KIRKPATRICK, *supra* note 15, at 5 (detailing the announcement of the Judicial Court of Massachusetts concerning the Proposed Massachusetts Rules of Evidence (December 30, 1982)). The announcement went on, however, to suggest that the proposal being rejected had "substantial value as a comparative standard" and that parties may "cite the Proposed Rules, wherever appropriate, in briefs and memoranda." *Id.*

53. *See generally* Saltzburg, *supra* note 10.

54. *See* Richards S. Walinski & Howard Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 367-86 (1978) (articulating the argument against the proposed Ohio Rules of Evidence which were modeled after the Federal Rules of Evidence).

55. Federal Rules 102, 103, 403, 404, 412, 609, 611, 614, 701, 702, 703, 705, 706, 803(6), 803(8), 803(24), 804(b)(5), and 1003 give enormous discretionary power to trial judges. *See* Saltzburg, *supra*

of the evidence against its potential prejudicial effects.[56] Even those rules which appear to be clear are often vague at the margins.[57] Furthermore, the harmless error rule enhances trial court discretion by directing the appellate courts to give the trial court room to be wrong without incurring reversal.[58] The enormous discretion given to trial judges may substantially undermine the predictability rationale of the rules.[59]

Opponents of codification further believe that discretion undermines the justice rationale of the rules. They point to studies, such as those performed by Professor Eleanor Swift, which demonstrate that certain classes of litigants achieve greater success in getting their evidence admitted than their adversaries.[60] Professor Swift analyzed the successful use of certain hearsay evidence[61] by prosecutors, criminal defendants, civil plaintiffs, and defendants.[62] In criminal cases, she found that prosecutors were successful in seventy-four percent of the cases in which they attempted to offer hearsay evidence.[63] In contrast, criminal defendants were successful twenty-one percent of the time.[64]

In civil cases, civil plaintiffs, frequently "underdogs seeking to change the status quo,"[65] were successful fifty-four percent of the time[66] whereas civil defendants, "who generally represent more established economic and societal interests,"[67] were successful in admitting hearsay

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note 10, at 190. Furthermore, the United States Supreme Court has increased the trial judge's control over the admission and use of expert witnesses with its decisions regarding the rules. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-95 (1993).

56. *See, e.g.*, FED. R. EVID. 403.

57. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 446 (1989).

58. When an appellant raises an evidentiary error, Fed. R. Evid. 103 requires the reviewing court to consider: (1) whether an erroneous ruling in admitting or excluding evidence was made below; (2) whether this error was appropriately brought to the trial court's attention, either by objection or offer of proof; and (3) whether a substantial right of a party was affected. If the court finds that no substantial right of a party was affected, even though error occurred, it will not reverse and will term the error "harmless." *See* Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). As a result of the harmless error rule, trial judges' evidentiary rulings are rarely reversed. *See* Margaret A. Berger, *When if Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893 (1992).

59. *See, e.g.*, Mengler, *supra* note 57, at 457.

60. Eleanor Swift, *The Hearsay Rule at Work: Has it Been Abolished DeFacto by Judicial Decision*, 76 MINN. L. REV. 473, 482-84 (1992).

61. *Id.* at 475. The categories of hearsay selected for study were Rules 803(1)-(4) and 803(6). *Id.*

62. *Id.* at 481.

63. *Id.*

64. *Id.*

65. *Id.* at 483.

66. *Id.*

67. *Id.*

evidence sixty-five percent of the time.[68] Critics of codification might use these statistics to buttress their argument that justice has not been achieved in the courtroom as a result of the Federal Rules.[69]

C. IMPROVEMENT OF THE BENCH AND BAR?

As to the argument that codification has improved the performance of the bench and bar, opponents would respond that there hasn't been any measurable improvement in either and would point to the fact that complaints concerning the competency of lawyers have dramatically increased since codification.[70]

D. POCKET BIBLE?

Opponents of codification might concede that the Federal Rules are easily accessible to lawyers at trial but given the discretion judges are accorded and the ambiguities of many of the rules, accessibility probably has not made a measurable difference in the courtroom.

E. MORE EVIDENCE?

As to the contention that the trier of fact has been able to arrive at better decisions because more evidence is available to them, opponents would respond that the linking of discretion and liberality is misplaced since trial judges, given so much flexibility, may exclude as easily as admit evidence.[71]

F. POOR DRAFTSMANSHIP AND APPLICATION

Another strong argument against codification is that the rules of evidence were poorly drafted and that as a result they have led to incorrect and unjust application and that these problems undermine the justification for the Federal Rules.

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68. *Id.* at 481.

69. *Id.* at 483. However, Professor Swift provides as an explanation for this disparity the fact that both criminal defendants and civil plaintiffs seek to admit their own statements as hearsay more often and that these self-serving statements were precisely the type of statements that the hearsay rule was designed to exclude. *Id.* at 486.

70. *See* Berger, *supra* note 36, at 261. However, it should be noted that this increase in complaints could be attributed simply to the fact that since codification the number of lawyers has dramatically increased.

71. *See* Mengler, *supra* note 57, at 413.

As a result of the drafting problems, numerous rules need to be revised. One such rule is Rule 407.[72] This rule excludes evidence of subsequent remedial measures as evidence of wrongdoing.[73] The rule makes no mention of its applicability in products liability actions. Federal appeals courts have split on the question of whether the rule applies in product liability cases.[74]

The rule excluding character evidence[75] is also in need of revision. First, it should be made clear that the rule applies to civil, as well as criminal cases. Second, every exception to the rule should be articulated.[76] Finally, an assessment of section (b) of this rule is needed.[77] Section (b) allows evidence of a party's prior crimes, wrongs and acts to be admitted for almost any purpose other than to prove propensity. These prior bad acts are admissible as long as "the jury can reasonably conclude that the act occurred and that the defendant was the actor."[78] Section (b) has enabled prosecutors to present highly prejudicial

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72. Rule 407 provides:

> When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

73. *Id.*

74. *See* Becker & Orenstein, *supra* note 1, at 893-94.

75. Rule 404(a) provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
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> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

FED. R. EVID. 404(a).

76. For instance, an exception to the rule is contained in Rule 405(b) for cases in which character is an essential element of the charge, claim, or defense. *See* FED. R. EVID. 405(b).

77. Rule 404(b) as amended provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

78. Huddleston v. United States, 485 U.S. 681, 689 (1987).

evidence of other alleged wrongdoing by criminal defendants. As a result, it has received an enormous amount of scholarly criticism[79] and generates more appeals than any other rule.[80]

Rule 412, the rape shield statute,[81] has a couple of flaws. First, the rule does not permit the prosecution or victims in civil cases to introduce evidence of the victim's sexual history.[82] Since the rule was enacted for the purpose of protecting alleged victims of sexual misconduct,[83] there is no reason why the prosecution or victim should not be allowed to introduce such evidence when it would buttress the victim's credibility.[84] Also, the rule makes no provision as to prior "false" allegations of

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79. Numerous proposals to reform section (b) have been made. Among the many suggestions are proposals to: (1) amend Rule 404 to restore the clear-and-convincing standard, *see Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 330 (1988); (2) amend section (b) to burden prosecutors with showing that probative value outweighs prejudice, *see* Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1497 (1985); (3) pay more attention to the issue of fairness to the accused since the general propensity argument cannot be effectively refuted even though it may not be right in any particular case, *see* Gilen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 611 (1985); and (4) admit only those prior acts that are distinguished by their unusual nature or regular occurrence so they really do show "predisposition to behave in a similar fashion under similar circumstances," *see* Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 886-89 (1982).

80. *See* MUELLER & KIRKPATRICK, *supra* note 15, at 488.

81. Rule 412 as amended provides in pertinent part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
>
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

FED. R. EVID. 412

82. *Id.*

83. *See* FED. R. EVID. 412 advisory committee note.

84. Some state rules permit the prosecution to offer such evidence. *See, e.g.*, CAL. EVID. CODE § 1103(a)(2) (West 1995).

sexual assault by the victim. Guidance is needed as to whether such prior allegations are admissible and under what circumstances these allegations are to be considered "false."[85]

The residual hearsay exceptions[86] are also crying out for either abolition or revision. These exceptions permit the introduction of an out-of-court assertion even though the hearsay does not fit within a class exception upon a showing that the statement has circumstantial guarantees of trustworthiness.[87] Trial judges have undermined the legislative intent by routinely admitting hearsay, such as grand jury testimony, which was specifically excluded from the admission as a hearsay exception.[88] As one commentator has correctly stated: "[T]he drafters never intended that a trial judge admit hearsay under the residual exception whenever he believed it necessary and reliable or true. Rather, only hearsay comparable to the hearsay permitted under a specific exception was to be admitted."[89]

Rule 410, which governs plea bargaining in criminal cases, also needs revision. The rule is vague on the question of whether plea discussions with agents for the prosecutor are protected[90] and whether the government's plea discussions with the defendant are also protected.[91]

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85. According to F.B.I. crime statistics, 8.4% of all reported rapes turn out to be "unfounded." *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 275 (1994). That percentage translates into more than 8,000 false rape reports each year. *Id.* at 275. Some state rape shield statutes provide for the admission of prior false allegations of sexual misconduct and could serve as a model for the Federal Rules. *See, e.g.*, OKLA. STAT. ANN. tit. 12 § 2412(B)(2) (West 1995).

86. The residual hearsay exceptions are Fed. R. Evid. 803(24) and 804(b)(5). Federal Rule 804(b)(5) states in pertinent part:

> (B) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . (5) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence.

FED. R. EVID. 804(b)(5).

87. *Id.*

88. *See* Randolf N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 441-62 (1986).

89. *Id.* at 440.

90. Rule 410 protects from admission "any statement made in the course of plea discussions with an *attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." FED. R. EVID. 410 (emphasis added).

91. Rule 410 provides that "[e]xcept as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the *defendant*." FED. R. EVID. 410 (emphasis added).

Additional needed clarifications are: 1) whether the trial judge has the authority under Rule 403 to exclude evidence made explicitly admissible by another rule;[92] 2) the definition of "predecessor in interest" under the former testimony hearsay exception;[93] 3) the confusion created by excluding prior statements and party admissions from the hearsay rule;[94] and finally, 4) the rules governing expert testimony need to be reconciled with the United States Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals*.[95]

VI. ALTERNATIVES

Since many of the criticisms of codification appear to have some merit, at this point it is appropriate to consider some alternatives to codification. The possibilities range from the civil law system's "free evaluation of the evidence," which gives almost total discretion to the trial judge, to one which allows the trial judge almost no discretion. The civil law systems which will be considered as possible alternatives are France, which employs a system of wide open admissibility and which invests total discretion to the trial judge, and Germany, which employs a system involving a limited number of exclusionary rules with discretion for the most part remaining with the trial judge. Finally, rules of evidence which are more detailed than the present system and which attempt to divest the trial judge of any discretion will be analyzed.

A. AN OVERVIEW OF CIVIL PROCEDURE IN CIVIL LAW JURISDICTIONS

A typical civil proceeding in a civil law jurisdiction is divided into three stages:

> There is a brief preliminary stage, in which the pleadings are submitted and a hearing judge appointed; an evidence taking stage, in which the hearing judge takes the evidence and prepares a summary written record; and a decision-making stage, in which the judges who will decided the case consider

92. Federal Rule 403 excludes evidence if its probative value is substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403. However, courts are in disagreement as to whether hearsay statements which fall within the parameters of an exception may be excluded pursuant to Rule 403. *See* United States v. DiMara, 727 F.2d 265, 272 (2d Cir. 1984) (stating that hearsay evidence cannot be excluded if it satisfies an exception); United States v. Mandel, 437 F. Supp. 262 (D. Md. 1977) (stating that evidence can be excluded even though it satisfies the requirements of a specific hearsay exception).

93. Federal Rule 804(b)(1) admits testimony of an unavailable witness in a civil case if the party against whom the testimony is offered, or his predecessor in interest, possessed a similar motive and opportunity to cross examine the witness. FED. R. EVID. 804(b)(1).

94. It has been suggested that these should be made hearsay exceptions instead. *See* Rice, The Evidence Project of the American University Washington College of Law.

95. 509 U.S. 579 (1993).

the record transmitted to them by the hearing judge, receive counsel's briefs, hear their arguments and render decisions.[96]

Civil trials in civil law countries are profoundly different from their common law counterparts. First, a civil proceeding in a civil law country is "actually a series of isolated meetings of and written communications between counsel and the judge in which evidence is introduced, testimony is given and procedural motions and rulings are made."[97] In contrast, in the United States, for instance, although the series of meetings and written communications between counsel share some similarities to the discovery process, the presentation of evidence is usually concentrated in one proceeding. Second, in civil law countries, evidence is received and a summary record is prepared by someone other than the judge who will decide the case, whereas, in common law countries, the same individual performs both tasks.[98]

The handling of testifying witnesses is also a major contrast between civil and common law systems. In civil law systems, testifying witnesses are questioned by the hearing judge rather than by counsel for the parties.[99] Furthermore, witnesses are not subject to intense cross-examination as in common law systems.[100] "The hearing judge makes notes of a witness' testimony and dictates a summary to the clerk. After the witness and lawyers agree about the accuracy of the summary, the summary will enter the record that goes to the deciding panel of judges."[101] Since the deciding judges are never afforded an opportunity to observe a testifying witness' demeanor, sincerity, or recollection, and since interested witness' parties, relatives, and interested third persons are disqualified from testifying as witnesses, there is little need to discredit witnesses.[102]

There is also "free evaluation of the evidence" by deciding judges. This means that in contrast to common law systems, there are virtually no exclusionary rules of evidence.[103] This point will be discussed in greater detail later in this paper. The most likely explanation for this distinction between civil and criminal law systems is the absence of juries in civil actions in civil law jurisdictions.[104]

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96. *See* J. MERRYMAN, ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1014 (1994).

97. *Id.* at 1014-15.

98. *Id.* at 1015.

99. *Id.* at 1016. Counsel for the parties can, however, submit written questions to the judge to be asked of the witness. *Id.*

100. *Id.* at 1017.

101. *Id.*

102. *Id.*

103. *Id.* at 1018.

104. *Id.*

B. CRIMINAL PROCEDURE IN CIVIL LAW JURISDICTIONS

A civil law criminal proceeding has three stages: "the investigative phase, the examining phase, and the trial."[105] The public prosecutor conducts the investigative phase.[106] The examining phase is analogous to the grand jury proceeding or preliminary hearing in the United States. A record of all the evidence is made and then there is a determination as to whether the defendant should stand trial for the crime.[107] The defendant can refuse to answer questions during this phase.[108]

The criminal trial in civil law jurisdictions is different in character from the common law trial. In civil law jurisdictions, the main function of the criminal trial "is to present [the] evidence to the judge and jury and to allow the prosecutor and the defendant's counsel to argue their cases,"[109] whereas in common law countries a major function of the trial is to make a record for appellate review. Although witnesses, including the defendant, can be questioned, as in civil proceedings, the questions are put to the witness by the judge and there is no developed system of cross-examination comparable to common law jurisdictions.[110] Furthermore, like civil proceedings, there are virtually no exclusionary rules of evidence.[111] Although there are juries in civil law criminal proceedings, these juries are usually composed of a mixture of professional judges and lay jurors.[112]

Finally, victims in most civil law jurisdictions are permitted, but not required, to join in the criminal proceeding.[113] Although civil parties will be represented by their own lawyer, the main burden of the proceeding will fall on the public prosecutor.[114] If the defendant's guilt is established by the prosecution, the civil party only has to prove causation and damages.[115] Thus, civil law courts deal with guilt, liability, sentence, and remedy all in the same proceeding.[116]

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105. *Id.* at 1064.
106. *Id.*
107. *Id.*
108. *Id.* at 1065.
109. *Id.*
110. *Id.*
111. *See* Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 367 (1977).
112. *See* MERRYMAN, *supra* note 96, at 1066.
113. *Id.* at 1073 (noting that Germany is the exception).
114. *Id.*
115. *Id.*
116. *Id.*

1. No Rules

One possible alternative to codification is a system which employs almost no technical rules concerning the admissibility of evidence, leaving decisions concerning the admissibility of evidence totally in the hands of the trial judge. This is the system presently employed in France and in International Tribunals.

In contrast to the United States, there is no law of evidence in France.[117] French trial courts are bound by very few legal restrictions on the nature of evidence they may receive. Typical is Article 427 of the French Code of Criminal Procedure:

> [1] Except when the law provides otherwise, offenses may be established by any manner of proof, and the judge shall decide according to his thorough conviction.
> [2] The judge may found his decision only on the evidence that is brought to him in the course of the trial and discussed before him by the parties.[118]

As a result of the absence of formal rules governing the form or scope of admissible evidence, the trial judge in France has complete discretion in this regard. Thus evidence which would normally be excluded in the United States (evidence bearing on the accused's prior convictions, general behavior, family history, hearsay testimony, and documentary evidence) is freely admitted.[119] The trial judge's discretion is further enhanced by the fact that although all issues of law and fact are appealable by both the prosecution and the defense, criminal appeals in France are extremely rare.[120] The trial judge's evidentiary rulings are, therefore, for the most part final.

Several factors explain the absence of evidence rules in France. First and foremost, fact-finding in France is dominated by professional judges, not lay jurors.[121] The participation of judges in fact finding

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117. *See* RENÉ DAVID, FRENCH LAW 146 (1972).

118. *See* GERALD KOCK & RICHARD FRASE, THE FRENCH CODE OF CRIMINAL PROCEDURE 199 (rev. ed. 1988).

119. *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out and Why Should We Care?*, 78 CALIF. L. REV. 539, 677 (1990).

120. *Id.* at 682. Reasons for the infrequency of defense appeals are that they usually provoke a prosecution cross-appeal, thus permitting the defendant's sentence to be increased and the fact that the defendant will be ordered to pay costs if the court finds that his or her appeal was not well founded. *Id.* at 682 n.742.

121. *Id.* at 678. In all but one French court, verdicts are rendered by professional judges; in the Cour d'Assises, decisions are rendered by a twelve person jury, composed of three professional judges and a lay jury of nine. *See* Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 U. COLO. L. REV. 449, 449 n.2 (1989).

tends to ensure that inflammatory evidence is not misused in the deliberation process. Furthermore, in contrast to the United States, where there is a series of evidentiary rules governing cross examination and other means of discrediting witnesses,[122] there is no cross examination in France. Thus, the absence of cross-examination helps to explain the absence of exclusionary rules.

Another explanation for the absence of evidence rules in France is that trial procedure is not divided into separate guilt and sentencing phases, so that all evidence bearing on sentencing must be admitted at the same time as evidence bearing on guilt. In addition, the absence of evidence rules maximizes the amount of information available to the fact finder. Finally, as to both guilt and sentence, the French believe that it is better to judge the whole person, not just his current situation "[o]ne judges the man, not the acts."[123]

Similarly, international tribunals do not employ formal rules of evidence.[124] Rather, trial judges are given almost total discretion and evidence is routinely admitted.[125] Typical is the following provision from the Nuremberg charter: "The tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedures and shall admit any evidence which it deems to have probative value."[126]

There are several rationales behind this policy of routine admissibility by international tribunals. First, decisions in international tribunals usually affect thousands of people along with relations between nation-states.[127] The court is therefore reluctant to allow a case to turn upon a technical rule of evidence or procedure.[128] Second, there is the belief that rules of evidence inhibit the ascertainment of the truth.[129] Third, international tribunals have generally incurred tremendous difficulties in obtaining evidence and do not want to limit the evidence

122. *See, e.g.*, FED. R. EVID. 607, 608, 609, 610, and 613.

123. *See* George W. Pugh, *The Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 10 (1962).

124. *See* DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 8-15 (rev. ed. 1975).

125. *Id.*

126. *See* Charter of the International Military Tribunal, ch. 5, 59 Stat. 1544, 1551 (1945).

127. *See* SANDIFER, *supra* note 124, at 4-5.

128. *Id.*

129. *Id.* at 6. This principle was stated in the Oscar Chinn Case by the Permanent Court of International Justice: "The Court is not tied to any system of taking evidence . . . its task is to cooperate in the objective ascertainment of the truth." *Id.* at 7.

available to them.[130] Finally, the fact that decisions are rendered by professional judges as opposed to lay jurors is an important factor.[131]

2. *Limited Rules*

Another possible alternative to the present Federal Rules of Evidence would be to adopt a limited number of evidence rules which is designed to deal with frequent evidence problems but which would otherwise invest the trial judge with authority in admitting and excluding evidence. The German system is a good illustration.

The German system is somewhere between the French system, which routinely admits all evidence, and the American system, with its detailed exclusionary rules. Like France, there's a general rule of admissibility in Germany: "In order to search out the truth the court shall on its own motion extend the taking of evidence to all facts and means of proof that are important for the decision."[132]

However, there are limits to the general rule of admissibility. First, the Germans have an analogue to the Anglo-American hearsay rule: "If the evidence of a fact is based upon a person's observation, this person shall be examined at trial. The examination may not be replaced by reading the record of an earlier examination or by reading a written statement."[133]

However, documentary evidence is still important in Germany.[134] "Prior examinations are admissible when a witness has died, become ill, or is otherwise hindered from appearing. Documentary evidence may also be used by the court to refresh the recollection of a witness or to contradict the testimony of a witness or an accused."[135] Finally, the German hearsay rule is limited to observation evidence.[136] "Thus, a variety of public records, such as birth certificates and prior judicial or minor medical matters, including blood type or blood alcohol content, may also be received; and summaries or police or prosecutor's pretrial examination of the accused and witnesses are available to the court."[137]

Second, the German code grants a variety of privileges to refuse to testify, including those of the spouse, ex-spouse, fiancee, relatives (to the

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130. *Id.* at 22. For some of the reasons contributing to the difficulties in obtaining evidence, see note 133, at 24-29.

131. *See infra* note 132, at 12.

132. *See* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 69 (1977).

133. *Id.* at 67.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

third degree of consanguinity), clergyman, and attorneys.[138] The privileges are so strong that a holder of a privilege can even prevent the admission of his or her pre-trial statements.[139]

German courts can also refuse to hear irrelevant evidence.[140] Evidence is irrelevant if it:

(1) is superfluous because the matter is common knowledge;
(2) has already been proven or is important;
(3) is inappropriate or unobtainable;
(4) is meant to delay the proceeding; or
(5) if the proposition to be proved would benefit the accused and the court is prepared to take it as though it were true without proof.[141]

The final matter which German exclusionary rules deal with is prior convictions. Prior convictions are used only if they are important for the decision and they are usually admitted because they are important to the issue of sentencing.[142] Because prior convictions are usually important for the issue of sentencing, they usually are revealed.[143]

Although German practice concerning prior convictions is remarkably different from American practice, where the general rule subject to significant exceptions is to withhold prior conviction evidence from the trier for fear of its prejudiciality,[144] two notable German rules governing the use of criminal records lessen the sting of prior conviction evidence. First, German law provides that criminal records be systematically expunged after the lapse of certain time periods.[145] Second, arrest records are not admissible.[146]

The Germans prefer their system of limited exclusionary rules as opposed to the more detailed alternative employed by the United States. They believe that the potential damaging effects of inflammatory evidence which are, for the most part, excluded in the United States can be overcome by having professional judges serve on juries with lay

138. *Id.* at 70.
139. *Id.*
140. *Id.*
141. I believe that what (5) excludes is unreliable evidence. *See id.* at 70.
142. *Id.* at 70. Proceedings in Germany are not bifurcated as they are in many American jurisdictions.
143. *Id.* at 76-77.
144. *See, e.g.*, FED. R. EVID. 403, 404(a), 410. However, these protections are limited by Federal Rules 404(b), 607, 608, 609, and 613.
145. *See* LANGBEIN, *supra* note 132, at 77.
146. *Id.* One observer commented about the contrast between the American and German use of arrest records: "Continental visitors will be astonished at the significance attached in America to such records. In their countries, very little, if any, significance is attached to records of arrest." *Id.* at 77.

persons[147] and by requiring that the triers of fact state reasons for their results.

C. MORE DETAIL

The final alternative to the current rules of evidence would be a system with even more detailed rules. In 1942, Professor John Wigmore proposed such a code.[148] Professor Wigmore's code was so detailed that it consisted of 242 rules and 544 pages.[149] He believed that an evidence code should not leave unfettered discretion in the hands of trial judges.[150] Professor Wigmore warned that when vast discretion is handed to the trial judge on evidentiary matters, predictability of decisions is necessarily lost and uncertainty in litigation is increased.[151]

An illustration of the detail provided in Professor Wigmore's code would be in the area of privileges. There are privileges for trade secrets,[152] official secrets,[153] theological beliefs,[154] political votes,[155] spousal testimony,[156] spousal communications,[157] self-incrimination,[158] attorney-client communication,[159] petit jurors,[160] grand juries,[161] public prosecutors and other officials,[162] official secrets,[163] patient-physician communications,[164] and penitent-priest communications.[165] In addition, the conditions of each privilege are spelled out in great detail. In contrast, there is only one federal rule concerning privileges.[166] It is a one paragraph statement directing the courts to recognize those privileges

147. The Germans employ a "mixed" court consisting of professional judges and lay juries. In some courts, lay jurors outnumber professional judges. In others, professional judges outnumber lay judges.

148. J. WIGMORE, CODE OF EVIDENCE (3d ed. 1942).

149. *Id.*

150. *See* J. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23, 24 (1942).

151. *Id.* at 24.

152. J. WIGMORE, CODE OF EVIDENCE, Rule 206, § 2273.

153. *Id.* § 2275.

154. *Id.* § 2276.

155. *Id.* § 2277.

156. *Id.* at Rule 207.

157. *Id.* at Rule 211.

158. *Id.* at Rule 208.

159. *Id.* at Rule 210.

160. *Id.* at Rule 210.

161. *Id.* at Rule 212.

162. *Id.* at Rule 214.

163. *Id.* at Rule 215.

164. *Id.* at Rule 216.

165. *Id.* at Rule 217.

166. *See* FED. R. EVID. 501.

which existed at common law and to apply local privileges in diversity cases.[167]

Proponents of a more detailed system would use the federal rule concerning privileges to buttress their concern that too much discretion has been given to the trial judge. As a result of the Federal Rule, judges have had to decide which privileges are to be recognized[168] and the extent of their coverage.[169] Furthermore, inconsistency is created by referring to state law in diversity cases.[170] Proponents believe that a more detailed code might eliminate these types of problems.

VII. WHERE DO WE GO FROM HERE?

This paper has discussed some of the weaknesses of the current Federal Rules and presented three alternatives: no rules, limited rules, or more detailed rules of evidence. The following is an assessment of each of the different options.

A. NO RULES

A system with no limitations on the admissibility of evidence, as employed in France and in International Tribunals, has several advantages. First, the fact finder is able to consider all relevant information in a particular case without being handcuffed by rules of evidence. Second, the absence of evidence rules might lessen or eliminate the problem of witness intimidation.[171] In France, for instance, pretrial statements may be used in court for substantive evidentiary purposes.[172] As a result, witnesses cannot change their testimony at trial, or if they do, their

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167. Federal Rule 501 states:

> Except as otherwise required by the constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. When the Advisory Committee drafted the Federal Rules, the committee included 12 detailed statutes devoted to privilege. However, Congress balked at enacting those statutes and only enacted Rule 501. *See* CARLSON *supra* note 6, at 732.

168. *See* CARLSON, *supra* note 6, at 732.

169. *See id.*

170. FED. R. EVID. 501.

171. Witness intimidation by gang members has become a serious problem in the United States. For instance, in recent testimony before a Congressional committee, prosecutors in Washington, D.C. said that the city was failing to pursue 30 to 35% of its murder cases because people with knowledge of events refused to cooperate. *See* Sam Howe Verhovek, *Gang Intimidation Takes Rising Toll on Court Cases*, N.Y. TIMES, Oct. 7, 1994, at 1.

172. Frase, *supra* note 119, at 678.

previous testimony will be admitted as substantive evidence.[173] Thus, there will be little motivation to bribe or intimidate potential witnesses.[174] In contrast, pretrial statements are generally inadmissible under the Federal Rules.[175] Finally, the relaxation of trial evidence rules might reduce dependence on plea bargaining.[176] Without evidence rules, trial time might not be spent by attorneys attempting to manipulate evidence rules and arguing about the exclusion of evidence.[177] As a result, trials would be of shorter duration and cases could be tried rather than plea bargained.[178]

This system is successful in France and in the International Tribunals since most decisions are rendered by professional judges as opposed to lay jurors. Even when lay jurors participate in fact finding professional judges are there to steer the jury away from basing its decisions on inflammatory evidence. Because the jury is such an integral part of the American system,[179] a system which employed no rules of evidence would be unworkable in the United States. Juries simply cannot be trusted with inflammatory evidence.[180]

Another reason why the French system should not be adopted in the United States is that it allows too much inquiry into an individual's past.[181] This flies in the face of the American ideal that individuals are capable of rehabilitation. Furthermore, studies have demonstrated the unreliability of character evidence as a predictor of future behavior. A leading study on the issue concluded that:

> First, behavior depends on stimulus situation and is specific to the situation; response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by strait state theories. The more

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173. *See* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 519-20 (1973).

174. *Id.* n.20.

175. Most pretrial statements are hearsay and are excluded from evidence as a result. FED. R. EVID. 802.

176. *See* Frase, *supra* note 119, at 678.

177. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U CHI. L. REV. 931, 993 (1983).

178. *Id.* at 993.

179. The Sixth Amendment to the U.S. Constitution states in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. The Seventh Amendment states in pertinent part: "[i]n Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

180. *See* Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003, 1008-09 (1984).

181. Frase, *supra* note 119, at 677.

> dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. Even seemingly trivial situational differences may reduce correlation to zero.[182]

Finally, jurors tend to place too much weight on evidence of bad conduct.[183]

A further problem with the French system is the fact that "relaxed trial evidence rules might . . . encourage prosecutors to file more weak cases, thereby increasing court congestion and the need for plea bargaining."[184] Finally, certain evidence rules are constitutionally required. For instance, the Sixth Amendment's confrontation clause[185] necessitates a hearsay rule.[186] Although the absence of rules of admissibility seems well suited for France, a similar system simply would not work in the United States.

B. LIMITED RULES

The German system of limited evidence rules is an attractive alternative. It puts judges on notice as to that evidence which is less desirable and which should be excluded while at the same time permitting the judge some flexibility to tailor the evidence to a particular case.

The German system works because of the participation of professional judges in the fact finding and deliberation process. Unlike the French system, in Germany, lay jurors play an integral role in fact finding. However, even though lay jurors participate in fact finding, professional judges deliberate along with them.[187] The presiding judge leads the deliberations, puts questions before the jury, and takes votes.[188] Thus, the presiding judge, along with two associate judges, is present and can ensure that evidence is not misused.[189]

The participation of professional judges in the deliberation process cannot be overstated. For instance, in one German case involving a

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182. *See* Mendez, *supra* note 180, at 1052.

183. *Id.* at 1006-07.

184. *See* Frase, *supra* note 119, at 678.

185. The Sixth Amendment states in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

186. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1979) ("The historical evidence leaves little doubt, however, that the [confrontation] Clause was intended to exclude some hearsay").

187. LANGBEIN, *supra* note 132, at 63.

188. *Id.* at 80.

189. For instance, one study of the German system found that lay jurors differed on the outcome of cases in only 1.4% of cases from their professional counterparts. *See* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 197-205 (1981). In contrast, American juries differed from the presiding judge 22% of the time. *Id.* at 204.

dispute between a prostitute and her pimp, the pimp was charged with a variety of offenses and acquitted of all charges.[190] However, one of the lay jurors wanted to convict.[191] In this juror's mind, the defendant's lifestyle was sufficient to establish the offense.[192] The lay juror eventually abandoned his position, persuaded by the judges' emphasis on the presumption of innocence.[193]

The German system, like the French system, would not work in the United States. The presence of professionals in deliberations and the requirement of written findings of fact and law are sufficient safeguards against the misuse of potentially prejudicial evidence. However, the absence of similar safeguards in the American deliberation process to guard against the misuse of inflammatory evidence ensures that a German type system would not work in the United States. Furthermore, like the French system, the German system permits too much of the defendant's past to be put on trial.

C. MORE DETAIL

Proponents of a more detailed system believe that it would better promote predictability by making evidence rules more precise. Both attorneys and judges would have a good grasp of the rules prior to trial and the rules could therefore be applied in a consistent manner. The attorneys would know before they step into the courtroom which evidence will be admitted and which will be excluded. In addition, a more detailed code would largely eliminate the trial judge's discretion in admitting and excluding evidence.

D. SUMMARY

Because of the importance of the jury in the United States and the lack of safeguards against the misuse of inflammatory evidence, the French and German systems of general admissibility are not viable options to the Federal Rules of Evidence. In addition, Americans would not be comfortable investing their trial judges with the amount of discretion given French and German trial judges in determining the admissibility of evidence. Thus, the only viable alternative would be a more detailed code along the line that Professor Wigmore proposed.

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190. *See* Langbein, *supra* note 189, at 130.
191. *Id.*
192. *Id.*
193. *Id.*

VIII. MORE DETAILED CODE VS. THE FEDERAL RULES OF EVIDENCE

An assessment must now be made as to whether the United States should adopt a more detailed evidence code or should the Federal Rules of Evidence be retained.

A. MORE DETAIL

The strongest argument in favor of a more detailed code, in addition to predictability, is that a more detailed code would largely eliminate the trial judge's discretion in admitting and excluding evidence. Opponents of discretion believe that it has a profound negative impact on the justice system in that it allows judges to decide similar situations differently. Discretion instructs the judge to announce the result he or she wants or thinks just, not the result that the rule of law, through its centuries of evolution and development, teaches is the appropriate result for those conditions and circumstances. Furthermore, in a society with deeply rooted racial, ethnic, class and other divisions, biased judges are inevitable and discretion increases the likelihood that these biases will be reflected in the courtroom. As a result, a system which limits the trial judge's discretion may be more desirable since it is more likely to produce justice and predictability.

However, attempts have been made before to eliminate discretion in other areas. These attempts have proven to be largely unsuccessful. Two prominent areas for comparison are the United States Sentencing Guidelines and capital punishment.

1. Sentencing Guidelines

In 1984, the United States Congress passed the Sentencing Reform Act.[194] Congress had two primary goals when it enacted the new federal sentencing statute.[195] First, Congress wanted "honesty in sentencing."[196] "Honesty in sentencing" is designed to ensure that "the sentence the judge gives is the sentence the offender will serve."[197] "Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public."[198]

194. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

Congress' second purpose was to reduce "unjustifiably wide" sentencing disparities between the federal circuits.[199] For instance, Congress was presented with evidence showing:

> The region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in Central California . . . [F]emale bank robbers are likely to serve six months less than their similarly situated counterparts . . . [and] black [bank robbery] defendants convicted . . . in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted . . . in other regions.[200]

"To remedy [both] problems, Congress created the United States Sentencing Commission, comprised of seven members (including three federal judges) appointed by the President [and] confirmed by the Senate."[201] The Commission proceeded to write Sentencing Guidelines which would take the form of a grid that determines sentencing in light of characteristics of the offense and of the offender.[202] The Guideline sentences consist of a range, the top of which range cannot exceed the bottom by more than twenty-five percent.[203] The judge might depart from the Guideline range, but in doing so, he or she must explain why and the imposed sentence is subject to appellate review for reasonableness.[204] The Commission serves as a permanent body, continuously revising the Guidelines over the years as circumstances change or conditions may warrant.[205]

While it is true that the trial judges' discretion in sentencing has been severely limited as a result of the guidelines, this discretion has simply been transferred to other law enforcement officials.[206] Furthermore, not only has the disparity in sentencing failed to diminish, it has in many cases increased.[207]

The Guidelines have shifted sentencing power and discretion away from the trial judge to the probation officer and prosecutor.[208] The

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199. *Id.*
200. *Id.* at 5.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 5-6.
205. 28 U.S.C. § 991 (1994 & Supp. 1997).
206. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 163 (1991).
207. *Id.* at 165.
208. *Id.* at 163.

probation officer is responsible for preparing a pre-sentence investigation report (PSI) after a defendant pleads guilty or is convicted at trial.[209] In a majority of cases, the court accepts the findings and recommendations contained in the PSI.[210] The prosecutor exercises discretion by determining whom should be charged and what the charge should be.[211] In addition, the time to be served by an offender is largely determined by the prosecutor since the probation officer, in preparing a PSI, relies heavily on the information in the prosecutor's file.[212]

Disparities in sentencing continue despite the guidelines. First, disparities exist between judicial district. A recent study of sentencing in four judicial districts in the Eighth Circuit revealed:

> the percentage of defendants pleading guilty ranged [between districts] from seventy-three to eighty-seven; the average sentence for those pleading guilty ranged from 23.9 to 41.8 months; the percentage of defendants pleading guilty who receive a two-level reduction for acceptance of responsibility ranged from fifty-four to eighty-six; the percentage of those pleading guilty who were sentenced in the lower quartile of the guidelines varied from fifty-eight to sixty-seven; the percent of those pleading guilty who were sentenced in the upper quartile of the guidelines range varied from sixteen to thirty; and the percentage of those pleading guilty who received sentences of probation only ranged from eleven to twenty-two.[213]

One of the primary goals of the Guidelines was to eliminate racial disparities in sentencing.[214] However, racial disparities in sentencing continue to exist. Prior to the Guidelines, blacks served approximately forty-five months compared to thirty-five months for whites.[215] After the Guidelines, blacks serve approximately seventy-four months whereas whites serve about thirty-seven months.[216] In addition, black and Hispanic males receive sentences of straight probation less frequently than white males.[217]

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209. *Id.* at 172-75.
210. *Id.* at 174.
211. *Id.* at 190.
212. *Id.* at 172-73.
213. *Id.* at 202.
214. *See* Palicido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357 (1994).
215. *See* Heaney, *supra* note 206, at 208.
216. *Id.* Factors contributing to longer sentences for black offenders include law enforcement's emphasis on curtailing crack cocaine, and the guidelines' mandatory consideration of prior criminal convictions. *Id.* at 206.
217. *Id.* at 208.

Congress had hoped that the Guidelines would eliminate discretion and disparity in sentencing. As the earlier discussion demonstrates, the Guidelines have accomplished neither.[218] The Guidelines have increased the volume of criminal cases[219] and the time served by federal convicts.[220] As a result, strains have been placed upon the criminal justice system.[221]

2. *Capital Punishment*

In *Furman v. Georgia*,[222] a five to four majority of the United States Supreme Court held that capital punishment, as then administered, violated the Eighth Amendment's prohibition on cruel and unusual punishment.[223] Three of the five justices in the majority felt that the fatal flaw with capital punishment was the arbitrary and discriminatory manner in which it has traditionally been imposed.[224]

Despite the fact that it subsequently reinstated the death penalty,[225] the Court has struggled to ensure that the death penalty is imposed "fairly and with reasonable consistency."[226] To this end, the Court has

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218. Judge Heaney, the Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, concludes that "these guidelines have not eliminated 'disparities' and that no set of guidelines, no matter how faithfully applied, can do so, so long as human beings law enforcement agents, prosecutors, probation officers and judges must make decisions affecting the liberty of human beings." *See id.* at 202-03; *see also* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991). *But see* U.S. SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTION DISCRETION AND PLEA BARGAINING, EXECUTIVE SUMMARY (1991) (concluding that Guidelines substantially reduced unwarranted sentencing disparity); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (concluding that the Guidelines have decreased disparity but conceding that there are real problems with excessive uniformity and with evasion and manipulation).

219. *See* Henry J. Reske, *Judges Irked by Tough-On-Crime Laws*, 80 A.B.A. J. 18 (1994).

220. *See* Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14.

221. For instance, a recent survey of federal judges found that 72.8% of appellate judges and 57.1% of district judges found the volume of criminal cases either a "large" or "grave" problem. *See* Reske, *supra* note 219, at 18.

222. 408 U.S. 238 (1972).

223. Furman v. Georgia, 408 U.S. 238, 238 (1972).

224. *Furman*, 408 U.S. at 309-10. Reflecting this sentiment, Justice Stewart said:

> These death sentences are cruel and unusual in the same way that being struck by lighting is cruel and unusual . . . . [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. (Douglas, J., and White, J., concurring).

225. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

226. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

attempted to confine the sentencer's discretion to impose death.[227] However, despite this attempt, the death penalty continues to be imposed in an arbitrary and discriminatory manner.

In *McClesky v. Kemp*,[228] the defendant, an African-American, argued that the Georgia capital sentencing scheme was administered in a racially discriminatory manner, in violation of the Eighth and Fourteenth Amendments.[229] In support of his claim, he proffered a highly reliable statistical study[230] which indicated that "after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared [the defendant's] life had his victim been black."[231] The Baldus study demonstrated that "blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks."[232] Additionally, the death penalty is more likely to be meted out to poorer defendants who cannot afford an attorney but who instead must rely on court-appointed counsel.[233]

Justice Blackmun, who attempted during his tenure on the court to ensure that capital punishment be carried out in a consistent, fair, and reasonable manner,[234] recently conceded the inherent impossibility of doing so:

> I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.[235]

The apparent failures of the Sentencing Commission and the Supreme Court to eliminate discretion and disparity in sentencing and capital punishment, respectively, demonstrate that a more detailed code of evidence rules isn't any more likely to produce fairness than the

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227. *See Furman*, 408 U.S. at 239-40.

228. 481 U.S. 279 (1987).

229. McClesky v. Kemp, 481 U.S. 279, 286 (1987).

230. Known as the Baldus study, it was "performed by Professors David C. Baldus, Charles Pulaski and George Woodworth that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.*

231. *Id.* at 325 (Brennan, J., dissenting).

232. *Id.* at 327.

233. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994).

234. *See* Callins v. Collins, 510 U.S. 1141, 1161 (1994) (Blackmun, J., dissenting).

235. *Id.* at 1168.

present Federal Rules of Evidence. The solution is not simply to eliminate discretion. Rather, the solution is to work towards transforming those deeply rooted attitudes and prejudices which are responsible for producing those disparities. Furthermore, a detailed code may result in rules which are too mechanical. There is a risk that judges will become what Justice Benjamin Cardozo[236] described as "pharmacists;" rules would become neat formulas for judges to apply, as opposed to rules which permit creativity in fitting them to a particular trial.[237]

Proponents such as Professor Wigmore would respond that detailed rules would serve as "guides, not chains."[238] Judges are given some discretion in working with the rules. In particular, there are provisions which allow judges to comment on the evidence,[239] make the judge's rulings final,[240] and protects the judge from reversals of erroneous rulings if the ruling was harmless.[241] However, the fatal flaw with a more detailed code and probably the reason why Professor Wigmore's code received so little support is the fact that however hard one may try, there is simply no way in which every possible situation which may arise at a trial could be anticipated in advance.[242]

B. THE FEDERAL RULES

The Federal Rules of Evidence are our best alternative. They represent a mixture of the three other alternatives without moving too much in one direction. Like the French system, certain rules are open-ended. For instance, judges have almost total discretion in the area of expert testimony.[243] Then there are rules which, like the German system, state certain broad principles but allow the trial judge discretion in fitting the rule to particular cases. A good illustration is Rule 401, which states the general principal that to be admitted, evidence must have probative value.[244] Finally, there are those rules which, along the lines of Professor Wigmore's proposal, leave no discretion in the hands of the trial judge. Trial judges, for instance, must admit for impeachment

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236. Benjamin Cardozo served as an Associate Justice of the United States Supreme Court from 1932 to 1938.

237. *See* Nat Hentoff, *The Judge With a Hole in His Soul*, VILLAGE VOICE, June 28, 1994, at 19.

238. *See* J. WIGMORE, CODE OF EVIDENCE xiii (3d ed. 1942).

239. *Id.* at Rule 6, Art. 3.

240. *Id.* at Rule 19.

241. *Id.* at Rule 19, Art. 4.

242. The trial of former football star O.J. Simpson is a prime example.

243. *See* FED. R. EVID. 701-06; *see also* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

244. FED. R. EVID. 401.

purposes those prior convictions which involve dishonesty or false statements.[245]

The strongest case, however, for the Federal Rules is the fact that they have the public's confidence. It is widely believed, for instance, that the truth of Professor Anita Hill's charges of sexual harassment against then Supreme Court nominee Clarence Thomas could have been ascertained had they been aired in a proceeding which employed rules of evidence similar to the Federal Rules.[246] In order to test my assertion that we should retain the Federal Rules, I decided to survey some selected federal judges. In particular, I wanted these judges to assess the validity of the critics' arguments against the Federal Rules. I chose to survey those federal judges who were on the federal bench prior to the enactment of the Federal Rules rather than the entire federal judiciary. The survey was so limited because I believed that those judges appointed prior to the enactment of the Federal Rules would have a unique perspective, having judged cases under both the common law regime and the Federal Rules. In addition, I felt that the survey would not be accurate if the entire judiciary were included because many judges would be favorably inclined to the Federal Rules simply because the Federal Rules are all that they have known.

The survey, which was conducted anonymously, asked the following questions:

1) Would you prefer a) the case-by-case approach which existed prior to the Federal Rules of Evidence or b) the Federal Rules of Evidence?
2) Have the Federal Rules made your job harder or easier or has there been no impact at all?
3) Have you observed any change in the quality of lawyering as a result of the Federal Rules?
4) Have the goals of the Federal Rules (uniformity, predictability, etc.) been met?

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245. *See* FED. R. EVID. 609.

246. *See* Stephen Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635, 636-38 (1992) ("The seamiest proofs were constantly propounded, the most dubious opinions were repeatedly trumpeted, and materials of the most minuscule probative value were regularly relied upon, all in disregard of the evidentiary principles Americans have come to see as emblematic of our notions of fair play. The rules of evidence matter if for no other reason than that they help to deter this sort of shameful spectacle"); *see also*, Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443 (1993) ("had the Democrats imposed basic rules of procedure, many of the ad hominem attacks against Professor Hill could have been eliminated").

5) Would you like to receive the results of this survey?
6) Comments.[247]

A total of fifty-five surveys were sent out. Forty-five responses were received. Forty-three of the forty-five respondents preferred the Federal Rules to the common law regime. Thirty-six responded that the Federal Rules had made their job easier, while seven felt as though they had no impact and two responded that the Federal Rules had made their jobs harder. As to the quality of lawyering, twenty-five of the respondents believed that the quality of lawyering had improved as a result of the Federal Rules while twenty believed that it had not changed. None of the respondents felt as though the quality of lawyering had become worse as a result of the Federal Rules. Finally, forty-two responded that the goals of the Federal Rules had been met while three felt as though they had not been satisfied.

The survey demonstrates that many of the critics' complaints are not valid. Most informative is the overwhelming belief of the judges that the goals of the Federal Rules had been met. Thus, not only are the Federal Rules our best alternative, but a wholesale revision of them is also not in order.

IX. RECOMMENDATIONS

This paper has demonstrated that codification of the Federal Rules of Evidence was a good idea and that they should be retained. However, there are steps which can be taken which would make the rules more workable. The most important step would be the creation of a permanent standing committee on the Federal Rules.

Many of the problems associated with the Federal Rules, for instance, the need for amendments and clarifications of ambiguities, exist because no one has the ongoing responsibility of monitoring the Federal

247. The following comments were received:
"FRE a vast improvement."
"In my view, the Federal Rules of Evidence have been helpful."
"I would like to see the State of Virginia adopt the same rules of evidence."
"I consider the FRE a monumental step forward."
"I believe the ostensible uniformity that a codification brings is better than the case-by-case approach pre-evidence rules. At the least, we now get a national body of law with "workable" answers to some of the problems even though some of us may not agree with the answers given. In this case, it is better to have a decision than to have no decision at all."
"These rules solve quickly many questions."
"The enactment of the rules got rid of a lot of silly bickering and senseless objections."
"They have been beneficial to the trial process."
"The Federal Rules of Evidence, I believe have been most helpful."
"The Federal Rules promote uniformity and have most impact at the trial level."

Rules. The appointment of an advisory committee on evidence rules was a step in the right direction. However, this committee should become a permanent standing committee.

The Judicial Conference of the United States has the authority to create such a committee.[248] Furthermore, there is precedent for such a committee; the United States Sentencing Commission serves as a permanent committee to monitor and recommend changes to the Sentencing Guidelines[249] and there are standing Advisory Committees for Civil, Criminal, Appellate, and Bankruptcy Rules to assist in monitoring the respective rules and proposing changes. A standing committee on evidence could perform similar functions.

X. CONCLUSION

More than twenty years after codification of the Federal Rules of Evidence is a good time to reflect on them and to draw certain conclusions. The Federal Rules are preferable to their most viable alternatives: the French open-ended system, the German's limited rules, and Professor Wigmore's very detailed code. Furthermore, while they are not perfect, the federal judges have told us that the Rules have served us well.

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248. 28 U.S.C. § 2073(b) (1988).
249. 28 U.S.C. § 991 (1994).