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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

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Introduction: The Glitch in the Federal Rulemaking Process

The fifteenth anniversary of the Federal Rules of Evidence ("the Federal Rules" or "the Rules"), which became effective on June 1, 1975, passed unnoticed well over a year ago. By most accounts, the Rules have been a great success. Nevertheless, a profusion of scholarly articles have questioned the clarity, consistency, efficacy, and wisdom of a host of evidence rules.[1] At least three comprehensive

1. *See, e.g.*, Freda F. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393 (1984); Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255 (1984); Ronald L. Carlson & Steven M. Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247; Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36

oversight initiatives (two ongoing) have surveyed the entire corpus of the Rules, noted problems, and recommended changes.[2] In addition, circuit splits have emerged on important evidence issues.[3]

Despite the scholarly activity, professional criticism, and divisions among the circuits, there have been only six substantive amendments to the Rules since their original passage in 1975, and three of these resulted from legislation that was initiated by Congress and not by any rules committee.[4] By contrast, during the same seventeen-year period, over one hundred substantive amendments to the Federal Rules of Civil Procedure have been made via the conventional rulemaking process.[5]

This rough comparison is not, of course, an accurate caliper for measuring the need for revision of the Federal Rules, but it raises serious questions. The relative inactivity in proposing needed amendments to the Rules stems in large part from an institutional

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CASE W. RES. L. REV. 431 (1986); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Facts*, 73 MINN. L. REV. 1 (1988); Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231; David E. Seidelson, *The Federal Rules of Evidence: A Few Surprises*, 12 HOFSTRA L. REV. 453 (1984); Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295 (1989).

2. The Williamsburg Conference, convened by the Federal Judicial Center and chaired by United States District Judge, and former Professor, Charles Joiner, issued a report on the Rules in May 1981. *See* FEDERAL JUDICIAL CTR., REPORT OF THE FEDERAL RULES OF EVIDENCE CONFERENCE (1981) [hereinafter FJC, REPORT] (copy on file with *The George Washington Law Review*). Two separate committees of the American Bar Association ("ABA") have conducted extensive reviews of the Rules. In 1983, the ABA Section of Litigation issued *Emerging Problems Under the Federal Rules of Evidence*, a 324-page, rule-by-rule analysis containing extensive criticisms. A second edition was published in 1991. *See* SECTION OF LITIG., AM. BAR ASS'N, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (2d ed. 1991) [hereinafter EMERGING PROBLEMS]. The Criminal Justice Section has conducted an ongoing review project. *See* CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, THE FEDERAL RULES OF EVIDENCE: A FRESH REVIEW AND EVALUATION (1987), *reprinted in* 120 F.R.D. 299 (1987) [hereinafter A FRESH REVIEW]. An initial version of this report was chaired by Professor Paul Rothstein. A more recent report, to be issued in 1992, was chaired by Professor Myrna Raeder.

3. *See infra* part V.A.

4. Congress, through legislative action, has amended Rule 410, Inadmissibility of Pleas, Plea Discussions, and Related Statements, *see* Act of Dec. 12, 1975, Pub. L. No. 94-149, § 1(9), 89 Stat. 805, 805; has added Rule 412, Sex Offense Cases; Relevance of Victim's Past Behavior, *see* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046, 2046-47; and has amended Rule 704(b), Opinion on Ultimate Issue, *see* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 406, 98 Stat. 1837, 2067-68. Three amendments are a product of the rulemaking process. The Supreme Court, acting on the recommendation of the Judicial Conference Standing Committee on Rules of Practice and Procedure, has amended Rule 410, *see* 441 U.S. 987, 992 (1979); Rule 609, Impeachment by Evidence of Conviction of Crime, *see* 480 U.S. 1025, 1030 (1987); and Rule 404(b), Other Crimes, *see id.* at 1028. The Rules process has also produced a number of purely technical amendments, primarily neutralizing gender.

5. *See, e.g.*, Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 290-92 (1989) (describing the rapid increase in amendments to the Federal Rules of Civil Procedure since the mid-1970s).

glitch in the federal rulemaking process—the absence of an Advisory Committee on the Rules of Evidence. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") is the administrative body that generates proposed rule changes.[6] The Standing Committee relies upon the separate Advisory Committees for Civil, Criminal, Appellate, and Bankruptcy Rules to assist in monitoring the various rules and proposing changes. No Advisory Committee on the Federal Rules exists.

The institutional history explaining the absence of an advisory committee is disconcerting. In 1981, the Federal Judicial Center ("FJC") convened the Williamsburg Conference to evaluate the Rules, which had been in effect for just over five years. The FJC Report resulting from the Williamsburg Conference recommended the establishment of an Advisory Committee on the Federal Rules of Evidence that would operate on the model of the Civil and Criminal Rules Advisory Committees.[7] In its September 1981 Report to the Judicial Conference, the Standing Committee, animated by the FJC Report, recommended that the Chief Justice reconstitute an Advisory Committee on the Federal Rules of Evidence.[8] Although the Judicial Conference approved the recommendation, the Chief Justice, for reasons we do not know, never appointed a Committee.

Two years later, Congress sought to amend the Rules Enabling Act to create an Advisory Committee on Evidence analogous to the other advisory committees, but this amendment did not become law.[9] Then, in September 1985, the Standing Committee reported that "the reactivation of the Committee [on Evidence Rules] at this time may not be desirable."[10] Instead, the Committee formed an ad hoc group consisting of members of the Civil and Criminal Rules Advisory Committees "to review the Evidence Rules and make proposals to the Standing Committee for any needed changes."[11] For reasons that remain unclear, the ad hoc committee never met. Between 1985 and 1990, primary responsibility for the Federal Rules

6. The Standing Committee is authorized by 28 U.S.C. § 2073. It is composed of trial and appellate judges, lawyers, and academics appointed by the Chief Justice. Interestingly, the statute provides that "[t]he Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, *and evidence* under subsection (a) of this section." 28 U.S.C. § 2073(b) (1988) (emphasis added). For some unexplained reason, the word "evidence" does not appear in the title of the Standing Committee.

7. *See* FJC, REPORT, *supra* note 2, at 6-7.

8. In its report, the Standing Committee wrote that "the time has now arrived to reactivate an Advisory Committee on the Federal Rules of Evidence to review the forthcoming report on the Williamsburg Conference and to consider various proposals for rules changes recommended in legal literature." STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 (1981).

9. H.R. 4144, 98th Cong., 1st Sess. (1983) (proposing an amendment to 28 U.S.C. § 2073(b)(1)).

10. STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE ON THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 4 (1985).

11. *Id.*

was assigned to the Advisory Committee on Criminal Rules, and the Civil Rules Committee served a secondary role. Since October 1990, responsibility for the Rules has been loosely and informally divided between the Advisory Committees on Civil and Criminal Rules. Both bodies have authority to propose changes in the Federal Rules, and occasionally have done so.[12]

The current arrangement is inherently unsatisfactory. First, the workload of the separate Criminal and Civil Rules Committees is too heavy to accommodate the added responsibility of monitoring the Federal Rules of Evidence. Given the nature and scope of the work ahead, only an independent Advisory Committee on the Rules of Evidence, with no duties other than the responsibility of reviewing seventeen years of legal development, can adequately perform the task.[13] Indeed, without a special Advisory Committee on the Rules of Evidence, the Judicial Conference arguably may violate its statutory mandate to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law."[14]

Second, the present informal division of responsibility for the Federal Rules between the Civil and Criminal Rules Committees will result in incomplete oversight and will create unnecessary tensions and confusion. For example, the Civil Rules Committee recently proposed an amendment to Rule 702 governing expert testimony.[15] The interest of the Civil Rules Committee is obvious—most problems with expert testimony arise in civil cases.[16] Expert testimony, however, is not only a civil trial problem. Some of the most important issues concerning expert testimony, such as the admissibility of DNA typing, voiceprints, and polygraphs, arise in criminal cases. The Civil Rules Committee proposals may not focus sufficiently upon the specialized needs of the prosecution or of criminal defendants. We note that the Criminal Rules Committee disapproved the Civil Rules Committee's initial Rule 702 proposal, but the Standing Committee nevertheless modified and submitted it for

12. For example, the recent amendment to Rule 404(b), *see supra* note 4, was proposed by the Criminal Rules Committee. The current proposal to amend Rule 702, *see infra* text accompanying notes 120-24, has been advanced by the Civil Rules Committee.

13. *See infra* Conclusion (describing why we believe an Advisory Committee is the correct mechanism).

14. 28 U.S.C. § 331 (1988).

15. *See infra* text accompanying notes 120-24.

16. *See, e.g.*, Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1517-18 (10th Cir. 1990) (discussing the difficulty of deciding when expert testimony is admissible under the Rules); Specht v. Jensen, 853 F.2d 805, 810-11 (10th Cir. 1988) (same), *cert. denied*, 488 U.S. 1008 (1989).

public comment.[17]

Third, the ad hoc division between the Civil and Criminal Advisory Committees presents administrative problems. For example, a Civil Rules Committee amendment, issued for public comment, may not attract sufficient timely attention of those concerned with criminal cases because the proposed rule ostensibly deals only with civil cases.

In short, the absence of an Advisory Committee on the Rules of Evidence to parallel the functions of the other advisory committees has resulted in a lack of much needed oversight over the Rules and explains the paucity of amendments, despite a demonstrated need. This Article argues for the appointment of such a committee, identifies problems in the current Rules as proof that such oversight is needed, and suggests where such a committee might start. The source of this proposal is not a preference for bureaucratic formalism, but rather our judgment, shared by many judges, law professors, and practitioners, that review and selective revision of these excellent rules are overdue.

The first task for an Advisory Committee should be a broad-based review of the Rules. In conducting the review, the Committee should consider the seventeen years of scholarship, federal jurisprudence, and activity within the state judicial systems energized by the promulgation of the Rules.[18] Proposals for selective revision of the Rules should follow. In addition, an Advisory Committee should serve as a forum for debates about evidence, and for collecting and responding to case law and scholarship on evidence. Finally, it should update the Advisory Committee notes and perhaps offer guidance in the form of a manual on evidence.[19]

In Part I of this Article, we review how the Supreme Court approaches and interprets the Federal Rules. This Part examines the influence of plain meaning on evidence jurisprudence. The discussion supports our argument for an Advisory Committee because such a committee would monitor "plain meaning," respond to the

17. *See* Preliminary Draft of Proposed Amendments to the Fed. Rules of Civil Procedure and the Fed. Rules of Evidence, 137 F.R.D. 53, 156 (1991) [hereinafter Preliminary Draft]. Another example of the Civil Rules Committee's narrow focus that can affect the Rules of Evidence concerns the proposed amendment to Federal Rule of Civil Procedure 26(a)(3)(C) that currently provides that most objections to exhibits are waived if not made before trial. The proposed amendment would severely limit trial objections to exhibits, and therefore alter evidence practice radically. We believe that the Civil Rules Committee did not fully consider the ramifications of the proposed amendment to the Federal Rules of Evidence on criminal practice. *See infra* note 288.

18. Thirty-four states, Puerto Rico, and the military courts have adopted their own rules modeled after the Federal Rules. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND STATE COURTS (Supp. 1991) [hereinafter WEINSTEIN & BERGER]. *See generally* GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987 & Supp. 1990) (detailing each state's adoption and modifications to the Federal Rules of Evidence). A number of states have modified the federal provisions. These modifications may be superior to the Federal Rules because some of the changes doubtless reflect proposed solutions to identified problems in the drafting or implementation of the Federal Rules.

19. *See infra* Conclusion (discussing the task for an Advisory Committee).

Court's interpretations, and engage in evidence reform. In the subsequent Parts of this Article, we discuss three areas of evidence law that demand immediate attention, all of which share the common thread of posing significant questions that have remained unanswered by the Rules.

Part II reviews the Supreme Court opinion in *Bourjaily v. United States,*[20] which held, contrary to the general judicial consensus, that courts could rely upon a coconspirator's statement itself in determining whether the preliminary showing of conspiracy was met. *Bourjaily* presents a serious problem in the interpretation of the Rules of Evidence and demonstrates the potential mischief that can result from a rigid plain meaning analysis of the Rules. *Bourjaily* also raises interesting questions about how the common law rules that preceded the Federal Rules should be utilized by the courts in interpreting the codified Rules.

Part III addresses the most controversial and important unresolved question in the Federal Rules—the standard for admitting novel scientific testimony. Before the adoption of the Federal Rules, many jurisdictions applied the *Frye* test of "general acceptance" for scientific testimony. The Rules and the advisory committee note[21] are silent on *Frye.* The circuits are split on its viability. As in *Bourjaily,* the Rules' silence has caused confusion, particularly in light of the preexisting common law jurisprudence. We believe that *Frye* is inconsistent with the letter and spirit of the Rules, but that it must be addressed nevertheless by a new Advisory Committee. We also comment upon the currently circulating proposal to amend Rule 702 on expert testimony. Although we disagree with the major thrust of the proposal, we welcome the dialogue the proposed amendment has initiated.

In Part IV, we discuss the interrelationship between the Sentencing Reform Act and the Federal Sentencing Guidelines, on the one hand, and the Federal Rules, on the other. We argue that the Rules are incompatible with changes in the substantive law of sentencing. Exempting sentencing hearings from evidentiary strictures was innocuous in 1975, when the Federal Rules were passed, but this exemption has caused great unfairness under the Sentencing Reform Act. We propose extending the protections of the evidentiary rules against unreliable evidence to sentencing. In addition, such changes in the substantive law underscore the need for an ongoing Advisory Committee to accommodate legal developments.

In Part V, we present a catalogue and summary of numerous other problems that have emerged in the Federal Rules. This brief

20. 483 U.S. 171 (1987).
21. *See* FED. R. EVID. 702 and advisory committee's note.

and necessarily incomplete review of circuit splits, gaps and inconsistencies in the Rules, debates over fundamental policy, and innovative suggestions provides further evidence that a Committee is needed, and that selective revision of the Federal Rules is in order. In the Conclusion, we review the need for ongoing supervision and argue that an Advisory Committee to the Standing Committee is the best mechanism to achieve this end.

I. Evidence Jurisprudence and the "Plain Meaning" Syndrome

Recently, scholars have discussed the trend in the Supreme Court's evidence decisions toward a "plain meaning"[22] interpretation of the Federal Rules.[23] For example, in *Bourjaily v. United States,*[24] which we discuss in detail in Part II of this Article, the Court relied heavily upon a plain meaning interpretation of Rules 104 and 801(d)(2)(E) in holding that a trial judge may consider the contested coconspirator statement itself in establishing the threshold requirement for the existence of a conspiracy.[25] The Court dissected the language of the Rules, and noted that the common law requirement of independent evidence of conspiracy was not codified in the Federal Rules. The Court discounted the common law tradition that

22. Plain meaning interpretation requires that where the words of the statute are clear, the "plain meaning" of those words control. In interpreting the Federal Rules, the Supreme Court has adopted a modified "new plain meaning," or textualism, interpretation—an approach that affords plain language preeminence, but does not necessarily forbid inquiry into legislative history. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 82 (5th ed. 1992) (noting that plain meaning is a primary but not exclusive justification that courts use in explaining their reasoning). Plain meaning is part of a larger trend in the Supreme Court's approach to statutory interpretation, of which Justice Scalia is the most vocal proponent. *See, e.g.,* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

23. Professor Imwinkelried has argued in a series of articles that the Federal Rules have become a self-contained civil law code. He complains that, under the aegis of the Rules, the judge has lost common law power to fashion exclusionary rules of evidence, and that logically relevant evidence is admissible even when the judge legitimately doubts the reliability of its source or when exclusion serves public policy. *See* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution,* 6 REV. LITIG. 129 (1987); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?,* 41 VAND. L. REV. 879 (1988); 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 (1985); *see also* PAUL F. ROTHSTEIN, EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES 5, 24-26 (2d ed. 1981) [hereinafter ROTHSTEIN, NUTSHELL] (arguing that the common law power to exclude expert testimony does not survive the Federal Rules); Berger, *supra* note 1, at 255 (arguing that the common law of the admissibility of evidence is replaced by the Federal Rules of Evidence).

Professor Jonakait has extended the argument. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence,* 68 TEX. L. REV. 745 (1990) (discussing recent Supreme Court evidence decisions and arguing that, in contravention of the history and source of the Rules, the Supreme Court has adhered to a plain meaning of the Rules' text).

24. 483 U.S. 171 (1987); *see also* Jonakait, *supra* note 23, at 749-52. For a discussion of *Bourjaily,* see *infra* part II.

25. *Bourjaily,* 483 U.S. at 181.

had required independent corroboration of the existence of a conspiracy before admitting a coconspirator's statement as an admission of the accused.[26]

Similarly, in *Huddleston v. United States,*[27] the Supreme Court relied upon plain meaning to hold that evidence of "other crimes, wrongs or acts" under Rule 404(b)[28] is admissible if the jury could reasonably conclude that the "other act" occurred.[29] The hallmark of the Court's analysis was its observation, based upon plain meaning, that nowhere do the Rules require a judicial screening of the other act evidence.[30] In addition to the plain meaning approach, the Court cited the "structure of the Rules of Evidence"[31] and the legislative history, noting that petitioner's contentions were "simply inconsistent" with the Advisory Committee Notes as well as the House and Senate Reports.[32]

In *United States v. Owens,*[33] the Court again approached the Federal Rules by first addressing plain meaning. In *Owens,* the Court held that an out-of-court identification of the defendant by a witness was admissible under Rule 801(d)(1)(C),[34] where the declarant could remember making the identification but could not recall the underlying incident.[35] In holding that the identification met the strictures of Rule 801, the Court began by analyzing the Rule's requirement that the identifying witness be "subject to cross examination concerning the statement." It then applied "the more natural reading"

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26. *Id.* at 179-82.
27. 485 U.S. 681 (1988).
28. 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(b) (emphasis added to language recently added).
29. *Huddleston,* 485 U.S. at 689.
30. Chief Justice Rehnquist wrote that "[t]he text contains no intimation, however, that any preliminary showing is necessary" and criticized petitioner's reading because it "superimposes a level of judicial oversight that is nowhere apparent from the language of that provision." *Id.* at 687-88.
31. *Id.* at 687.
32. *Id.* at 688.
33. 484 U.S. 554 (1988).
34. Rule 801(d)(1)(C) provides: "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person." FED. R. EVID. 801(d)(1)(C).
35. *Owens,* 484 U.S. at 564. The witness, a prison guard, had received such serious head injuries that he was unable to remember the events of the assault. In a lucid moment, the guard had identified Owens as the perpetrator. At trial, he could not remember the underlying incident, but he did recall making the identification. *Id.* at 556.

to argue that because the witness was present and available to answer questions, he was subject to cross-examination concerning the statement.[36]

Despite the Court's rhetoric and its affinity for plain meaning, it has not adopted a monolithic approach, and continues to rely also upon legislative history, structure, and the overall policies of the Rules. The Court has recognized that plain meaning is not a useful method for dissecting every evidence problem. Some evidence questions simply lie outside the Rules. For example, in *United States v. Abel*,[37] after quoting with approval the statement that "[i]n principle, under the Federal Rules no common law of evidence remains,"[38] the Court analyzed and applied a principle of evidence—impeachment for bias—that is not delineated in the Rules.

Furthermore, codification does not assure susceptibility to plain meaning. For example, in *Beech Aircraft Corp. v. Rainey*,[39] plain meaning analysis was not helpful where the issue concerned the definition of the purposely vague and flexible term, "factual finding," under Rule 803(8). The Court attempted a plain meaning interpretation but admitted its uselessness.[40]

Finally, the Court specifically has rejected a plain meaning approach when it leads to absurd results. For example, *Green v. Bock Laundry Machine Co.*[41] required the Court to interpret Rule 609, which admits evidence of former convictions "only if" the probativeness of the evidence exceeds its prejudice "to the defendant."[42] The Court refused to read Rule 609 literally in civil cases, noting that favoring a civil defendant over a civil plaintiff is illogical and arguably unconstitutional.[43] Although the Court split on how much

36. *Id.* at 561-62. The Court compared the Rule 801(d)(1)(C) standard, which requires only cross-examination "concerning the statement," with Rule 804(a)(3), which defines unavailability. *Id.* at 562. Rule 804 defines unavailability, in part, as where the declarant cannot remember "the subject matter of the declarant's statement." FED. R. EVID. 804(a)(1). The Court relied upon the structural argument that Congress, in approving the language of Rule 801, could have required, as it did in Rule 804, a witness to possess memory of the underlying event. The Court mentioned legislative history, but only briefly, commenting on Congress' rationale for the identification exception, which stressed that prior identifications are more reliable than subsequent ones. *Owens*, 484 U.S. at 562.

37. 469 U.S. 45 (1984) (allowing the prosecutor to use extrinsic evidence to impeach a defense witness for bias).

38. *Id.* at 51 (quoting Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)).

39. 488 U.S. 153 (1988).

40. *Id.* at 163-64. The legislative history also was enigmatic, *Id.* at 164-68, and the Court decided the case based upon policy grounds and the structure of the Rules. *Id.* at 168-70.

41. 490 U.S. 504 (1989).

42. FED. R. EVID. 609.

43. *Green*, 490 U.S. at 509-10.

legislative history to consult,[44] and how to rectify this obvious drafting error,[45] it was unanimous in rejecting the plain language that would have led to an absurd result.[46]

Significant scholarly attention has been devoted to theories of statutory interpretation, particularly in light of the Court's recent trend toward plain meaning.[47] In particular, there is a growing recognition that generalized, global theories of statutory interpretation are less helpful than approaches tailored to individual statutes.[48] The Federal Rules present a fascinating, if peculiar, case study for plain meaning.

The Rules govern an area of judicial activity where judges have firm opinions, strong interest, and perhaps some unique wisdom.[49] The Rules are generally clear and well-written. Thus, a plain meaning approach does not trigger noticeable angst about our ability to understand and agree upon meaning. Many of the Rules, however, although "clear" and "plain," are purposely flexible. For example,

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44. Justice Scalia concurred separately, arguing that the majority's lengthy discussion of legislative history was excessive and might mislead future litigants into believing that such detailed and obscure history would constitute persuasive authority. *Id.* at 529-30 (Scalia, J., concurring).

45. Three dissenters, Justices Blackmun, Brennan, and Marshall, argued that instead of limiting the balancing test to criminal defendants, the Court instead should extend it to all civil litigants, defendants, and plaintiffs alike. *Id.* at 530-33.

46. Rule 609 is one of the few Rules of Evidence that has been changed since the enactment of the Federal Rules of Evidence in 1975. *See* 480 U.S. 1025, 1030 (1987). The sensible changes in Rule 609 result in part from the Court's criticism of the irrationality of the old version.

47. *See generally* WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY ch. 7 (1988) (reviewing recent opinions where the Court used the plain meaning approach to decide the case and discussing Justice Scalia's theory that the use of legislative history to determine legislative intent is inherently unreliable).

48. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (arguing that statutes, like the Constitution, should be interpreted in their present societal, political, and legal contexts); Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991) (arguing for a refinement of theories of interpretation to reflect the unique nature of the tax legislative process); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (arguing for an economics-based interpretation to legislation); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (arguing for the development of a new set of interpretive norms for interpreting statutes).

49. There is no reason that more deference should be paid to the plain meaning of the Federal Rules than the other rules of procedure because Congress affirmatively enacted the Federal Rules. *But cf.* 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL: A GUIDE TO THE FEDERAL RULES OF EVIDENCE 12 (5th ed. 1990) (arguing that Congress' affirmative enactment of the Federal Rules of Evidence may impede the growth and development of evidence law). The judiciary is a coequal branch of government with the special obligation for the administration of justice. Furthermore, one justification for plain meaning—that it is a way of preventing judicial overreaching—seems less compelling in the context of rules governing the conduct of a judicial trial.

whether information will "assist"[50] or "confuse"[51] the trier of fact is a quintessential judicial judgment call. Where Congress purposely left a point open or vague, attempts to justify various interpretations by resort to plain meaning are disingenuous.

The relationship between the Rules and the vast body of common law that they codify and incorporate is complex. Unquestionably, the Rules coexist with unstated common law assumptions that were never formally incorporated into the corpus of the Rules. The special relationship of the Federal Rules to the common law and the special expertise of the bench in evidentiary matters affect how the Rules should be interpreted.

Many of the so-called plain meaning debates pose questions of how to resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions.[52] Under the new theory of plain meaning, the language of the Federal Rules controls, even in light of a strong and persuasive common law tradition to the contrary. Obviously, where the Rules consciously and clearly depart from preexisting common law, that departure supplants the pre-Rules approach. Plain meaning is troubling, however, when there is no indication that Congress intended to deviate from the prior common law consensus, yet courts still use such "plain" interpretations to overrule the underlying common law that at least informed, and perhaps determined, congressional understanding and expectation.

Whatever the merits of plain meaning, however, it has arrived as a theory of choice in interpreting the Federal Rules. It is therefore vital that a group convened to consider revision of the Rules should be free to reframe the Rules consistent with the original intent of the drafters. If the drafters failed to draft with sufficient clarity the first time (or if the Supreme Court misread the text), the drafters can produce a better second effort. So viewed, the jurisprudence of plain meaning should act not as a deterrent, but as a spur to a Rules revision process. Moreover, the Court's affinity for plain meaning emphasizes the need to monitor the Rules so that they say what they mean. Because of the current trend in interpretation, an Advisory Committee will perform an essential service by making words more specific and clarifying what is intended. All of these factors support the creation of an Advisory Committee on Evidence.

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50. *See* FED. R. EVID. 702.

51. *See* FED. R. EVID. 403.

52. Two examples of these debates are discussed in this Article. *See infra* part II (discussing the proper relationship between the common law and the Rules on coconspirator declarations); *infra* part III (discussing the proper relationship between the common law and the Rules on the admissibility of scientific testimony).

II. Rules 104 and 801(d)(2)(E)—The Trouble with Bourjaily

In *Bourjaily v. United States,*[53] the Court considered the foundational requirements for the admissibility of coconspirator declarations under the Federal Rules. Rule 801(d)(2)(E) exempts from hearsay "a statement [made] by a coconspirator of a party during the course and in furtherance of the conspiracy."[54] As a foundational matter, to apply the exemption, a court must determine that a conspiracy existed and that the declarant and the defendant were both a part of it.[55]

Reliance upon the actual statement to prove the foundational requirement was labelled derisively "bootstrapping" by the common law. Instead, the common law required that the judge, to make the foundational finding of a conspiracy, use evidence entirely independent of the coconspirator declaration sought to be admitted.[56] The common law requirement of independent evidence of a conspiracy does not appear, however, in Rule 801(d)(2)(E). Both the text of Rule 801(d)(2)(E) and the accompanying advisory committee notes are silent on the independence element. *Bourjaily* departed

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53. 483 U.S. 171 (1987).

54. FED. R. EVID. 801(d)(2)(E).

55. *Bourjaily,* 483 U.S. at 175. We do not distinguish between civil and criminal cases. Although most conspiracy cases arise in a criminal context, Rule 801(d)(2)(E) encompasses both, and arises most notably in civil Racketeering, Influenced, and Corrupt Organization ("RICO") cases. Because of the close nexus between criminal law and civil RICO, strong policy arguments exist for applying the same standard in RICO cases. Moreover, applying a different standard in civil and criminal cases seems unduly complicated.

56. Such evidence is usually referred to as "evidence aliunde." In Glasser v. United States, 315 U.S. 60 (1942), and United States v. Nixon, 418 U.S. 683 (1974), both of which pre-date the Federal Rules, the Supreme Court set out the evidence aliunde requirement. In *Glasser,* a defendant claimed that he was denied his Sixth Amendment right to adequate assistance of counsel where his attorney also represented another defendant in the case. *Glasser,* 315 U.S. at 67. Glasser contended that his attorney had failed to object to a statement implicating him because the statement was made by his attorney's other client in the case. *Id.* at 68-69. The prosecution argued that the statement nevertheless would have been admissible as a coconspirator declaration. *Id.* at 74. The Court dismissed the possibility that the statement constituted a coconspirator's admission. *Id.* at 73-75. The Court noted that "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, *only if there is proof aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.* at 74-75 (citations omitted) (emphasis added). Similarly, in setting out the standard of coconspirator's admissions in *Nixon,* the Court included the requirement that such declarations are admissible "upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants." *Nixon,* 418 U.S. at 701 (footnote omitted). Virtually all of the courts of appeals had adopted this "independence" requirement and adhered to it even after the Federal Rules were adopted. *See, e.g., Bourjaily,* 483 U.S. at 195 n.9 (Blackmun, J., dissenting) (describing how the Courts of Appeals have treated this issue); *see also* Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay,* 12 HOFSTRA L. REV. 323, 371 (1984) (arguing, pre-*Bourjaily,* that the independence requirement survived the enactment of the Federal Rules).

from the common law prohibition on bootstrapping and held that a judge need not rely entirely upon independent evidence of conspiracy, but may consider the coconspirator statement itself in determining whether a conspiracy existed.[57] It left open, however, the question of whether coconspirator statements may serve as the *only* evidence of the preliminary fact of conspiracy. In contesting his conviction,[58] Bourjaily challenged the admission of statements made by Angelo Lonardo and introduced by the government against Bourjaily as coconspirator declarations. In a tape-recorded telephone conversation, Lonardo told an FBI informant that he had a "gentleman friend" who wished to purchase cocaine. Lonardo arranged to meet the informant at a deserted hotel parking lot, where Lonardo stated that his "friend" would be waiting to complete the transaction. Lonardo removed the cocaine from the informant's car and carried it to the car where Bourjaily had been waiting. At that point, the FBI interceded and arrested Lonardo and Bourjaily, finding nearly $20,000 in cash in Bourjaily's car.[59]

Bourjaily claimed that statements by Lonardo concerning a "gentleman friend" were inadmissible as coconspirator admissions because there was insufficient proof of conspiracy and because the district court had relied upon the statement itself in determining whether a conspiracy existed.[60] Bourjaily urged the Court to hold that the common law prohibition survived because the Federal Rules "evidenced no intent to disturb the bootstrapping rule."[61] He argued that the common law rule prohibiting bootstrapping was so well-settled that it should survive the adoption of the Federal Rules absent "affirmative evidence" indicating Congress' intent to abolish the rule.[62]

The Supreme Court majority rejected Bourjaily's argument. Relying primarily upon the text of the Federal Rules themselves, the majority noted that Rule 801(d)(2)(E) imposed no requirement of independent proof of conspiracy.[63] Instead, the Court turned to

57. *Bourjaily*, 483 U.S. at 178-79.

58. Bourjaily was convicted in the United States District Court for the Northern District of Ohio for conspiracy and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). Bourjaily appealed his convictions, United States v. Bourjaily, 781 F.2d 539 (6th Cir. 1986), and the Supreme Court granted certiorari, 479 U.S. 881 (1986).

59. *Bourjaily*, 483 U.S. at 173-74.

60. *Id.* at 176. Furthermore, Bourjaily argued that his Sixth Amendment confrontation rights were violated by the admission of Lonardo's statements against him when Lonardo was unavailable for cross examination. *Id.* at 181-82. We discuss only the statutory aspect of *Bourjaily*. We note, however, that courts traditionally considered only independent evidence of the conspiracy. This traditional prohibition on bootstrapping, which *Bourjaily* eliminated, belies the majority's argument that the coconspirator exemption (as construed by the Court) is a "firmly rooted hearsay exception." *Id.* at 183. Therefore, although we do not address the constitutional result, which depends upon the "firmly rooted" rhetoric, we note that if *Bourjaily* had been decided the way we suggest—requiring independent evidence of a conspiracy—the constitutional question simply would not have been presented.

61. *Id.* at 178.

62. *Id.*

63. *Id.* at 178-79.

Rule 104, which controls preliminary determinations about evidence. In examining Rule 104, the majority found no requirement that a trial judge rely upon independent evidence to determine the existence of a conspiracy. It interpreted Rule 104, which exempts the court from employing the strictures of the Federal Rules in making preliminary determinations, to require no independent proof of conspiracy.[64] The majority contended that its reading was consistent with the plain meaning of the text and that such a plain meaning "would seem to many to be the end of the matter."[65]

The majority also refuted Bourjaily's argument that, in this context, Congress could not possibly have intended the sweeping abrogation of common law that its plain meaning approach to Rule 104 would effect.[66] Without specifically addressing the place of legislative history, the majority simply dismissed the logic of Bourjaily's argument, sharply rejecting the notion that legislative silence could be imputed to support the proposition that Congress intended to perpetuate the requirement of entirely independent evidence of conspiracy. The majority observed that "[i]t would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104."[67] Finally, the majority discussed the policy underlying the coconspirator declaration rule, and argued that it would be fair to use the declaration itself to prove the threshold fact of the existence of the conspiracy.[68] It stressed that such statements are merely "*presumed* unreliable"[69] and may, when joined with other evidence, paint

64. *Id.* at 178. Rule 104 provides in part: "In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges." FED. R. EVID. 104(a).

65. *Bourjaily*, 483 U.S. at 178. The majority, however, did not rest its reasoning on the plain meaning of Rule 104 alone, although its rhetoric implies that it could have. It reviewed the common law that had developed requiring independent proof of conspiracy, but then dismissed these cases because they were pre-Rules decisions. *Id.* at 177-78. By doing so, the majority emphasized its plain meaning approach, portraying the Rules as an entirely new body of law, about which traditional common law could not meaningfully instruct. The majority also examined the policy behind coconspirator admissions.

The dissent makes the important point that the majority's plain meaning is not the only logical interpretation of the Rules, particularly when Rules 801(d)(2)(E) and 104 are read together. *Id.* at 194-96 (Blackmun, J., dissenting). Another valid interpretation, and one that comports with the history of the Rule, *see infra* note 80 and accompanying text, would accommodate the liberal Rule 104 standard of permitting the judge to rely upon inadmissible evidence in making preliminary determinations about the traditional requirement of *independent* proof of conspiracy. It would frame the inquiry in terms of the common law requirement of independence. Thus, the judge could use all evidence, except privileged evidence, to determine whether there existed *independent proof of conspiracy*. *Bourjaily*, 483 U.S. at 195 (Blackmun, J., dissenting). *See* Mueller, *supra* note 56, at 372 (distinguishing the manner of proof, governed by Rule 104, and the point to be proved, independent existence of conspiracy).

66. *Bourjaily*, 483 U.S. at 178.

67. *Id.* (emphasis in original).

68. *Id.* at 179-80.

69. *Id.* at 179 (emphasis in original). The court noted that "a piece of evidence,

a convincing picture of conspiracy.[70]

We believe that *Bourjaily* reaches a fundamentally incorrect result. The Supreme Court majority fails to confront the underlying rationale and history of the admission of coconspirator's statements and thereby undervalues the importance of independent proof of conspiracy.[71]

The most frequently articulated rationale for admitting coconspirator statements is the agency theory[72]—that coconspirators have made a "partnership in crime."[73] Abandonment of the independence requirement, however, vitiates the agency justification. As a general matter, agency law requires independent proof of the agency relationship; hence, the traditional prohibition that an agent's statement alone cannot serve as proof of agency.[74] By analogy, the coconspirators' "partnership in crime" must also be proven by independent evidence.

Furthermore, it is difficult to justify admission of coconspirator declarations on the basis of trustworthiness.[75] As the admissions become more removed from the party-opponent himself, the statements seem less reliable.[76] Particularly in the case of coconspirators, such statements are suspect because participants in a criminal

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unreliable in isolation, may become quite probative when corroborated by other evidence. A *per se* rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required." *Id.* at 180.

70. The reliability factor would be undercut, however, if the coconspirator statement is the *only* evidence of conspiracy. *See infra* notes 75-79 and accompanying text.

71. For a discussion of the rationale of the rule, see RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 394-98 (2d ed. 1982) [hereinafter LEMPERT & SALTZBURG] (discussing various theories for justifying coconspirator admissions); 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(2)(E)[01] (same); Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467, 474-78 (1989) (discussing the rationale for the exemption).

72. *McCormick on Evidence* introduces its section on coconspirators by observing: "Analogous to partnerships are conspiracies to commit a crime or an unlawful or tortious act." MCCORMICK ON EVIDENCE § 267, at 792 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK]. Not everyone agrees, however, that the agency theory makes sense. The committee note to Rule 801(d)(2) labels it a fiction. FED. R. EVID. 801(d)(2) advisory committee's note. *Weinstein's Evidence* explains that the drafters adhered to the agency rationale for coconspirator declarations "not because they found it a convincing rationale but because they adjudged it a useful device for protecting defendants from the very real dangers of unfairness posed by conspiracy prosecutions." 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(2)(E)[01], at 801-310.

73. Judge Learned Hand explained: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926).

74. *See* RESTATEMENT (SECOND) OF AGENCY § 285 (1957).

75. Often admissions are justified "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." FED. R. EVID. 801(b)(2)(E) advisory committee's note. This justification, even when accounting for agency theories, only makes sense in the context of personal, authorized, or adopted admissions. FED. R. EVID. 801(d)(2)(A) to (C). *See* Mueller, *supra* note 56, at 355.

76. Coconspirator declarations are the last of a series of admissions in the hearsay exemption that evolve from personal to vicarious admissions, beginning with the admission of the party himself and ending with an admission of a coconspirator. *See* FED. R. EVID. 801(d)(2).

endeavor have the incentive to blame or involve others.[77] The trustworthiness, if any, of coconspirators' statements derives from the special knowledge that the conspiring criminals obtained in the course of the conspiracy.[78] Such putative trustworthiness, however, presumes the existence of a conspiracy, and thereby makes bootstrapping appear particularly dangerous. As the *Bourjaily* dissent explained, abandonment of the independence requirement "will eliminate one of the few safeguards of reliability that this exemption from the hearsay definition possesses."[79]

Bourjaily is flawed not only because it failed to confront the underlying rationale of the coconspirator exception, but also because it failed to address the history and development of this exemption from hearsay. Congress did not invent coconspirator admissions, it only attempted to codify the preexisting rule. The Advisory Committee, uncertain about the wisdom of the agency principle, decided to incorporate it into the rule without expanding it.[80] The Federal Rules retain all other aspects of the common law coconspirator declaration requirements—duration and furtherance—except independent proof of agency. The silence likely stems from the oversight in tailoring the very general provisions of Rule 104 to the

77. Conspirators are not noted for trustworthiness or dependability. *See* Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule,* 52 MICH. L. REV. 1159, 1165 (1954) ("It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law."), *quoted in* United States v. Inadi, 475 U.S. 387, 405 (1986) (Marshall, J., dissenting); Mueller, *supra* note 56, at 355. The Court's emphasis on reliability, *see* Bourjaily v. United States, 483 U.S. 171, 180 (1987) ("[T]here is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant."), stems in part from a confusion between statements that would otherwise be hearsay, exempted from hearsay by Rule 801(d)(2), and those operative facts or verbal acts that are not hearsay at all. *See* LEMPERT & SALTZBURG, *supra* note 71, at 398-400.

78. The drafters of the Model Code of Evidence rejected the agency theory and argued for an expansion of the coconspirator exemption based upon its reliability. The comment to Rule 508(b) of the Model Code read: "[T]he tendency in the authorities is to receive evidence of all declarations of a conspirator concerning the conspiracy when made during its pendency. These statements are likely to be true, and are usually made with a realization that they are against the declarant's interest." MODEL CODE OF EVIDENCE Rule 508(b), at 251 (1942), *quoted in* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(2)(E)[01], at 801-309 n.25.

79. *Bourjaily,* 483 U.S. at 186 (Blackmun, J. dissenting); *see also* 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 427, at 332 (1980) [hereinafter LOUISELL & MUELLER] (stating that the "independent evidence requirement amounts to an expression of mistrust in the use of such statements"); Mueller, *supra* note 56, at 373 ("[T]he coconspirator exception is one which, in its very nature and for good reason, calls out for corroborative proof.").

80. The Advisory Committee note explained that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." FED. R. EVID. 801(d) advisory committee's note.

specialized case of the coconspirator exception. Indeed, the argument that the *Bourjaily* majority rejects—that silence imputes the status quo—probably best reflects congressional intent to perpetuate the rule.

Abolishing the independence requirement strengthens the hand of the prosecutor.[81] It requires less of a showing of conspiracy than was required under the common law. It may also assist in insulating irrational trial court decisions on conspiracy from judicial review.[82] In addition, although the majority in *Bourjaily* specifically avoided the question,[83] the opinion leaves open the dangerous possibility that the coconspirator statements could form the *only* evidence of conspiracy.

The ultimate impact of *Bourjaily* is, however, unclear. First, it is rare that the only available proof of conspiracy is the statement itself. Often there is additional circumstantial evidence.[84] Second, the trial judge still must pass on the reliability of the statement and find the existence of a conspiracy by a preponderance of the evidence. *Bourjaily* does not *require* a finding of conspiracy or *mandate* bootstrapping. It only rejected the common law majority rule that would consider only independent proof of conspiracy[85] and permitted the trial judge to rely upon the coconspirator's statement itself.[86] If the only evidence of the conspiracy is the coconspirator's statement, we hope that a judge would find that insufficient evidence of a conspiracy existed to meet the threshold requirement.

We note that the courts of appeals, in interpreting *Bourjaily,* have routinely relied upon and occasionally overtly required additional *independent* evidence aside from the coconspirator's statement.[87]

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81. *See* Michael H. Graham, *Evidence and Trial Advocacy: The Impact of* Bourjaily *on Admissions by Coconspirator,* 24 CRIM. L. BULL. 48, 52 (1988) (arguing that *Bourjaily*'s impact will be substantial because it "will significantly ease the government's burden in many of its more difficult cases").

82. *See* Mueller, *supra* note 56, at 373.

83. "We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence." *Bourjaily,* 483 U.S. at 181.

84. *See* Thomas J. Scorza, *Problems with Co-Conspirator Hearsay,* 16 LITIG. 30, 31 (1990) (discussing the likelihood that other evidence of the conspiracy will exist).

85. *Bourjaily,* 483 U.S. at 178-79.

86. *Bourjaily* states that "a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted." *Id.* at 181. The Court acknowledged that the ultimate decision is one for the trial judge who " 'should receive evidence and give it such weight as his judgment and experience counsel.' " *Id.* (quoting United States v. Matlock, 415 U.S. 164, 175 (1974)). *See* Brian Burris & Gary Nelson, Note, *Co-Conspirator Hearsay in Federal and Kansas Jurisdictions After* Bourjaily v. United States, 27 WASHBURN L.J. 528, 544 (1988) (noting that trial judges may, in their discretion, rely totally upon independent evidence in making a finding as to the admissibility of conspiracy statements).

87. *See* United States v. Gambino, 926 F.2d 1355, 1361 n.5 (3d Cir.) (noting that "every United States court of appeals that has addressed this issue has required some independent evidence," and listing recent cases), *cert. denied,* 111 S. Ct. 2800 (1991); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988) (finding that a statement standing alone is insufficient without some independent evidence, otherwise all such statements would be "self-validating" and would eliminate the safeguard of corroboration); *see also* 5 LOUISELL & MUELLER, *supra* note 79, § 427, at 168 (noting that "the Court in *Bourjaily* expressly declined to hold that the statement *alone* could prove the necessary

Even those courts that have not explicitly required some independent evidence have nevertheless, without exception, relied upon other evidence in addition to the statement itself to find the existence of a conspiracy.[88] To our knowledge, no court has allowed the statement alone to serve as sufficient evidence of conspiracy; yet, since *Bourjaily,* that possibility exists. Given the vast amount of judicial discretion involved in making the preliminary determination and the current trend toward harmless error, it is unlikely that a trial court would be reversed on this point.

In addition to its controversial outcome, *Bourjaily* is important because of its reasoning. The dissent chides the majority for espousing "an overly rigid interpretive approach"[89] and eschewing "a more complete analysis."[90] The dissent challenged the majority's overarching view of the function of the Federal Rules and the majority's willingness to cast away the common law tradition without first investigating the complicated interrelationship of the Rules and the presumptions of Congress.[91] By "accepting the easily available safety 'net' of Rule 104(a)'s 'plain meaning,' "[92] the majority failed to wrestle with a truly difficult question of interpretation. In *Bourjaily,* the Court demonstrated its willingness to adhere to its own version of plain meaning and to ignore another interpretation that comported with congressional intent to leave the coconspirator exception intact.[93] Its preference for plain meaning outside any consideration of the context in which the Rule was drafted may

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predicate, and post-*Bourjaily* cases suggest that *some* independent evidence is still required") (footnote omitted) (emphasis in original); 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(2)(E)[01], at 801-311 (stating that "[s]ufficient proof is defined as hearsay statements coupled with other independent evidence which corroborates the hearsay statements") (citing *Bourjaily*); Burris & Nelson, *supra* note 86, at 544 (interpreting *Bourjaily* to allow bootstrapping only where there is some independent evidence).

88. *See, e.g.,* United States v. Chestang, 849 F.2d 528, 531 (11th Cir. 1988) (stating that "[w]e need not decide whether the district court could have relied *solely* on the coconspirator statements in making preliminary factual determinations under Rule 801(d)(2)(E). In addition to the coconspirator statements themselves, there was sufficient independent evidence . . . to support the district court's finding . . . that the Chestangs were involved in a conspiracy . . . .") (footnote omitted); United States v. Zambrana, 841 F.2d 1320 (7th Cir. 1988) (admitting bootstrapped coconspirator's statement to prove conspiracy in light of corroboration by other independent evidence); *see also* John E. Sullivan, Note, Bourjaily v. United States: *A New Rule for Admitting Coconspirator Hearsay Statements Under Federal Rule of Evidence 801(d)(2)(E),* 1988 WIS. L. REV. 577, 596 n.123 (reviewing recent United States Courts of Appeals decisions and noting that "[i]n all these cases, some form of nonhearsay corroborating evidence was presented to link the defendant to a conspiracy"); Patrick J. Sullivan, *supra* note 71, at 502 n.259 (discussing cases that have required independent evidence to buttress the coconspirator's statement).

89. *Bourjaily,* 483 U.S. at 187-88 (Blackmun, J. dissenting).

90. *Id.* at 188.

91. *Id.* at 186-96.

92. *Id.* at 195.

93. On the Court's plain meaning approach to interpreting the Federal Rules, see *supra* part I.

seem less jarring in light of Congress' silence on the issue. The majority's rhetoric, however, insinuates that plain meaning will trump congressional intent, provided the result is not absurd, even where there is strong evidence in the legislative history that the "plain" language plainly is not what Congress meant.

The Court's opinion in *Bourjaily* raises important issues for a newly-created Advisory Committee to consider. First, such a Committee should consider the substantive issue of whether independent evidence of conspiracy is required for the admission of a coconspirator's declaration. At the very least, it is clear that Congress did not address this question. We suggest that the Rule be amended.[94] Second, such a Committee should consider the underlying basis for the submission of coconspirator's statements, for there seems to be little consensus on the rationale behind allowing such admissions. Finally, on a more theoretical level, *Bourjaily* presents a case study for interpreting the plain meaning of the Federal Rules. It raises the issue of how pre-Rules common law should affect courts' interpretations of the Rules.

III. Rule 702—Scientific Evidence and Expert Opinion

Rule 702, which liberalized the common law's rules concerning admission of expert opinion testimony, is among the most innovative and controversial of the Federal Rules.[95] Rule 702 allows the admission of any expert testimony that "will assist the trier of fact."[96] Hence, it substitutes a "helpfulness" standard for the previous common law requirement that an expert may only testify where the subject matter of the testimony otherwise would be incomprehensible to the lay factfinder.[97] This revision of the common law

94. One possible solution has been advanced by the American Bar Association Criminal Justice Section Committee on Rules of Criminal Procedure and Evidence, which is in the process of proposing a redraft of the coconspirator declaration rule. The Section's current proposal, (1) requires that the declarant be produced if available; (2) requires that membership in the conspiracy and the trustworthiness of the statement be corroborated by independent evidence; (3) applies a standard of clear and convincing evidence in criminal cases and a preponderance standard in civil cases; and (4) requires notice to the adverse party. We favor a return to the common law majority requirement of proof aliunde. We believe that the prophylactic value of a rule barring all bootstrapping preserves the trustworthiness and integrity of coconspirator admissions. The ABA proposal, however, provides a reasonable alternative that will also protect the rights of the alleged coconspirator and offers a starting point for reconsideration of the coconspirator rule. *See also* Sullivan, *supra* note 71, at 503-04 (discussing alternatives that would limit reliance upon bootstrapping).

95. *See* Paul Rothstein, *New Approaches to Qualification of Experts in Courts*, 1 CTS. HEALTH SCI. & L. 450, 450-51 (1991) (delineating "Seven 'Great Liberalizations' of Opinion and Expert Evidence"). The other major innovation in expert testimony is Rule 703. *See infra* notes 190-95 and accompanying text (discussing the reasonable reliance standard of Rule 703).

96. Rule 702 reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

97. *See* 4 LOUISELL & MUELLER, *supra* note 79, § 380, at 633; 3 WEINSTEIN & BERGER, *supra* note 18, ¶ 702[02], at 702-09.

has been successful generally, but includes the greatest single oversight in the Rules—failure to clarify the standard for admitting novel scientific evidence.

Neither Rule 702 nor the Advisory Committee's note adopted a position on the post-Rule 702 viability of *Frye v. United States*,[98] the landmark opinion on novel scientific evidence. In *Frye*, the Court of Appeals for the District of Columbia Circuit held that a polygraph test had not yet attained the requisite acceptance among experts in the field to be admitted into evidence.[99] *Frye* held that, to be admissible, such novel scientific evidence must satisfy a "general acceptance" standard.[100] Although *Frye* predates the Rules, the circuits are sharply divided on its applicability,[101] as are the state courts.[102] *Shepard's Federal Citations* lists over one thousand citations to *Frye* in state and federal courts.[103] Concomitantly, scholarship on the *Frye* issue is legion.[104]

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98. 293 F. 1013 (D.C. Cir. 1923).

99. *Id.* at 1014 (stating that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"). *See generally* LEMPERT & SALTZBURG, *supra* note 71, at 861-62 (describing the *Frye* standard); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (same).

100. *Frye*, 293 F. at 1014. Although the *Frye* issue is often couched in terms of standards for the admission of *novel* scientific evidence, the analysis is the same when applied to scientific evidence in general.

101. *Compare* Clinchfield R.R. v. Lynch, 784 F.2d 545, 553-54 (4th Cir. 1986) (rejecting *Frye*) *and* United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985) (same) *and* United States v. Williams, 583 F.2d 1194, 1197-98 (2d Cir. 1978) (same), *cert. denied*, 439 U.S. 1117 (1979) *with* Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc) (per curiam) (adopting the *Frye* standard), *cert. denied*, 60 U.S.L.W. 3597 (U.S. Mar. 3, 1992) *and* United States v. Tranowski, 659 F.2d 750, 755-56 (7th Cir. 1981) (same) *and* United States v. Brady, 595 F.2d 359, 362-63 (6th Cir.) (same), *cert. denied*, 444 U.S. 862 (1979) *and* United States v. Alexander, 526 F.2d 161, 163 (8th Cir. 1975) (same) *and* United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974) (same).

102. *Compare* People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976) (endorsing the *Frye* standard) *and* Reed v. State, 391 A.2d 364, 372 (Md. 1978) (same) *and* State v. Schwartz, 447 N.W.2d 422, 424 (Minn. 1989) (same) *and* People v. Castro, 545 N.Y.S.2d 985, 986 (Sup. Ct. 1989) (same) *and* Commonwealth v. Topa, 369 A.2d 1277, 1281 (Pa. 1977) (same) *with* Prater v. State, 820 S.W.2d 429, 431 (Ark. 1991) (rejecting the *Frye* standard) *and* Campbell v. People, 814 P.2d 1, 7-8 (Colo. 1991) (same) *and* Andrews v. State, 533 So. 2d 841, 846-47 (Fla. Dist. Ct. App. 1988) (same) *and* Rubanick v. Witco Chem. Corp., 593 A.2d 733, 747-48 (N.J. 1991) (same).

103. SHEPARD'S FEDERAL CITATIONS (7th ed. 1989 & Supps.). *See generally* Giannelli, *supra* note 99, at 1204-08 (discussing the widespread reliance upon and citation to *Frye*).

104. *See, e.g.*, Giannelli, *supra* note 99; Michael H. Graham, *Relevancy and the Exclusion of Relevant Evidence: Admissibility of Evidence of a Scientific Principle or Technique—Application of the* Frye *Test*, 19 CRIM. L. BULL. 51 (1983); Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879 (1982); Andre A. Moenssens, *Admissibility of Scientific Evidence—An Alternative to the* Frye *Rule*, 25 WM. & MARY L. REV. 545 (1984); *Symposium on Science and Rules of Evidence*, 99 F.R.D. 187 (1983); *see also* 3 WEINSTEIN & BERGER, *supra* note 18, ¶ 702[03]; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Paul C. Giannelli, *Scientific Evidence: A Proposed Amendment to Federal Rule 702*, 115 F.R.D. 102 (1986); Peter W. Huber, *On Law and Sciosophy*, 24 VAL. U. L. REV. 319 (1990); Frederic I. Lederer, *Resolving the* Frye *Dilemma—A*

Criticism of *Frye* stems from two interrelated concerns. First, the *Frye* test has been criticized on its own terms as unsound policy.[105] Second, courts and commentators have argued that *Frye* is incompatible with the plain meaning, as well as the spirit, of Rule 702.[106]

On the first point, the *Frye* test has been criticized as "too malleable" and vague.[107] Courts can easily "manipulate the parameters of the relevant 'scientific community' and the level of agreement needed for 'general acceptance.' "[108] Furthermore, courts vary in their examinations of whether evidence derives from novel science.[109] One of *Frye*'s attractions is that it is easy to apply. Yet this ease of application has led, in some cases, to an "uncritical acceptance of prior *judicial,* rather than scientific, opinion as a basis for finding 'general acceptance.' "[110]

Second, and equally important, the *Frye* test fundamentally conflicts with the Rules. As the Third Circuit explained in *United States v. Downing,* "in its pristine form the general acceptance standard reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence."[111] The helpfulness standard is purposefully broad and intended to expand the use of experts. It establishes no specific limitation on scientific evidence, novel or otherwise.

The importance of the debate over *Frye* is illustrated by the newly developing field of toxic torts. Many toxic tort cases involve difficult questions of scientific causation, such as the effects on humans of exposure to PCBs,[112] the ingestion of Bendectin,[113] and dioxin.[114]

Reliability Approach, 115 F.R.D. 84 (1986); James E. Starrs, Frye v. United States *Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702,* 115 F.R.D. 102 (1986).

105. *See, e.g.,* United States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970) (arguing that courts cannot abdicate to scientists the responsibility for ruling on the admissibility of evidence), *cert. denied,* 401 U.S. 994 (1971); State v. Hall, 297 N.W.2d 80, 84-85 (Iowa 1980) (en banc) (rejecting *Frye* and explaining that distinguishing scientific from other testimony is difficult and that general acceptance is a "nebulous concept"); 2 LOUISELL & MUELLER, *supra* note 79, § 105, at 818 (citing *Frye*'s unpredictability and tendency to exclude useful evidence); MCCORMICK, *supra* note 72, § 203, at 491 (arguing that the *Frye* standard is appropriate for judicial notice, but too rigid a standard to control the admissibility of all novel scientific evidence).

106. *See generally* ROTHSTEIN, NUTSHELL, *supra* note 23, at 24-25 (summarizing the debate over *Frye*'s compatibility with Rule 702).

107. United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985).

108. *Id.* at 1236. *See generally* Giannelli, *supra* note 99 (describing how courts have approached the issue of the admissibility of novel scientific evidence after *Frye*).

109. *See, e.g.,* Giannelli, *supra* note 99, at 1211 ("It is unresolved whether the *Frye* standard requires general acceptance of the scientific technique or of both the underlying principle and the technique applying it.").

110. *Downing,* 753 F.2d at 1236.

111. *Id.* at 1237.

112. *See, e.g., In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990), *cert. denied,* 111 S. Ct. 1584 (1991).

113. *See, e.g.,* DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990).

114. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd on other grounds,* 818 F.2d 187 (2d Cir. 1987), *cert. denied,* 487 U.S. 1234 (1988). Another highly contested area relates to the admissibility of DNA typing in criminal cases. *See, e.g.,* Prater v. State, 820 S.W.2d 429 (Ark. 1991).

Some scholars who favor extending *Frye* contend that much plaintiff expert testimony has been marred by "pseudo-science."[115] Too many marginally qualified "experts" endorse scientific theories that possess little scientific integrity, yet those same "experts" are in a position to expose defendants to astronomical liability in individual or class-action litigation.[116]

Concerns over "hucksterism" and false science, however, are nothing new. Although toxic torts cases often involve scientific questions on the frontiers of epidemiology, it would be a mistake to suppose that questions about expert testimony are themselves novel.[117] Furthermore, it would be unwise to let one controversial and difficult area determine the general interpretation of Rule 702. The "tail" of the toxic tort cases should not wag the "dog" of expert rules that also apply to smaller civil cases and criminal trials.

The Supreme Court has yet to consider the admissibility of scientific testimony under Rule 702. If it does, the jurisprudence of plain meaning[118] presumably will rule out the Court's endorsement of *Frye* because nothing in the text of the Rule suggests that scientific methodology must be generally accepted before expert testimony based upon it is admissible. Certainly, the Court's reasoning in *Bourjaily*[119] suggests that the common law's prior extensive reliance upon *Frye,* and the silence of the Federal Rules and the Advisory Committee's note, do not combine to make *Frye* the law in a post-Rules regime. Unlike *Bourjaily,* however, *Frye* is at the center of a highly charged debate, with a strong and vocal constituency arguing for its vitality. Furthermore, given the flexibility of the Rule 702 helpfulness standard, a plain meaning approach cannot yield conclusive results.

The Advisory Committee on Civil Rules has proposed amending Rule 702 so that experts may testify to "scientific, technical, or other specialized information" if such testimony is "reasonably reliable and will substantially assist the trier of fact."[120] The proposal also

115. *See, e.g.,* Chaulk v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (stating that "there is hardly anything not palpably absurd on its face, that cannot now be proved by some so-called 'expert' ") (citations omitted); *see also* Michael C. McCarthy, *"Helpful" or "Reasonably Reliable?": Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703,* 77 CORNELL L. REV. 350, 350 n.1 (1992) (compiling scholarly and judicial calls for greater supervision of expert testimony).

116. *See* McCarthy, *supra* note 115, at 350-54 (describing improper uses of expert testimony).

117. The problems of resolving conflicts between expert witnesses in front of lay jurors were identified long ago by Learned Hand when he observed that "[t]he expert becomes a hired champion of one side." Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 HARV. L. REV. 40, 53-54 (1901).

118. Plain meaning jurisprudence is discussed *supra* part I.

119. *Bourjaily v. United States* is discussed *supra* part II.

120. Preliminary Draft, *supra* note 17, at 156.

provides for notice to the opponent of the testimony.[121] The Committee Advisory note accompanying the proposed amendment explains that the revision is "intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues."[122] The Committee Advisory Note explains that "[t]he rule does not mandate a return to the strictures of *Frye v. United States.* However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder."[123] Furthermore, the note explains that the determination of "reasonable reliability" and whether the testimony will "substantially assist" the trier of fact will be decided by the trial judge as a preliminary question pursuant to Rule 104(a).[124]

We have little philosophic objection to the requirement that scientific testimony be "reasonably reliable."[125] At some point, of course, the reliability inquiry collapses into a Rule 401 relevance test. If the science is not reliable, the testimony fails to pass even minimal standards of relevancy. Beyond the minimal reliability necessary to pass the low threshold of Rule 401 relevance, however, we question how a judge would determine "reasonable reliability." The difficulty in establishing a standard of reliability explains the popularity of the *Frye* test, which, despite its drawbacks, is easy to apply. We fear that without further direction, the revised Rule's requirement of "reasonable reliability" could, despite the Advisory note's disclaimer, lead to an informal adoption of *Frye.* Although the Advisory Committee note clearly states that the *Frye* standard of general acceptance does not represent the only avenue for judicial determination of reliability, it reopens the door for *Frye* in a manner

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121. The notice portion of Proposed Rule 702 provides:

> Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefor, that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure.

Id. These proposed disclosure requirements strike us as eminently sensible and noncontroversial. In fact, our only objection is that the notice provision merely duplicates the civil rules and does not go far enough. In a symposium on scientific testimony, Professor Giannelli proposed more generally that expert testimony only be admitted where the proponent provides the adverse party with "sufficient advance written notice of intent to use such evidence, including the nature of the expected testimony, the tests used, and the qualifications of the person who will testify." Paul C. Giannelli, *Scientific Evidence: A Proposed Amendment to Federal Rule 702, supra* note 104, at 102. Professor Giannelli's proposal, in addition to reinforcing the civil discovery rules, would have a beneficial effect in criminal cases, where discovery is not as liberal. *Id.* at 106.

122. Preliminary Draft, *supra* note 17, at 156.

123. *Id.* at 157 (citations omitted).

124. *Id.*

125. This requirement of reliability echoes the proposal of Professor Lederer, who suggested that "[i]f *reliable* scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." Frederic I. Lederer, *Resolving the* Frye *Dilemma—A Reliability Approach,* 115 F.R.D. 84, 84 (1986) (emphasis in original).

that, in our assessment, the current version of Rule 702 does not allow.

More important, we question the insertion of "substantially" before "assist."[126] This phraseology constitutes an invitation to federal trial judges to exclude the testimony of any expert they doubt, even that of a highly qualified expert. This invitation contravenes the spirit of Rule 702, which liberalizes the basis for admission of expert testimony so that the jury may benefit from increased scientific knowledge.[127] The requirement that the testimony "substantially" assist the trier of fact also may inadvertently raise due process concerns in criminal cases where the judge excludes relevant expert testimony for the defense.[128]

The "substantially assist" requirement is problematic even in civil cases, however, given our system that designates the jury as finder of fact and determiner of credibility. The addition of "substantially" may usurp the role of the jury as factfinder. Jurors evaluate the credibility of expert witnesses, and our system is strongly committed to the notion that lay jurors ought to make such judgments. In many respects, then, the debate over scientific evidence is also a debate over how much we trust the intelligence and good sense of jurors.[129] Although the concern about "hucksters" is real, the addition of "substantially" is too powerful a tonic under the circumstances. This is particularly true because the addition of "substantially" limits the *entire* ambit of expert testimony, not only that which may be characterized as novel scientific evidence.

We would prefer to see trial judges continue to exclude worthless scientific testimony within the framework of the Rule 401 relevancy/reliability model, aided by the preliminary determination procedures of Rule 104. Currently, judges exclude testimony by witnesses whose competence or methodology render them unworthy of expert status. Despite our displeasure with the current proposal for revision of Rule 702, however, we are encouraged to see *Frye* mentioned specifically in the text of the Committee note to the proposed

126. Preliminary Draft, *supra* note 17, at 156.

127. *See* Prater v. State, 820 S.W.2d 429 (Ark. 1991); *see also* DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 956 (3d Cir. 1990) (noting that the Federal Rules "embody a strong and undeniable preference for admitting any evidence having some potential for assisting the trier of fact and for dealing with the risk of error through the adversary process"); *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 857 (3d Cir. 1990) (noting that "in making reliability determinations, courts must err on the side of admission rather than exclusion"), *cert. denied,* 111 S. Ct. 1584 (1991).

128. *See* Comments Before the Advisory Committee on Civil Rules by Professor Myrna Raeder Concerning Proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence (Nov. 21, 1991) (copy on file with *The George Washington Law Review*).

129. *See, e.g.*, Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577 (1984) (arguing in favor of *Frye* and expressing distrust of juries).

rule. We hope that it initiates the important dialogue that is long overdue.

Instead of the current proposed amendments to Rule 702, we advocate the Third Circuit's approach to expert testimony in *United States v. Downing,*[130] which is faithful to the Rule 702 helpfulness standard. *Downing* held that the admission of expert scientific testimony "is not automatic, but conditional."[131] "First, the evidence must survive preliminary scrutiny in the course of an in limine proceeding conducted by the [trial] judge."[132] "This threshold inquiry," derived from the helpfulness standard of Rule 702, "is essentially a balancing test, centering on two factors: (1) the reliability of the scientific principles upon which the expert testimony rests, [and] (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury."[133] Second, admission depends upon the "fit," i.e. upon a specific showing that the proffered scientific evidence will elucidate particular features of the contested issue.[134] For example, in *Downing,* which involved expert testimony on eyewitness identification, the judge would have to find that the particular features of the eyewitness identifications involved may have impaired the accuracy of those identifications. Finally, the district court retains discretionary authority under Rule 403 to exclude any relevant evidence that would unduly waste time, confuse, or mislead the finder of fact.[135]

Downing has been widely followed.[136] However, courts continue to decide cases on both sides of the *Frye* issue.[137] We endorse an amendment to Rule 702 that tracks the analysis in *Downing,* and expressly provides for an in limine hearing on contested issues. We are also impressed with Professor Berger's suggestion, which is

130. 753 F.2d 1224 (3d Cir. 1985).
131. *Id.* at 1226.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *See, e.g.,* Campbell v. People, 814 P.2d 1 (Colo. 1991); Rubanick v. Witco Chem. Corp., 593 A.2d 733 (N.J. 1991).
137. For example, the Fifth Circuit en banc in Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (en banc) (per curiam), *cert. denied,* 60 U.S.L.W. 3597 (U.S. Mar. 3, 1992), recently established the *Frye* test in that circuit. It espoused a four-part test for scientific testimony: (1) qualification of the expert under Rule 702; (2) examination of the facts upon which the expert relies under Rule 703; (3) examination of the expert's methodology using *Frye;* and (4) balancing prejudice and probative value under Rule 403. *Id.* at 1110. The Fifth Circuit apparently extended *Frye* beyond novel scientific techniques (such as polygraph or voice prints) to evaluation of methodology in more traditional science. *Id.* at 1132-34 (Reavley, J., dissenting). Justices White and Blackmun dissented from the denial of the petition for a writ of certiorari in *Christophersen.* Justice White wrote:

> As the Fifth Circuit is divided, so the Court of Appeals are in disagreement. Some continue to apply the approach set forth in *Frye* in deciding whether expert evidence is admissible. But courts in other circuits have concluded that *Frye* was superseded in 1975 by the Federal Rules of Evidence, which they maintain established a lower threshold for determining the admissibility of expert evidence. Because this is an important and recurring issue, I would grant certiorari to resolve the conflict.

60 U.S.L.W. 3597, 3597 (U.S. Mar. 3, 1992) (citations omitted).

compatible with *Downing*. Professor Berger advances a "relevancy" approach to scientific evidence. She proposes to add a sentence to Rule 702: "When the witness seeks to testify about a scientific principle or technique that has not previously been accorded judicial recognition, the testimony shall be admitted if the court determines that its probative value outweighs the dangers specified in Rule 403."[138] Professor Berger's "relevancy" approach is useful because it replicates the familiar Rule 403 standards and emphasizes the central question that a judge must confront: the balance between the probativeness and the potential prejudice or confusion of the testimony. Unlike Rule 403, however, the proposal requires the court affirmatively to conduct a balance in order to *admit* the scientific evidence, although this balance need not "substantially" favor admission.

Another possible approach to the "huckster" problem is to impose a heightened standard for qualifying experts under Rule 104.[139] Although it would, of course, be desirable if all experts had written a certain number of peer-reviewed articles, or that they had published in preferred journals, the prospect of devising a workable protocol based upon such criteria seems totally at odds with the flexible standard and spirit of Rule 702. Such a requirement would also be unfair to many litigants who cannot afford to hire super-specialized expert witnesses.[140] An overly strict definition of experts would prevent plaintiffs who cannot afford or cannot find local experts from proving their case.[141]

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138. Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence,* 115 F.R.D. 89, 89 (1987).

139. *See, e.g.,* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 205-06 (1991) (approving of some jurisdictions' limitations on experts who can testify in medical malpractice actions); *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases,* 69 B.U. L. REV. 731, 738-41 (1989) (finding that 33% of the federal judges favor making special rules as to who is qualified to testify).

140. Consider, for example, a strict liability case involving an alleged defect in a power mower. Under Rule 702, a plaintiff who produces a qualified mechanical engineer or safety expert is not required to prove his or her expertise in the design of power mowers to qualify the expert in a product liability case dealing with the alleged defect design of such a product. The odds are that there may be only a few such experts, most in the employ of the defendant manufacturers, and that a strict rule would effectively bar a plaintiff geographically remote from urban centers, where such experts usually reside, from court.

141. *See, e.g., In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990) (finding that otherwise qualified Ph.D.'s are not barred from testifying as to the effect of PCB's on humans because they are not M.D.'s), *cert. denied,* 111 S. Ct. 1584 (1991); Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990) (finding that self-acknowledged lack of medical expertise of expert in mechanical engineering and accident reconstruction goes only to weight of his opinion regarding alleged defect in eyeguard worn by plaintiff hit by racquetball); Habecker v. Copperloy Corp., 893 F.2d 49 (3d Cir. 1990) (finding that a safety specialist, who had received a master's degree in safety education and a doctorate in human factors and product safety design, could testify on whether the failure of the

A promising solution for dealing with the problems of unreliable or disreputable experts lies in the selective use of Rule 706, which provides for the appointment of court-appointed experts.[142] Court-appointed expert testimony seems particularly helpful where the expert testimony appears tenuous. A major problem with the appointment of an impartial expert is cost, which the parties (usually the plaintiff) often simply cannot afford to pay.[143] Perhaps an Advisory Committee could recommend the creation of an expert witness fund, derived from court filing costs or some dedicated source.[144] Availability of such a fund would make Rule 706 a more potent tool for the administration of justice and might rectify some of the problems with expert testimony.

We acknowledge that some judges and commentators believe that a court-appointed expert of one view in a multiple-view case will unduly influence the jury and may be inconsistent with the judge's role as umpire.[145] To remedy this potential problem, depending

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forklift manufacturer to put seat belts in the forklift caused the death of the operator of a forklift that overturned, notwithstanding that the expert was not an engineer); Ventrulli v. Cincinnati, Inc., 850 F.2d 825 (1st Cir. 1990) (finding that, where plaintiff was injured by a shearing machine, plaintiff's expert would be permitted to testify despite having no experience with shears or heavy machinery; expert had been a registered safety engineer for over twenty years and was familiar with texts concerning safety engineering and had been President of the National Society of Professional Engineers); Hammond v. International Harvester Co., 691 F.2d 646 (3d Cir. 1982) (finding that an engineer, whose only qualifications were sales experience in the field of automotive and agricultural equipment and teaching high school automobile repair, nevertheless was permitted to testify in products liability action involving tractors); Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979) (finding that an expert may testify that unguarded elevator buttons constitute an alleged design defect despite expert's lack of a specific background in the design and manufacture of elevators). *But see* Graham v. Wyeth Labs., 906 F.2d 1399 (10th Cir.) (finding that, to be qualified, expert must have knowledge not within general sphere of knowledge, and his opinion must rest upon a substantial foundation and assist the trier of fact), *cert. denied,* 111 S. Ct. 511 (1990); Hoban v. Grumman Corp., 717 F. Supp. 1129 (E.D. Va. 1989) (finding doctor not competent to testify as an expert witness where he possessed no education or experience in the field at issue), *aff'd,* 907 F.2d 1138 (4th Cir. 1990); Wilkinson v. Rosenthal & Co., 712 F. Supp. 474 (E.D. Pa. 1989) (finding that a basic understanding of an area of expertise does not necessarily imply qualification as an expert); Will v. Richardson-Merrell, Inc., 647 F. Supp. 544 (S.D. Ga. 1986) (finding doctor not competent to testify as an expert where he possessed no scientific knowledge of the effects of drug at issue).

142. FED. R. EVID. 706.

143. Rule 706(b) provides, with respect to compensation:

> *(b) Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

FED. R. EVID. 706(b).

144. In a related vein, the American Law Institute has received a proposal for "Blue Ribbon Science Panels" and a "Federal Science Board" to assist courts in the disposition of scientific questions. 2 AMERICAN LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 319, 335-39 (1991).

145. *See generally* Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge,* 64 VA. L. REV. 1, 74-80 (1978) (discussing the problems with the association of the court's authority with court-appointed expert witnesses and suggesting limitations on the use of court-appointed experts).

upon the magnitude of the case, several experts of differing views could be appointed. Alternatively, the court could appoint an expert who merely educates the jury as to the range of permissible views.

In any event, we see Rule 702 as a prime area for the attention of an Advisory Committee for the Rules of Evidence. The status of *Frye* needs to be resolved. Decisions, particularly in the toxic tort and DNA areas, are appearing in virtually every issue of *United States Law Week* and *Criminal Law Reporter.*[146] Moreover, there is much recent scholarly work to consider, and much research activity underway.[147]

IV. Rule 1101(d)(3)—Applicability of the Federal Rules in Sentencing Hearings

Rule 1101(d)(3) specifies that the Federal Rules (other than those with respect to privileges) do not apply to sentencing proceedings.[148] The Sentencing Reform Act (the "SRA"),[149] which revolutionized federal sentencing and introduced guideline sentencing in the federal courts, does not address evidentiary matters. Congress, however, did continue to prohibit any "limitation on the [kind] of information" a sentencing court may consider about the "background, character, and conduct" of the convicted defendant before

146. *See, e.g.*, 50 Crim. L. Rep. (BNA) 1466 (Feb. 26, 1992) (describing *Kelly v. State*, in which the Court of Criminal Appeals of Texas rejected *Frye* and admitted DNA test results); 60 U.S.L.W. 1117-18 (U.S. Feb. 4, 1992) (describing *United States v. Jakobetz*, in which the United States Court of Appeals for the Second Circuit permitted the routine admissibility of DNA profiling evidence); 50 Crim. L. Rep. (BNA) 1254 (Dec. 18, 1991) (describing *Prater v. State*, in which the Arkansas Supreme Court rejected *Frye* and admitted DNA print analysis); 50 Crim. L. Rep. (BNA) 1163 (Nov. 20, 1991) (describing *Hopkins v. State*, in which the Indiana Supreme Court admitted DNA evidence); 60 U.S.L.W. 1030 (U.S. Aug. 20, 1991) (describing *Rubanick v. Witco Chem. Corp.* in which the New Jersey Supreme Court expanded the admissibility of toxic tort scientific evidence).

147. For example, the Federal Judicial Center will soon report the results of a major survey of all active federal trial judges on the characteristics of expert testimony in recent federal civil trials, in which the views of the judges concerning many of the issues addressed in this Article will be summarized.

148. Rule 1101(d) states:

> *(d) Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations:
>
> *(1) Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
>
> *(2) Grand jury.* Proceedings before grand juries.
>
> *(3) Miscellaneous proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; *sentencing*, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

FED. R. EVID. 1101(d) (emphasis added).

149. 18 U.S.C. §§ 3551-3586 (1988 & Supp. I 1991).

it.[150] In addition, the Sentencing Commission has addressed evidentiary matters in Guideline 6A1.3, which states that "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."[151]

Taken together, the three most important provisions—18 U.S.C. § 3661 (which prohibits limitation on information in sentencing), 28 U.S.C. § 991 (authorizing the Sentencing Commission to establish sentencing practices), and Guideline 6A1.3 (authorizing receipt of otherwise nonadmissible evidence in sentencing hearings)—appear to require only a due process standard for the admissibility of evidence at sentencing proceedings.[152] Courts applying the Guidelines accordingly have applied such a minimal constitutional standard,

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150. *Id.* § 3661 (codifying Williams v. New York, 337 U.S. 241 (1949)) (originally designated 18 U.S.C. § 3577, renumbered by Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837, 1987 (1984)).

151. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 6A1.3(a) (1992) [hereinafter GUIDELINES]. Congress authorized the United States Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system." The Act creating the Sentencing Commission provides in relevant part:

> *(b)* The purposes of the United States Sentencing Commission are to—
>
> *(1)* establish sentencing policies *and practices* for the Federal criminal justice system . . . ."

28 U.S.C. § 991 (1988) (emphasis added).

Guideline 6A1.3 also provides:

> (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

GUIDELINES, *supra*, 6A1.3(b).

The commentary to Guideline § 6A1.3 provides in relevant part:

> The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.
>
> In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." Unreliable allegations shall not be considered.

GUIDELINES, *supra*, 6A1.3 commentary (citations omitted).

152. The due process standard is defined in pre-Guidelines cases. *See, e.g.*, United States v. Baylin, 696 F.2d 1030, 1042 (3d Cir. 1982) (remanding for resentencing where sentencing court inferred defendant's involvement in a crime from the fact that government had promised not to prosecute that crime); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971) (remanding for resentencing where sentencing court relied on unsubstantiated charge by government agent included in the presentence report).

demanding only some minimum indicia of reliability for evidence to be considered in sentencing hearings.[153] Furthermore, evidence at sentencing is evaluated in virtually all federal courts on the basis of the preponderance standard, the lowest trial court evidentiary standard.[154]

Before the enactment of the SRA and the promulgation of the Sentencing Guidelines, the exclusion of sentencing from the Federal Rules gave rise to little difficulty. Judges possessed wide discretion in sentencing and could rely upon evidence admissible under the Rules, or not, as they believed fair and appropriate. Except in the (then) rare case requiring mandatory minimum sentences, the sentencing judge, by reason of his or her unlimited sentencing discretion, possessed the essentially untrammeled power to devalue unreliable evidence and extirpate the effects of any questionable evidence introduced during the sentencing phase.

That broad latitude and power, however, disappeared with the advent of the SRA and the promulgation of the Sentencing Guidelines. Under the new regime, the sentence is shaped, and in many respects driven by, the trial court's factual findings, particularly the findings that relate to relevant offense conduct not included in the conviction itself. The finding of other nonconviction but related conduct can raise the base offense level.[155] These findings may derive from evidence that would be inadmissible under the Rules. In one common scenario, a minor figure in a drug conspiracy may be linked by otherwise inadmissible evidence to large quantities of drugs trafficked by his coconspirators of which he was unaware. This linkage may affect his sentencing significantly. In contrast with the pre-

153. A notable exception is United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990), which held that the minimal due process standard is insufficient in cases where the sentencing hearing can fairly be characterized as the key issue in controversy. Such cases arise when the findings of fact about relevant offensive conduct not implicated in the conviction itself, *see* GUIDELINES, *supra* note 151, 1B1.3, can raise the base offense level and lead to a very substantial increase in the sentence under the Guidelines. Where the sentencing hearing is the " 'tail which wags the dog of the substantive offense,' " *Kikumura* holds that due process requires more than a "minimum indicium of reliability." *Kikumura,* 918 F.2d at 1103 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)). *Kikumura* also holds that, in such circumstances, "the court should examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy." *Id.*

154. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986). In light of *McMillan,* the federal courts have generally rejected any higher standard of proof for use in federal sentencing. *See, e.g.,* United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir. 1989) (applying a preponderance of the evidence standard); United States v. Lee, 818 F.2d 1052, 1057 (2d Cir. 1987) (same). *But see* United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990) (applying a clear and convincing standard when the facts informing the sentence may raise the base offense level and were not implicated in, but overshadow, the facts involved in the underlying conviction).

155. *See* GUIDELINES, *supra* note 151, 1B1.3.

Guidelines regime under the SRA, the judge is not free to compromise by reducing the sentence in proportion to the degree of persuasiveness of the evidence bearing on the sentencing factors.

Under the aegis of the Sentencing Guidelines, the minimum constitutional standard often results in the following scenario: The government declines to prosecute a defendant on certain charges because it cannot establish sufficient legally admissible evidence to meet the burden of proof beyond a reasonable doubt. Under the Guidelines' broad definition of relevant conduct in section 1B1.3, the defendant could nonetheless receive a substantially higher sentence based on unindicted conduct, evidence of which is introduced at the sentencing hearing.[156] Thus, even though that evidence would have been inadmissible at trial, and even though the standard of proof at sentencing is far lower than at trial, the defendant's sentence is drastically increased. Arguably tenuous evidence can increase the sentence in three common ways: (1) by increasing the amount of the drugs in the offense; (2) by increasing the dollar amount of the fraud involved in the offense; and (3) by linking a firearm to the underlying criminal activity. In all three cases, the related conduct substantially increases the sentence.[157]

Although some evidentiary disputes as to the admissibility of evidence in sentencing proceedings relate to matters of relevancy, the dispute more often revolves around hearsay problems.[158] Hearsay comes not only from unsubstantiated presentence reports, but also from testimony in other proceedings, such as codefendants' trials.[159] Every court of appeals to address the problem has held that

156. Astoundingly, the same result may obtain even for acquitted conduct. *See, e.g.*, United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (upholding the trial court's consideration at the sentencing stage of the defendant's possession of a handgun despite his acquittal of the substantive firearm offense).

157. *See* GUIDELINES, *supra* note 151, 2D1.1(c) (drug quantity table); *Id.* 2F1.1(b)(1) (fraud amount schedule); *Id.* 2A2.2(b)(2) (base level for aggravated assault increased if firearm is discharged).

158. Questions have also arisen concerning the use of evidence barred by the exclusionary rule at sentencing. *See* David N. Adair, Jr. & Toby D. Slawsky, *Fact-Finding in Sentencing*, FED. PROBATION, Dec. 1991, at 58, 63 (describing the effect of the exclusionary rule on the admissibility of evidence at sentencing); *see, e.g.*, United States v. Lynch, 934 F.2d 1226, 1236-37 (11th Cir. 1991) (holding that exclusionary rule does not bar consideration of illegally seized evidence in sentencing hearings, but leaving open whether such evidence would be admissible if police knowingly failed to comply with the Fourth Amendment to introduce evidence at sentencing), *cert. denied*, 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992); United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991) (raising the question of whether evidence of warrantless search should be excluded at sentencing), *cert. denied*, 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991) (holding that suppressed evidence may be considered in determining the appropriate range of the sentence).

159. *See, e.g.*, United States v. Notrangelo, 909 F.2d 363, 365 (9th Cir. 1990) (finding that testimony from trial of codefendant admissible to establish sentencing facts if defendant receives notice that it will be used); United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir.) (same), *cert. denied*, 110 S. Ct. 3302 (1990); *see also* Adair & Slawsky, *supra* note 159, at 61-62 (discussing standards of reliability required by several circuits). *But see* United States v. Castellanos, 904 F.2d 1490, 1496 (11th Cir. 1990) (finding that codefendants' trial testimony cannot be used in sentencing over defendant's objection).

hearsay is not excludable in sentencing proceedings.[160] For example, the Eleventh Circuit has written that the district court "could consider any information, including 'reliable hearsay' from the trial of a third party, so long as the defendant has 'the opportunity to rebut the evidence or generally to cast doubt upon its reliability.' "[161] In that case, the court held that the "[a]ppellant was given an opportunity at his sentencing hearing to challenge the evidence against him. He has not shown that the hearsay statements considered by the court were unreliable."[162]

This development is disconcerting. Under traditional evidentiary and Federal Rules analysis, the notion of "reliable hearsay" is, theoretically at least, an oxymoron. Hearsay that does not fall into a specified exception or into a "residual" exception[163] is generally excluded because it is presumed to lack circumstantial guarantees of trustworthiness.[164] Thus, in assessing admissibility of evidence in sentencing hearings, courts have turned the general approach to hearsay on its head. The hearsay is presumed reliable—the defendant has the burden of demonstrating otherwise.

The argument against applying the Federal Rules to sentencing proceedings is powerful. By their nature, sentencing hearings require the development of background evidence about the defendant that may derive from stale and distant events. Furthermore, strict application of the Rules would prolong sentencing hearings that, as important as they are, already expend much precious time.

Nevertheless, sentencing proceedings are arguably the most important judicial business conducted by Article III judges. This is particularly true because the SRA and the various Anti-Drug Abuse Acts[165] have resulted in significant increases in the average sentence in federal court. The Anti-Drug Abuse Acts have legislated numerous long, mandatory, minimum sentences that are also driven by

160. *See, e.g.*, United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (approving use of hearsay in presentence report to establish sentencing fact if such hearsay is sufficiently reliable); United States v. Murillo, 902 F.2d 1169, 1172 (5th Cir. 1990) (same); United States v. Blanco, 888 F. 2d 907, 908 (1st Cir. 1989) (same). *See generally* Adair and Slawsky, *supra* note 159, at 60-63 (discussing the role and reliability of presentence reports).

161. United States v. Query, 928 F.2d 383, 385 (11th Cir. 1991) (quoting United States v. Castellanos, 904 F.2d 1490, 1496 (11th Cir. 1990)).

162. *Id.; see also* GUIDELINES, *supra* note 151, 6A1.3 commentary (stating that "reliable hearsay evidence may be considered").

163. FED. R. EVID. 803(24), 804(b)(3).

164. Indeed, that the residual exception imposes serious restrictions on the admissibility of hearsay bolsters the argument against its generalized admission in sentencing proceedings.

165. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4318 (codified as amended at 21 U.S.C. §§ 841-858 (1988 & Supp. I 1989)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (same); Anti-Drug Abuse Act of 1984, Pub. L. No. 98-473, 98 Stat. 2030 (same).

facts found at sentencing hearings.[166] The new sentencing regime surely was not anticipated by the framers of Rule 1101(d)(3), who promulgated the Rules well over a decade before the SRA was enacted. Given the centrality of the district court's findings under the new regime, reliance upon inadmissible evidence at the sentencing stage presents a serious problem. The exclusion of sentencing proceedings from the ambit of the Rules is particularly important because the Guidelines have resulted in a large increase in the proportion of the convicted defendants sentenced to prison.[167] The Guidelines have also increased the sentences imposed for many crimes, particularly white-collar crimes. In these instances, the de facto liberty interest is tried at the sentencing hearing, not the trial, and yet the evidentiary standards required in trials are absent. There is no inherent reason why the Rules cannot be applied, at least in part, to sentencing proceedings, or why some special rules could not be devised. Any amendment to the Federal Rules supersedes, by reason of the Rules Enabling Act,[168] both the SRA and any promulgations of the Sentencing Commission, at least if there is clear notice to Congress.

Early efforts to establish a constitutional standard higher than minimal due process have met with only limited success. Two circuits have superimposed Confrontation Clause limitations upon sentencing hearings, but the panels in these cases were sharply divided, and the opinions were vacated and will be reviewed en banc.[169] Moreover, most courts that have considered this issue have held that the Confrontation Clause does not apply at sentencing.[170]

We suggest that the Supreme Court, acting through an Advisory Committee on the Rules of Evidence, amend the Rules to include more protections to reflect the changed role of sentencing hearings.[171] One approach would be to make selected Rules applicable in sentencing proceedings. The idea of special rules for sentencing proceedings seems eminently sensible. Just as there are special rules for § 2254 and § 2255 proceedings,[172] sentencing proceedings seem to be a prime candidate for such treatment. Alternatively, the

166. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6055, 102 Stat. 4318, 4367 (codified as amended at 21 U.S.C. § 841(b) (1988)).

167. *See* U.S. SENTENCING COMM'N, ANNUAL REPORT 1990 (figs. 5, 11).

168. 28 U.S.C. § 2072(b) (1988). The "supersession clause" of the Rules Enabling Act provides: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.*

169. *See* United States v. Silverman, 945 F.2d 1337 (6th Cir.), *vacated*, Nos. 90-3205, 90-5733, 90-5816, 1991 U.S. App. LEXIS 28543 (6th Cir. Dec. 4, 1991) (en banc); United States v. Wise, 923 F.2d 86 (8th Cir.) (per curiam), *vacated*, No. 90-1070WA, 1991 U.S. App. LEXIS 4326 (8th Cir. Mar. 15, 1991); United States v. Fortier, 911 F.2d 100 (8th Cir. 1990).

170. *See, e.g.*, United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990); United States v. Castellanos, 904 F.2d 1490, 1496 (11th Cir. 1990); United States v. Byrd, 898 F.2d 450, 452-53 (5th Cir. 1990); United States v. Beaulieu, 893 F.2d 1177, 1180-81 (10th Cir. 1990).

171. Any such amendment, of course, is subject to congressional approval under 28 U.S.C. § 2074.

172. *Id.* §§ 2254-2255. These sections provide post-conviction remedies to prisoners held in state or federal custody, respectively. Section 2254 governs motions for habeas

Court could prescribe a general rule that: (1) when the challenged evidence may have a significant impact on the actual sentence; and (2) where a timely objection—presumably promptly upon receipt of the presentence investigation report and well before the sentencing hearing—is interposed, the evidence must meet a *strong* reliability standard (in contrast to the minimum constitutional standard). This rule might be stated as a requirement that the proponent of the evidence must establish that it is trustworthy by a clear and convincing standard.

An Advisory Committee might also consider the standard of proof for facts that affect the Guidelines calculation. As the foregoing discussion suggests, the standards for admissibility of evidence and of the requisite level of proof are closely related, at least in terms of measuring the ultimate fairness of sentencing proceedings. The Committee might consider the Third Circuit approach of increasing the standard to a clear and convincing level of proof where the sentencing hearing is the "tail that wags the dog" of the substantive offense,[173] or, alternatively, prescribing a sliding scale whereby the level of proof increases or decreases depending upon the significance of the relevant offense conduct that is not implicated in the conviction itself. Such an evaluation should consider some of the Sentencing Commission's other pronouncements on evidentiary matters that denigrate the level of evidentiary precision required to support a finding that may affect the sentence significantly.[174] An Advisory Committee on the Rules of Evidence could balance the various interests at stake and develop a workable proposal that would safeguard the rights of defendants in sentencing proceedings without unduly burdening sentencing courts. At the very least, a manual for evidence in sentencing proceedings might be developed.

V. Other Rules in Need of Review—The Legacy of Circuit Splits and Scholarly Analysis

Considerations of time and space preclude a detailed analysis of other rules in need of review. A number of very fine compilations organized by rule already exist.[175] Moreover, as we demonstrate throughout this Article, many scholars have identified flaws in various Federal Rules, and some have proposed revisions. We therefore limit ourselves to identifying categories of problems that

corpus relief. Section 2255 governs motions to correct, set aside, or vacate erroneous sentences.

173. *See supra* note 153.

174. *See* GUIDELINES, *supra* note 151, 2B1.1, Application Note 3 (stating that the amount of loss in theft cases "need not be determined with precision"); *Id.* 2F1.1, Application Note 8 (stating the same with respect to loss in fraud cases).

175. *See supra* note 2.

demonstrate the need for ongoing review. Our overview encompasses suggestions of all types, from the need to resolve major circuit splits, to the need to revisit major policy questions, to relatively minor drafting changes.

A. Circuit Splits

The circuits are sharply divided on a number of crucial issues, as well as some more minor questions. Circuit splits are detrimental because they undermine the goal of uniformity that underlies the enactment of Federal Rules.

1. Rule 103: Harmless Error

Rule 103(a) states that an evidentiary ruling may not be reversible error "unless a substantial right of the party is affected."[176] Some circuits have held that the standard of review for harmless error in a civil case is whether the substantial rights of the parties were "more probably than not untainted by the error."[177] Other circuits, however, have held that a higher standard applies. They hold that the standard of review for harmless error is the same for both criminal and civil cases; thus, errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights."[178] Although the standard of review is not ordinarily a matter within the scope of the Federal Rules, in view of this division within the courts, an Advisory Committee might wish to study the matter and formulate a revised rule, or at least draft a policy statement on the issue.[179]

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176. FED. R. EVID. 103(a); *see also* 28 U.S.C. § 2111 (1988) (stating that appellate court should give judgment "without regard to errors or defects which do not affect the substantial rights of parties"); FED. R. CIV. P. 61 (stating that "[n]o error . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice"); 1 WEINSTEIN & BERGER, *supra* note 18, ¶ 103[01], at 103-6 (arguing for reversal if a substantial right of a party is affected). Obviously, determining what is substantial is itself a challenge. *See* Kotteakos v. United States, 328 U.S. 750, 761 (1946) (stating that "what may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another").

177. Haddad v. Lockheed Cal. Corp., 720 F.2d 1454, 1459 (9th Cir. 1983); *accord* United States Indus. v. Touche Ross & Co., 854 F.2d 1223, 1253 (10th Cir. 1988); Smith v. Chesapeake & O. Ry., 778 F.2d 384, 389 (7th Cir. 1985); McIlroy v. Dittmer, 732 F.2d 98, 105 (8th Cir. 1984). Professor Saltzburg supports this view. *See* Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 998 (1973).

178. McQueeney v. Wilmington Trust Co., 779 F.2d 916, 924 (3d Cir. 1985) (quoting Government of the Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976)); Williams v. United States Elevator Corp., 920 F.2d 1019, 1023 (D.C. Cir. 1990) (stating that "in civil cases courts should apply the same standard as announced in *Kotteakos v. United States*, a criminal case") (citation omitted); Aetna Casualty & Sur. Co. v. Gosdin, 803 F.2d 1153, 1159 (11th Cir. 1986) (same); O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1308 n.3 (5th Cir. 1977) (same). Louisell and Mueller appear to support this view. They commend Justice Traynor's test of high probability that applies to both criminal and civil cases as being "concise and readily understood." 1 LOUISELL & MUELLER, *supra* note 79, § 18, at 90-91.

179. *See* EMERGING PROBLEMS, *supra* note 2, at 9 ("Some users of the Rules have suggested that it might be preferable to have a harmless error standard specified in the rule. . . . A uniform standard could not make the law less clear than it now is, but it probably is unduly optimistic to believe that because a standard is stated it will be significantly easier to distinguish harmful from harmless error.").

2. *Rule 407: Subsequent Remedial Measures*

The circuits are divided over whether Rule 407, which excludes evidence of subsequent remedial measures,[180] applies in products liability cases. A majority of courts have held that the Rule excludes evidence of subsequent remedial measures for claims of design defect based upon a theory of strict products liability.[181] Other courts, however, have declined to apply the Rule to products liability cases.[182] In some respects, the differences among the circuits reflect their divergent views of the strict liability cause of action, and their various perceptions of how the Rule 407 exclusion would affect safety improvements by manufacturers. In their various opinions, courts rely upon everything from plain meaning to law and economics to determine the applicability of Rule 407 to products liability cases.[183]

The matter is complicated, however, by *Erie* considerations.

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180. Rule 407 provides in relevant part: "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." FED. R. EVID. 407.

181. *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 468-70 (7th Cir. 1984) (finding that the policy behind Rule 407 makes it applicable to strict products liability cases); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 886-88 (5th Cir. 1983) (following other circuits in applying Rule 407 to strict liability cases); Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982) (holding that Rule 407 applies to products liability actions, based on the court's interpretation of *Restatement (Second) of Torts* § 402A); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (holding that "[t]he failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions"), *cert. denied*, 456 U.S. 960 (1982); Werner v. Upjohn Co., 628 F.2d 848, 856-58 (4th Cir. 1980) (holding that policy and common law bases for Rule 407 favor its applicability to strict liability actions), *cert. denied*, 449 U.S. 1080 (1981); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978) (finding no error in trial court's refusal to admit evidence of post-accident repairs); *see also* Seidelson, *supra* note 1, at 471-76 (arguing that the Rule should apply in strict liability cases). *See generally* LEMPERT & SALTZBURG, *supra* note 71, at 193-94 (describing the circuit split on the applicability of Rule 407 to strict liability cases); ROTHSTEIN, NUTSHELL, *supra* note 23, at 115-20 (collecting cases).

182. *See, e.g.*, Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 931-32 (10th Cir.) (holding that Rule 407 does not apply to strict liability actions as matter of state policy), *cert. denied*, 469 U.S. 853 (1984).

183. On the issue of a plain meaning interpretation of the Rule, compare Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (holding that "Rule 407 [does not apply to products liability cases because it] is, by its terms, confined to cases involving negligence or other culpable conduct") with *Flaminio*, 733 F.2d at 469 (rejecting "purely semantic argument" and noting that apportionment of damages indicates a willingness to attach blame to products manufacturers, hence rendering them "culpable"). On the issue of law and economics, compare Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974) (reasoning that "it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effects upon the public image") with *Flaminio*, 733 F.2d at 469 (reasoning that "accidents are low-probability events" and that the "probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue . . . and make devastating use at trial of any [remedial] measures").

These cases derive from state causes of action and generally arise in federal court on the basis of diversity jurisdiction. In *Erie* parlance, the justifications for Rule 407 appear overwhelmingly substantive. Because the Federal Rules were promulgated by Congress, there is no Rules Enabling Act issue presented, and the question is essentially a constitutional one under *Hanna v. Plumer*.[184] Some suggest that if a federal court's interpretation of Rule 407 conflicts with a state rule governing subsequent remedial measures, sound policy derived from the principles of *Erie* dictates that state law should control, and that Rule 407 may be unconstitutional under the *Hanna* standard.[185] However, others believe that the Rule is clearly constitutional, and agree with Judge Posner's sharp rejection of the *Erie* argument in *Flaminio v. Honda Motor Co.*[186] Although Judge Posner acknowledged the "substantive consequences" of Rule 407, he relied upon *Hanna v. Plumer* for the proposition that the Rule falls " 'within the uncertain area between substance and procedure' " and hence should be classified as procedural for *Erie* purposes.[187] Judge Posner concluded that he was

> reluctant to cast a cloud over the whole federal rulemaking enterprise and open a new chapter in constitutional jurisprudence by holding that a procedural rule is beyond even the power of Congress to enact for application to diversity cases, because the rule affects substantive questions that the *Erie* doctrine reserves to the states.[188]

Products liability cases comprise a significant portion of the docket of many federal courts. The presence of a circuit split and of a disparate approach to the theoretical underpinnings of Rule 407 make this area ripe for an Advisory Committee's attention.[189]

3. Rule 703: Experts' Reasonable Reliance on Otherwise Inadmissible Evidence

The recognition that an expert's testimony often derives from inadmissible (often hearsay) sources resulted in the Rule 703 reasonable reliance standard, permitting experts to ground their testimony in inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.[190]

The circuits are split on the question of who should determine an

184. 380 U.S. 460 (1965).

185. *See* 2 LOUISELL & MUELLER, *supra* note 79, § 167, at 428 (stating that "[a]pplying the federal provision in this context amounts to an unwarranted incursion upon the *Erie* doctrine—one apparently not intended by Congress, one which is arguably unconstitutional, and one which arguably violates both the Rules of Decision Act and the Rules Enabling Act"); 2 WEINSTEIN & BERGER, *supra* note 18, ¶ 407[02], at 407-14 (suggesting that because Rule 407 involves extrinsic substantive policies and imputes no special federal interest, state law should be followed in its interpretation).

186. 733 F.2d at 463.

187. *Id.* at 471-72 (quoting *Hanna*, 380 U.S. at 472).

188. *Id.* at 472.

189. *See* Berger, *supra* note 1, at 266 (stating that "[t]here is nothing to be gained by leaving this question open for further judicial resolution, other than an incentive for forum shopping . . . and a consequent expenditure of judicial resources").

190. Rule 703 provides:

expert's "reasonable reliance" on otherwise inadmissible evidence.[191] Some courts hold that reasonable reliance is a preliminary determination, analogous to qualification of witnesses that the trial court makes under Rule 104(a). These courts hold that the district judge must undertake "an independent analysis of the trustworthiness of the data underlying the expert opinions."[192] Other courts, noting that the drafters of Rule 703 purposefully adopted a liberal standard that relied upon the experts in the field, hold that reasonable reliance depends upon the experts themselves.[193]

Although we acknowledge the burden on the trial judge in making an independent determination,[194] we believe that judges should determine the extent of reasonable reliance.[195] At all events, this circuit split should be resolved.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

191. *Compare* Peteet v. Dow Chem. Co., 868 F.2d 1428, 1432 (5th Cir. 1989) (finding that the reliability of the basis is generally considered a matter for the profession, and the court cannot reject the expert's uncontested testimony as to acceptability) *and* United States v. Lundy, 809 F.2d 392, 395-96 (7th Cir. 1987) (same) *and In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 277 (3d Cir. 1983) (same), *rev'd on other grounds,* 475 U.S. 574 (1986) *with* Ricciardi v. Children's Hosp. Medical Ctr., 811 F.2d 18, 25 (1st Cir. 1987) (finding that the court, pursuant to Rule 104, must determine reasonable reliance) *and In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1243-45 (E.D.N.Y. 1985) (same), *aff'd on other grounds,* 818 F.2d 187 (2d Cir. 1987), *cert. denied,* 487 U.S. 1234 (1988).

192. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1324 (E.D. Pa. 1980), *rev'd,* 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds,* 475 U.S. 574 (1986). Judge Weinstein in the Agent Orange litigation observed that:

> [T]he court may not abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility. If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.

In re "Agent Orange," 611 F. Supp. at 1245.

193. *See In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d at 277-78; Seese v. Volkswagenwerk A.G., 648 F.2d 833, 844 (3d Cir.), *cert. denied,* 454 U.S. 867 (1981); Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge,* 66 B.U. L. REV. 521, 526-30 (1986). *See generally* Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony,* 39 VAND. L. REV. 577 (1986) (discussing courts' attempts to define the scope of admissible expert testimony); Paul Rothstein & Michael A. Crew, *When Should the Judge Keep Expert Testimony from the Jury,* 1 INSIDE LITIG. 19 (1987) (setting forth cases on both sides of the question).

194. *See* EMERGING PROBLEMS, *supra* note 2, at 177 (raising this criticism).

195. Our view comports with that of the district court in *In re* Japanese Electronic Products Antitrust Litigation, 505 F. Supp. at 1313. We recognize that at first blush our position on Rule 703 seems to conflict with our approach to Rule 702, where we rejected the *Frye* test as being overly conservative and incompatible with the inclusive tenor of the Federal Rules. *See supra* part III. If any contradiction exists at all, however, it is reflected in the Rules themselves. We believe that in both cases, our reading is the more

4. *Rule 801(d)(1)(B): Prior Consistent Testimony*

Another circuit split concerns the admissibility of prior consistent testimony. Rule 801(d)(1)(B) immunizes from hearsay treatment (and admits as substantive evidence) prior consistent statements "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," where the declarant is available to testify and is subject to cross examination.[196] The proffered statement need not have been made in a prior proceeding or under oath.[197] Some courts have grafted an additional guarantee of reliability to Rule 801(d)(l)(B). They apply the exemption from hearsay only where prior consistent statements were made *before* the motive to fabricate.[198] The circuits are split on this temporal requirement that appears nowhere in the language of the Rule, but has a venerable common law history.[199] Some courts treat the timing issue as a matter of evaluating the relevance of the

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natural reading. The consistency of our position transcends mere plain meaning, however, as well it should given our dislike for an overly mechanical reading of the Rules. *See supra* part I.

In interpreting Rule 702, we assert our confidence in the ability of the civil jury to discern and reject false science when it intrudes upon the liberal standard of admission of scientific evidence. But that same generosity of spirit does not license the experts themselves to circumvent the Rules. Even where an expert relies upon evidence that all others in the field use in making their assessment, the court must nevertheless assure itself that the expert's testimony comports with the overarching requirement of reasonableness.

Furthermore, the *Frye* standard and a liberal reading of Rule 703, both of which we reject, would hamstring a trial judge. The tests we propose, *Downing*'s interpretation of the Rule 702 helpfulness standard and the district court's opinion in *Japanese Electronic*, would allow the trial judge to conduct individual and independent balancing of the evidence in the case. Rather than abdicate control to the scientific community, either through the parsimony of the *Frye* rule or the blind acceptance of allowing experts to dictate the boundaries of "reasonable reliance," we elevate the one actor who is in the best position to make both these judgments: the trial judge.

196. FED. R. EVID. 801(d)(1)(B).

197. *See* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(1)(B)[01], at 801-185.

198. *See, e.g.*, United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979); United States v. Quinto, 582 F.2d 224 (2d Cir. 1978); *see also* EMERGING PROBLEMS, *supra* note 2, at 202 (describing some courts' requirement that the prior consistent statement come before the motive to fabricate); 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(l)(B)[01], at 801-195 (same); Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 285-287 (same); Judith A. Archer, Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B)*, 55 FORDHAM L. REV. 759, 770-78 (1987) (same).

199. *Compare* United States v. Vest, 842 F.2d 1319 (1st Cir.) (requiring that consistent statement be made *before* motive to falsify), *cert. denied*, 488 U.S. 812 (1988) *and* United States v. Bowman, 798 F.2d 333 (8th Cir. 1986) (same), *cert. denied*, 479 U.S. 1043 (1987) *and* United States v. Stuart, 718 F.2d 931 (9th Cir. 1983) (same) *and* United States v. McPartlin, 595 F.2d 1321 (7th Cir.) (same), *cert. denied*, 444 U.S. 833 (1979) *with* United States v. Anderson, 782 F.2d 908 (11th Cir. 1986) (relaxing common law timeline requirement that consistent statement be made before motive) *and* United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982) (same), *cert. denied*, 459 U.S. 1117 (1983) *and* United States v. Rios, 611 F.2d 1335 (10th Cir. 1979) (same), *cert. denied*, 452 U.S. 918 (1981) *and* United States v. Williams, 573 F.2d 284 (5th Cir. 1978). For an interesting recent opinion discussing the circuit split, see United States v. Montague, No. 91-3012, 1992 U.S. App. LEXIS 3740 (D.C. Cir. Mar. 10, 1992) (rejecting the temporal requirement and delineating the split in authority). *See generally* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 801(d)(1)(B)[01], at 801-196 nn.13-14 (listing cases); Archer, *supra* note 198, at 770-71 nn.60-61 (same).

prior consistent statement, but not as a "hard and fast rule of admissibility."[200] In light of the Supreme Court's plain meaning approach,[201] this requirement, although logical, might not survive scrutiny.[202] The Rule would benefit from an Advisory Committee's review.

5. *Rule 803(3): State of Mind Exception to Hearsay—The* Hillmon *Doctrine*

Another circuit split revolves around the scope of the state of mind exception to the hearsay rule. Rule 803(3) was inspired by the famous case of *Mutual Life Insurance Co. v. Hillmon,*[203] which rendered statements of intent by a declarant admissible to prove not only the declarant's future conduct but also that of another person. Rule 803(3) excepts from hearsay "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition[,] such as intent, plan, motive."[204] Although there is very little case law on point, there is a split in authority on whether Rule 803(3) renders admissible only the declarant's statements about his own plans, or whether it also renders admissible circumstantial evidence of the future conduct of another.[205]

This confusion about the scope of Rule 803(3) is compounded by the legislative history. The House Judiciary Committee rejected the expansive interpretation of *Hillmon* as including circumstantial evidence of a third-party's activities.[206] The Senate and Conference Reports, however, do not discuss the issue.[207] Once again, the scrutiny of an Advisory Committee would be beneficial.

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200. *Hamilton*, 689 F.2d at 1273, *cert. denied,* 459 U.S. 1117 (1983).

201. *See supra* part I.

202. Prior consistent statements made after motive to fabricate might pass the low threshold of Rule 401's relevancy requirement on the theory that repetition of the statement has *some* tendency, however slight, of making the statement more likely to be true.

203. 145 U.S. 285 (1892)

204. FED. R. EVID. 803(3).

205. *Compare* United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976) (finding that state of mind evidence of victim's plans can serve as circumstantial evidence of the activity of the defendant), *cert. denied,* 429 U.S. 1099 (1977) *with* Gual Morales v. Hernandez Vega, 579 F.2d 677 (1st Cir. 1978) (indicating, in dicta, that statement that one planned to visit the defendant would not be admissible under Rule 803(3) against the defendant). *See generally* LEMPERT & SALTZBURG, *supra* note 71, at 427-30 (discussing various judicial approaches to Rule 803(3)); 4 WEINSTEIN & BERGER, supra note 18, ¶ 803(3)[04] (arguing that the judiciary has been extremely circumspect about relying upon Rule 803(3) when the action of a person other than the declarant is involved); Seidelson, *supra* note 1, at 453 (discussing, among other Rules, Rule 803(3), the *Hillmon* doctrine, and their interaction); Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3),* 64 TEMP. L.Q. 145 (1991) (analyzing Rule 803(3) and the problem of implied or indirect assertions about external conditions).

206. H.R. REP. No. 650, 93d Cong., 2d Sess. 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7087.

207. S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051; H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974

6. *Rule 804(b)(1): Former Testimony—The Predecessor-in-Interest Requirement*

Another circuit split revolves around the definition of the "predecessor-in-interest" requirement of the former testimony exception to hearsay. 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. The definition is complicated by a tortured legislative history. The predecessor-in-interest requirement was added to the Rule to restrict its scope.[208] The original draft of the Rule would have permitted the use of former testimony in civil trials any time the witness was cross-examined by someone with similar motive and opportunity.[209] In *Lloyd v. American Export Lines, Inc.*,[210] the Third Circuit construed the predecessor-in-interest language as mandating only a "sufficient community of interest" between the prior litigant and party against whom the hearsay is offered.[211] This construction arguably reads the predecessor-in-interest standard out of the Rule, and thus contravenes the intent of Congress when it specifically added the predecessor-in-interest language.[212] Many courts have followed *Lloyd's* interpretation,[213] but others have adhered to a more narrow interpretation.[214] Uniformity is desirable here, and an Advisory Committee could be the vehicle to attain it.

7. *Rules 803(24) and 804(b)(5): Notice in the Residual Hearsay Exceptions*

Finally, there is a split among the circuits concerning the rigid notice requirements of the residual hearsay exceptions.[215] Some

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U.S.C.C.A.N. 7098. *See* A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 378 (noting the lack of clarity of the Senate and Conference reports); EMERGING PROBLEMS, *supra* note 2, at 222-24 (noting the tension between the House Judiciary Committee Report and the "conspicuous silence" of the Senate Report); 5 LOUISELL & MUELLER, *supra* note 79, § 442, at 561-62 (arguing that the more limited language of the House Report should control and that Senate silence should be deemed assent); 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 803(3), at 803-35 (describing the differences between the committee reports).

208. *See* Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 299 (1989).

209. *See id.* at 312. Nine states have adopted this expansive version. *See* EMERGING PROBLEMS, *supra* note 2, at 259 & n.10 (citing 2 EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 59.2 to 59.4 (Gregory P. Joseph & Stephen A. Saltzburg eds., 1991)).

210. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

211. *Id.* at 1185-86. *See generally* LEMPERT & SALTZBURG, *supra* note 71, at 476-78 (discussing the policy of the same party requirement).

212. *See* Weissenberger, *supra* note 208, at 311-18 (discussing the legislative history of Rule 804(b)(1)).

213. *See, e.g.*, Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1294-95 (6th Cir. 1983), *cert. denied*, 467 U.S. 1253 (1984). *See generally* Weissenberger, *supra* note 208, at 319 n.120 (listing cases).

214. *See, e.g., In re* Screws Antitrust Litig., 526 F. Supp. 1318, 1319 (D. Mass. 1981). *See generally* Weissenberger, *supra* note 208, at 319 n.121 (listing cases that applied the predecessor-in-interest test more narrowly).

215. FED. R. EVID. 803(24), 804(b)(5).

courts adhere to the notice requirements; others ignore them.[216] In our view, the rigid requirements are ill-advised, for they do not permit the judge sufficient discretion.[217] An Advisory Committee should examine closely the residual exception, and, at a minimum, propose a redraft to promote more flexibility.

B. Gaps in the Rules

Aside from circuit splits, there are obvious problems in applying the Federal Rules that derive from omissions in the language of the Rules.

1. Rule 201: Judicial Notice

The Rules address judicial notice of adjudicative facts but do not encompass judicial notice of legislative facts.[218] The Rules' failure to address legislative facts has been criticized as too narrow and unambitious.[219] This lack of guidance has led to concerns surrounding the process for noticing legislative facts.[220] The issue of legislative facts is particularly interesting in the context of toxic tort cases.[221] An Advisory Committee should consider filling this gap in

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216. *Compare* United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977) (finding that Congress intended that the requirement of advance notice be rigidly enforced) *with* United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976) (finding that the residual exception notice requirements may be waived if defense counsel had a fair opportunity to prepare to meet the testimony).

217. Others join us in this view. *See* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 803(24)[01], at 803-294 (citing and criticizing courts that have adopted an "unwarranted rigidity, unmindful of Rule 102 and trial realities"); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 116 (1987) (stating that the "notice provision is far too strict").

218. Adjudicative facts are facts submitted to factfinders in court trials. As the Advisory Committee stated:

> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

FED. R. EVID. 201 advisory committee's note, subdivision (a); *see* Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (discussing the differences between legislative and adjudicative facts).

219. *See* FJC, REPORT, *supra* note 2, at 8 (stating that "[s]ubstantial scholarly criticism . . . is aimed mainly at the fundamental theory of the draft of the Rule limiting its application to adjudicative facts"); Kenneth C. Davis, *Judicial Notice*, 1969 ARIZ. ST. L.J. 513, 513-14, 530-32 (offering seven criticisms of the rule of judicial notice, including that the Rule is limited to adjudicative facts); Irving Younger, *Symposium: The Federal Rules of Evidence—Introduction*, 12 HOFSTRA L. REV. 251, 252 (1984) (criticizing the Rules for not addressing judicial notice of legislative facts). *See generally* LEMPERT & SALTZBURG, *supra* note 71, at 838-52 (discussing and criticizing the judicial notice Rule).

220. *See* Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 29-31 (1988) (discussing courts' difficulty in interpreting the federal Rule). Cases showing the difficulties presented because judicial notice is only partly covered by Rule 201 are collected and summarized in PAUL F. ROTHSTEIN, EVIDENCE: CASES, MATERIALS AND PROBLEMS 1293-310 (1986).

221. One of the leading cases discussing the nature and effect of legislative facts is *In*

the Rule. In addition, it might consider addressing the question of judicial notice of law. Rule 44.1 of the Federal Rules of Civil Procedure addresses this subject with respect to foreign law,[222] and refers to the Federal Rules of Evidence. We believe that such a provision belongs in the Rules of Evidence as well.

2. Rule 301: Presumptions

The Rules concerning presumptions have been criticized in a similar vein as being incomplete and "uncourageous" because they do not prescribe in detail the effect of a presumption after it has shifted the burden of going forward.[223] That is, the Rules do not address whether the presumption stays in the case and serves as some evidence of the presumed fact, or whether it vanishes, like the famous "bursting bubble" of Thayer and Wigmore. In addition, Article III of the Rules contains no provision relevant to criminal proceedings.[224] These gaps in Rule 301 should be addressed by the proposed Advisory Committee.

3. Rule 410: Inadmissibility of Pleas, Plea Discussions, and Related Statements

Rule 410 excludes "any statement made in the course of plea discussions with an attorney for the prosecuting authority."[225] Although Rule 410 already has been amended twice,[226] one reviewing body has proposed that the Rule be amended again to exclude statements made to law enforcement officers who undertook (or indicated that they were undertaking) the discussion at the request of the prosecuting attorney.[227] This avoids the unfairness of admitting

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re Asbestos Litigation, 829 F.2d 1233 (3d Cir. 1987), *cert. denied,* 485 U.S. 1029 (1988), which addressed who decides, and how, whether asbestos hazards were knowable to the industry in the 1930s. In that case, the industry challenged, on federal equal protection grounds, the New Jersey Supreme Court's judge-made law rejecting the "state-of-the-art" defense in asbestos cases while recognizing it in other types of strict liability cases. *Id.* at 1235-36. One member of the majority would have held that the court merely had noticed the legislative fact that the hazards of asbestos exposure were *knowable* to the industry at all relevant times, and that it was thus a factual determination the court had made, and not a special legal rule. *Id.* at 1245-51.

222. Rule 44.1. Determination of Foreign Law

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

FED. R. CIV. P. 44.1.

223. *See* Younger, *supra* note 219, at 253.

224. *See* FJC, REPORT, *supra* note 2, at 9 (noting a gap in the law stemming from Congress' failure to adopt the original Advisory Committee's proposed Rule, and citing a lack of direction for trial courts).

225. FED. R. EVID. 410(4).

226. *See supra* note 4.

227. *See* A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 339-40; *see also* EMERGING PROBLEMS, *supra* note 2, at 65-66 (discussing cases where the defendant discusses pleas with law enforcement officers, and distinguishing cases where the officers are authorized to negotiate on behalf of the prosecuting attorney and those where the officers lacked authority to plea bargain).

prior discussions that the defendant reasonably believed were conducted by police on behalf of the prosecuting attorney. The proposal extends protection to plea discussions on an agency relationship.[228] This proposed amendment would fill a void currently existing in the Rules.

4. Rule 606(b): Juror Competency

An Advisory Committee should also examine carefully a small, but potentially vital, gap in the Rules on juror competency. Rule 606(b)'s restrictive policies concerning the competency of jurors to testify are sensible protections of the integrity of jury verdicts and jurors' personal privacy. The Rule permits post-deliberation testimony by a juror only to discuss "extraneous prejudicial information" or "outside influence."[229] The Rule, however, apparently excludes threats or duress by jury members against one another in the course of deliberation.[230] We agree with the ABA Report insofar as it proposes that the Rule be broadened to fill this present void in Rule 606(b) by permitting inquiry into such threats.[231]

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228. This contrasts with an earlier amendment to Rule 410, which eliminated a bargain with a police officer from the scope of Rule 410. The amendment was made because defendants were able to exclude otherwise admissible discussions with police officers on the ground that they were engaging in plea negotiations. The pendulum has swung too far however, and now even genuine attempts at plea bargains with law enforcement officers fall outside the rigid requirement that the plea discussion must be with the attorney only. For a discussion of these changes to Rule 410 and of the admissibility of plea discussions, see LEMPERT & SALTZBURG, *supra* note 71, at 202.

229. Rule 606(b) provides:

> (b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

230. *See* EMERGING PROBLEMS, *supra* note 2, at 127; *see, e.g.*, United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988) (finding that alleged harassment of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b)); United States v. Blackburn, 446 F.2d 1089 (5th Cir 1971) (same), *cert. denied*, 404 U.S. 1017 (1972); United States v. Stoppelman, 406 F.2d 127 (1st Cir.) (same), *cert. denied*, 395 U.S. 981 (1969); Simmons First Nat'l Bank v. Ford Motor Co., 88 F.R.D. 344 (E.D. Ark. 1980) (same).

231. *See* A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 353-54 (proposing another exception "or as to any threats of violence or violent acts brought to bear on jurors to reach a verdict"); *see also* 3 LOUISELL & MUELLER, *supra* note 79, § 287, at 132 (noting that scholars have advocated permitting jurors to testify about threats by other jurors and citing Ronald L. Carlson & Steven M. Sumberg, *Attacking Jury Verdicts: Paradigms for*

C. *Inconsistencies in the Rules*

The Rules are intelligently drafted, but small errors and minor contradictions do exist. Such errors range from simple typographical errors to logical inconsistencies. For example, a number of commentators have criticized contradictions in the Rules' treatment of judicial notice. Rule 201(g) provides in pertinent part that in a criminal case "the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."[232] This requirement is consistent with the principle that the judge cannot direct a verdict against a criminal defendant, but results in a conflict with Rule 201(f), which allows a court to take judicial notice at any stage of the proceedings, including appeals (where the jury obviously would not have an opportunity to reject the judicially noticed fact).[233] Some courts have relied upon Rule 201(g) to forbid an appellate court from taking judicial notice on appeal even for patently obvious propositions.[234] In contrast, some circuits, to avoid highly technical acquittals, do not accept this result; instead they simply ignore the conflict in the Rule and notice facts on appeal.[235] Still other courts find harmless error based, in part, upon the fact that the jury would not have acquitted the defendant, even if the instruction had been given.[236] One solution to the conflict with Rule 201(f) proposes that in a criminal jury trial judicial notice may be taken only before jury deliberations.[237] An Advisory Committee on the Rules could evaluate this proposal, and also propose remedies for other inconsistencies in the Rules.

D. *Innovative Suggestions*

A further task for an Advisory Committee on Evidence would be to pursue innovative suggestions for the Federal Rules. These suggestions may come from judges, practitioners, or scholars. They also may emerge from experiments and alterations made by various states that have adopted the Federal Rules. For example, an Advisory Committee would doubtless join the current movement to

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Rule Revision, 1977 ARIZ. ST. L.J. 247, 274); Berger, *supra* note 1, at 267 n.60 (arguing that Rule 606(b) be amended because the intent of the drafter was not clearly stated).

232. FED. R. EVID. 201(g).

233. *See* 1 WEINSTEIN & BERGER, *supra* note 18, ¶ 201[06], at 201-60 (noting that although 201(f) does not explicitly refer to appeals, courts have so applied it, even when the matter to be noticed was not raised below).

234. *See* A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 312 (noting that Rule 201(g) prevents courts from correcting "even the most blatant procedural oversights") (citing United States v. Dior, 671 F.2d 351, 358 n.11 (9th Cir. 1982) (refusing to notice American/Canadian exchange rate to determine if property was worth $5,000) and United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (refusing to notice that South Central Bell Telephone was a common carrier)); 1 LOUISELL & MUELLER, *supra* note 79, § 60, at 509 n.23 (citing constitutional policy for reading 201(g) as modifying 201(f)).

235. *See, e.g.*, United States v. Lavender, 602 F.2d 639 (4th Cir. 1979) (noticing the fact of jurisdiction on appeal).

236. *See, e.g.*, United States v. Piggie, 622 F.2d 486, 488 (10th Cir.) (holding that fact that court did not instruct the jury that it could choose whether to accept judicially noticed jurisdiction was not prejudicial because the jury would have found jurisdiction regardless), *cert. denied,* 449 U.S. 863 (1980).

237. *See* A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 311, 313.

streamline litigation. Most attention in this movement has been focused upon the discovery process, and the Advisory Committee on Civil Rules has advanced proposals for significant revisions in that area.[238] However, recent interest also has been directed to the problem of cost and delay attendant to lengthy trials.

Narrative statements represent one device for expediting testimony.[239] Although the flexibility afforded the trial judge by Rule 611 arguably permits the use of narrative statements,[240] neither that Rule nor the accompanying Advisory Committee note encourages such statements. Judge Keeton has drafted a rule that encourages use of narrative statements. It provides that "the testimony of any witness on any relevant subject matter as to which the witness is competent to testify may be received either in the form of an oral narrative answer or in the form of an affidavit."[241] In addition, the proposal provides that "a court may at any time ask or permit counsel to ask the witness to give a narrative answer, or may permit a narrative answer to a question even if the question did not call for that form of answer."[242] The recently proposed amendments to Evidence Rule 702 and Federal Rule of Civil Procedure 26, requiring detailed pretrial notice of the substance of testimony of experts, suggest that more liberal use of narrative statements is a logical next step.[243]

Another method of focusing trials and limiting unnecessary appeals can be gleaned from the draft of Rule 103 of the proposed New York Code of Evidence. The New York State Law Revision Commission restated the principles governing review of rulings based upon general and incorrect specific objections.[244] The New York Rule provides that error in admitting testimony may not rest on an incorrect specific objection at trial unless the evidence was not admissible for any purpose whatsoever. If evidence is excluded, a

238. *See, e.g.*, ADVISORY COMM. ON CIVIL RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE 47-70 (1989), *reprinted in* 127 F.R.D. 237, 312-35 (1989).

239. *See generally* MANUAL FOR COMPLEX LITIGATION § 22.51 (5th ed. 1982) (describing the benefits of utilizing narrative testimony).

240. Rule 611(c) provides in relevant part: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." FED. R. EVID. 611(c).

241. Letter from Robert E. Keeton, Chairman of the Standing Committee of Rules of Practice and Procedure of the Judicial Conference of the United States, to Members of the Standing Committee on Rules of Practice and Procedure 2 (Jan. 15, 1991) (copy on file with *The George Washington Law Review*).

242. *Id.*

243. *See, e.g.*, Oostendorp v. Khanna, 937 F.2d 1177 (7th Cir. 1991) (upholding trial judge's requirement that deposition testimony to be read to the jury be reduced to a five-page narrative summary).

244. *See* Proposed NYCE § 103(a) (proposed draft 1982). Apparently, the code has not been adopted, although succeeding drafts have been circulated.

general objection is sufficient if any ground existed for exclusion of the evidence, and an erroneous specific objection is not sufficient unless the evidence was not admissible for any purpose.[245] Professor Martin, in suggesting certain clarifications to the Commission's proposal, explained the policy behind New York's proposed rule.[246] He noted that Federal Rule 103, while salutary, does not fully address the delicate balance between providing the trial judge maximum assistance from counsel in evidentiary rulings and assuring the right of appellate review where counsel was reasonably diligent.[247] We believe that Rule 103 may be insufficiently specific and that the New York proposals, which specifically address the effect of objections on incorrect grounds, are worthy of consideration by an Advisory Committee on the Rules of Evidence.

E. Debates over Policy

There are some Rules of Evidence that deserve reconsideration in light of the policy issues they raise. An Advisory Committee could examine the Rules and the concommitant policy issues, and propose any needed revisions.

1. Rule 404(b): Other Bad Acts

There is much judicial dissatisfaction with the Rules governing admission of character evidence, especially Rule 404(b), which routinely enables the prosecutor to present highly prejudicial evidence of other criminal conduct by the defendant. Rule 404(b) has engendered a tremendous amount of litigation and has inspired more judicial opinions, and arguably more confusion, than any other section of the Rules.[248] The recently adopted amendment to Rule 404(b) does no more than to provide a procedural vehicle—a motion in limine—for adjudication of 404(b) disputes.[249]

The ABA Report proposed a more radical redrafting of Rule 404(b) whereby in criminal cases evidence of prior bad acts could be introduced

> only if the prosecution demonstrates by clear and convincing evidence that the accused committed the act in question and the court determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion of the issues, or misleading of the jury, and that its admission would not

245. *Id.*
246. *See* Michael M. Martin, *Evidence,* N.Y. L.J., July 8, 1983, at 1, 2, 17.
247. *Id.* at 17.
248. *See* FJC, REPORT, *supra* note 2, at 10 (stating that Rule 404(b) "seems to be the most highly litigated Rule"); 2 LOUISELL & MUELLER, *supra* note 79, § 140, at 172 (discussing the "extraordinary mass of appellate opinion" on Rule 404(b)); 2 WEINSTEIN & BERGER, *supra* note 18, ¶ 404[08], at 404-52 to 404-60 (citing the "huge volume" of perplexing and apparently contradictory opinions stemming from Rule 404(b)). *See generally* EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE (1984) (discussing the admissibility of prior bad acts in criminal prosecutions); LEMPERT & SALTZBURG, *supra* note 71, at 220-24 (discussing arguments for and against the admissibility of prior bad acts).
249. *See supra* note 28.

> unduly delay the proceeding, waste time, or provide needlessly cumulative evidence.[250]

This proposal would reverse the Supreme Court's holding in *Huddleston v. United States,*[251] which required only a reasonable belief that the uncharged conduct occurred.[252] Additionally, the proposal recasts the familiar criteria of Rule 403, requiring instead that the proponent show that the probative value substantially outweighs the prejudice.[253] By limiting the scope of other acts admitted by the Rule, a revised Rule 404(b) might also encourage more judicial analysis rather than a mere recitation of the "other purposes" exceptions to the Rule.[254]

This proposal would doubtless engender strong opposition from the Department of Justice and other law enforcement agencies. The controversy is real, however, and it affects substantial rights of criminal defendants. We believe that further study is warranted.

2. *Rule 501: Privileges*

An Advisory Committee should take a careful look at the Rules covering privileges. The fact most remembered by the bar at large about the genesis of the Rules is Congress' deletion of the privilege rules, despite their careful drafting by the original Advisory Committee and close consideration by the Supreme Court.[255] Congress

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250. A FRESH REVIEW, *supra* note 2, 120 F.R.D. at 330. A version of this position was adopted by the ABA House of Delegates in a resolution approved by voice vote:

> Be it resolved, That the American Bar Association urges that Rule 404(b) of the Federal Rules of Evidence, and similar State rules which may govern the purposes for which extrinsic evidence of crimes, wrongs or acts may be admitted, be amended to provide that in criminal cases:
>
> 1. Questions of preliminary fact regarding the admissibility of evidence of the extrinsic act will be determined by the court; and
> 2. The existence of any preliminary fact required as a precondition to the admission of evidence of the extrinsic act must be demonstrated by the proponent by clear and convincing evidence.

ABA House of Delegates Report No. 109B: Summary of Action Taken by the House of Delegates of the American Bar Association 38 (Midyear meeting 1989).

251. 485 U.S. 681 (1988).

252. *See supra* notes 27-32 and accompanying text.

253. *See* FED. R. EVID. 404(b) advisory committee's note (citing Rule 403 as grounds for excluding Rule 404(b) evidence).

254. For example, McCormick lists ten categories of "permissible purposes." *See* MCCORMICK, *supra* note 72, § 190, at 558-65; *see also* 2 LOUISELL & MUELLER, *supra* note 79, § 140, at 172 (criticizing courts' use of permissive uses with "little analysis"); 2 WEINSTEIN & BERGER, *supra* note 18, ¶ 404[08], at 404-56 (criticizing courts' use of permissive uses "without any analysis").

255. The FJC Report has referred to Article V as containing "the largest gap in the Evidence Rules." FJC, REPORT, *supra* note 2, at 12. The report suggested that "[i]f a new Committee on Evidence Rules is established [Article V] should have its immediate attention." *Id.* Professor Younger, too, criticized the incompleteness of the Rules because "[t]hey say nothing of substance about privileges." *See* Younger, *supra* note 219, at 252. Professor Rothstein also favors a specific list of privileges. *See* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence,* 62 GEO. L.J. 125, 128-31 (1973).

rejected the proposed rules of privilege because it was troubled by the dilution of spousal and patient-physician privileges, the absence of a news-report privilege, and the broadening of protection for government documents. Instead of passing a law of its own, Congress left state law privileges to control in diversity cases and provided that common law should control in federal question cases.[256] By leaving this black hole in the Federal Rules, Congress insulated the federal law of privilege from the "plain meaning" control extended to most of the remainder of the Rules.[257] Ironically, privilege—the area which caused Congress the most concern, and prevented Congress' wholesale adoption of the Rules—is now the primary area in which the judiciary can assert independence and contribute the most to the development of the law.[258]

The time has come to assess how the federal common law has performed. Scholars have raised questions about individual privilege decisions by the Supreme Court.[259] In addition, scholars suggest with great frequency new candidates for privileges, such as accountants, parents, and children.[260] It is important, however, to track the development of the common law in all areas of privilege. Overwhelming uniformity might indicate that codification is now possible. Conversely, vast divergences in the federal common law developed by the circuits would also demand attention from rulemakers. There are many strong arguments for maintaining the status quo, particularly if the federal common law mirrors state law.[261] Nevertheless, privileges remain an area ripe for study.

3. Rule 801: The Structure of Hearsay

Another area that deserves reconsideration is hearsay and its exceptions. The call for global hearsay reform is growing. An entire issue of the *Minnesota Law Review* comprised of papers delivered at a recent conference on the subject will soon appear.[262] That volume follows a number of important scholarly pieces dealing with the subject.[263]

At the very least, the structure of the Rules should be revisited.

256. Although we believe that application of federal statutory privilege rules in state law diversity cases would be clearly constitutional, we also believe that it would be highly undesirable in an area so interwoven with the state's interest in the status and relationships of its citizens. Therefore, we believe that the Rule 501 command—that where state law governs the rules of decision, state privileges should apply—should continue. The more interesting and controversial question concerns the fate of the federal common law that has continued to develop since the enactment of the Federal Rules.

257. *See supra* part II.

258. *See* EMERGING PROBLEMS, *supra* note 2, at 112 (stating that "[i]ronically, Congress enacted a rule and a statute that resulted in the Supreme Court's having as much, if not more, control over privileges than it would have had if specific rules had been adopted along with the remainder of the Rules").

259. *See* ROTHSTEIN, NUTSHELL, *supra* note 23, at 442 (criticizing Trammel v. United States, 445 U.S. 40 (1980)).

260. *See id.* at 454-61.

261. *See* EMERGING PROBLEMS, *supra* note 2, at 112-13 (discussing the benefits and drawbacks of codification).

262. The symposium will be published at 76 MINN. L. REV. in the spring of 1992.

263. *See, e.g.*, Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L.

The Rules' denomination of certain prior statements and admissions as "non-hearsay" exemptions from (instead of exceptions to) the hearsay rule is unnecessarily confusing.[264] The reasoning behind this taxonomy, which is only murkily understood by the bar, derives from theories of agency and the adversary system.[265] The consequences of this logic are significant, however, because the traditional requirement for a hearsay exception—circumstantial guarantees of trustworthiness—does not apply to "non-hearsay."[266]

Additionally, an Advisory Committee might examine the "structure" problem insofar as it permits the admission of prior consistent statements as substantive (as opposed to merely rehabilitative) evidence, a distinction that has produced much confusion, and even division in the circuits, with apparently little benefit to the litigation

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REV. 51 (1987); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1341 (1987).

264. Rule 801(d) defines prior statements and identifications by available witnesses and various forms of admissions as "statements which are not hearsay." FED. R. EVID. 801(d); *see, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 183-89 (1988) (deriding the "statutory magic" of labeling 801(d) not hearsay).

265. The touchstone of hearsay exclusion is lack of cross-examination. An agent's statements legally operate as one's personal statements. Because a party cannot complain that he missed the opportunity to cross-examine himself, the argument goes, a party cannot complain because he missed the opportunity to cross-examine his agent or coconspirator. To the extent the logic is compelling at all, it does not make sense for the types of admissions most removed from the party against whom the admission is admitted—admissions of agents and coconspirators.

266. *See* Bein, *supra* note 1, at 393 (questioning the fundamental structure of Rule 801, arguing that admissions should be subjected to a trustworthiness requirement, and suggesting a redraft of 801(d)(2)). The title of Professor Bein's article emanates from the case of Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978), which held admissible the (outcome determinative) statement by the Director of Education of Wild Canid that Sophie, a "gentle wolf . . . bit a child." However, the Director had not been present at the incident and it was questionable whether the child's injury may have come not from a wolf bite but from the barbs on top of a fence that the child may have climbed over to visit Sophie. The Director's statement, although highly speculative and arguably quite unreliable, was admitted on an agency theory. *Id.* at 631.

Similarly, there is no overarching requirement of trustworthiness mandated under the hearsay exceptions. Neither the text of Rule 801, nor the text of Rules 803 and 804, which enumerate approved exceptions to the hearsay rule, articulate what the jurisprudence generally considers to be an incident to approved exceptions to the Rule—the requirement of circumstantial guarantees of trustworthiness. Some exceptions do have individual trustworthiness requirements. *See, e.g.*, FED. R. EVID. 803(6), 803(8), 803(24). The lack of such a blanket trustworthiness requirement can lead to anomalies.

A case recently tried in the Northern District of Alabama, called to our attention by Chief Judge Sam C. Pointer, suggests the desirability of adding a general trustworthy proviso to Rule 802. Rule 803(16) excepts "[s]tatements in a document in existence twenty years or more the authenticity of which is established." Counsel in the Alabama case argued that, in the absence of an overarching trustworthiness requirement, a statement in a twenty-year-old edition of a supermarket checkout-counter tabloid could come into evidence as a statement in an ancient document. Although the specific point is not of major import, it suggests a glitch of broader potential significance that would benefit from attention.

process.[267]

4. Rules 803(24) and 804(b)(5): The Hearsay Residual Exceptions

Another area that we believe deserves close attention is the hearsay residual or catch-all clause.[268] Scholars and judges have formulated theories as to appropriate use of the residual exception. At the very least, the residual was designed for the odd case where clearly trustworthy hearsay could be admitted although it did not fit within a recognized exception.[269] There is debate as to how much more open the residual exception should be.[270]

The operation of the hearsay residual exception sheds light on hearsay doctrine and its development. Indeed, examining the use of the residual exception is a good way of determining what is on the cutting edge of hearsay admissibility and what types of reliable, but technically excluded, hearsay are presented to the courts. The residual exception thus can serve as a testing ground for developing hearsay exceptions.

We are troubled, however, when courts commonly use the residual exception to admit hearsay for which Congress explicitly refused to provide an exception. This phenomenon is particularly apparent with respect to prior inconsistent statements that fall outside the scope of Rule 801(d)(1)(A), such as former grand jury testimony where the witness is no longer available.[271] Rule

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267. *See* United States v. Casoni, 950 F.2d 893, 905 (3d Cir. 1991) (finding that prior consistent statements can be admissible as substantive evidence, but acknowledging that "the rule is confusing").

268. Although there are actually two residuals, Rule 803(24) and Rule 804(b)(5), they overlap and can be considered as one. Both residuals require that: (1) the statement must be relevant (redundant of Rule 401); (2) the statement must have circumstantial guarantees of trustworthiness equivalent to the trustworthiness of the enumerated exceptions in Rule 803 and Rule 804(b); (3) the statement must be more probative than any other evidence the proponent can offer through reasonable efforts; (4) once admitted, the statement must serve the interest of justice; and (5) the proponent of the statement must provide pre-trial notice to the opposing party. The only significant difference between Rule 803(24) and Rule 804(b)(5) is that Rule 804 requires that the declarant be unavailable. It is hard to imagine a case that could fall under Rule 804(b)(5) and yet not meet the identical requirements of Rule 803(24). Indeed, one sensible suggestion for reform could be the reformulation of the two residuals into one separate rule.

269. *See, e.g.*, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) (holding proper reliance on a 20-year-old newspaper article to prove that a fire had occurred; the ancient documents exception did not exist at this time).

270. *See, e.g.*, Edward J. Imwinkelreid, *The Scope of the Residual Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978) (advocating a more liberal construction of the exception); Myrna Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 LOY. L. REV. 1326 (to be published in 1992) (arguing that the hearsay catch-all rule affects criminal defendants disproportionately); David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982) (arguing for a broadening of the residual hearsay exception); Raymond L. Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587 (1980) (arguing for a liberalized construction of the residual hearsay exception).

271. *See* United States v. Marchini, 797 F.2d 759, 762-65 (9th Cir. 1986) (holding that admissibility of prior grand jury testimony with adequate indicia of reliability did not violate the Confrontation Clause), *cert. denied*, 479 U.S. 1085 (1987); United States v. Walker, 696 F.2d 277, 280-81 (4th Cir. 1982) (same), *cert. denied*, 464 U.S. 891 (1983);

801(d)(1)(A) requires that, before the hearsay may be used as substantive evidence, the declarant must be available for cross-examination. Resort to the catch-all exception eviscerates this important safeguard. Once it becomes evident that the residual exception is being used repeatedly to cover a certain type of hearsay, such as out-of-court statements of child victims of sexual assault,[272] an Advisory Committee should consider either creating a new exception, or labelling the evidence as inadmissible hearsay.

Another reason for our position disfavoring repeated use of the residual exception is that the stare decisis effect of the residual exception is limited to the facts of individual cases.[273] Therefore, even if repeated use of regular exceptions specifically rejected by the Rules' drafters or by Congress constitutes an appropriate use of the residual exception, it cannot substitute for amendments to the Rules.[274]

Conclusion: The Task for an Advisory Committee

The foregoing discussion demonstrates that the time has come for a thorough review and selective revision of the Federal Rules. Significant conflicts, questions, and inconsistencies have developed in the jurisprudence during the sixteen-year hegemony of the Rules. We have focused primarily on three areas that need immediate attention: the foundation requirements for coconspirator declarations,[275] the standard of admissibility for scientific evidence,[276] and the applicability of evidence rules in sentencing proceedings.[277] A

United States v. Barlow, 693 F.2d 954, 960-65 (6th Cir. 1982) (same), *cert. denied*, 461 U.S. 945 (1983); United States v. Boulahanis, 677 F.2d 586, 588-89 (7th Cir.) (same), *cert. denied*, 459 U.S. 1016 (1982); United States v. Carlson, 547 F.2d 1346, 1352-60 (8th Cir. 1976) (same), *cert. denied*, 431 U.S. 914 (1977). *But see* United States v. Fernandez, 892 F.2d 976, 982 (11th Cir. 1989) (holding that prior grand jury testimony is inadmissible unless "extraordinarily trustworthy"); United States v. Vigoa, 656 F. Supp 1499, 1506 (D.N.J. 1987) (same), *aff'd*, 857 F.2d 1467 (3d Cir. 1988). *See generally* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 803(24)[01], at 803-375 to 803-376 (discussing various approaches to the admissibility of former grand jury testimony where the witness is no longer available); Randolph 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 (1986) (analyzing judicial interpretations of the residual exceptions in cases considering the admissibility of grand jury testimony).

272. *See, e.g.*, United States v. Shaw, 824 F.2d 601, 609 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); United States v. Dorian, 803 F.2d 1439, 1441 (8th Cir. 1986).

273. *See* 4 WEINSTEIN & BERGER, *supra* note 18, ¶ 803(24)[01].

274. Concerns that individual judges may be circumventing established hearsay doctrine have led us to endorse the "near miss" rule, which holds that the residual exception does not apply in cases where the proffered evidence misses, just barely, inclusion within another category of exception. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1262-64 (E.D. Pa. 1980), *modified*, 723 F.2d 238 (3d Cir. 1983). *But see* Sonenshein, *supra* note 270, at 885-88 (finding the near miss theory "unhelpful").

275. *See supra* part II.

276. *See supra* part III.

277. *See supra* part IV.

host of other candidates, however, invite review and possible revision. We have identified some of them in what we hope will serve as a starting point toward discussion and reform.

We note preliminarily our view that certainty in the Federal Rules is, in at least one significant respect, more important than certainty in the rules of Civil or Criminal Procedure. During the crucible of trial, when counsel and the court must make important decisions without much time for reflection or research, they rarely need to consult the Rules of Civil or Criminal Procedure (except perhaps with respect to motions for directed verdicts or judgment of acquittal). They must, however, constantly consult the Rules of Evidence.[278] Accordingly, clarity and certainty in the Rules is critically important. Implicated here is not only the goal of predictability, but also the cost of relitigation. Careful revision will not undermine, but, rather, enhance the certainty of the Rules, given the current state of confusion surrounding many of them. An Advisory Committee is needed to rectify the problems that we have identified. The Committee may accomplish its task not only by Rule revision and clarification, but also by the monitoring and ancillary educational process that it might initiate.

An Advisory Committee would serve at least four functions. First, and most important, it would review and continuously monitor the Federal Rules. This reviewing process would involve decisions ranging from specific details to global questions about evidence. On a prosaic level, the Committee would clarify unintended ambiguities, correct subtle contradictions, and tidy-up small errors that transcend mere technical problems but do not rise to the level of policy debates. Identifying and reconciling conflicts and other small errors is an obvious, but extremely important, function of our proposed Advisory Committee on the Rules of Evidence. In some ways, these smaller errors present the best reasons for gathering together a Committee to review the Rules. Egregious problems or popular concerns may eventually be addressed by Congress. Circuit splits may some day attract the attention of the Supreme Court. However, small contradictions, such as those affecting the rules of judicial notice,[279] may go uncorrected. Similarly, an Advisory Committee, because of its focus and expertise, is the best vehicle for addressing occasional poor drafting of the Rules.[280]

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278. *See* Stephen A. Saltzburg, *The Federal Rules of Evidence and the Quality of Practice in Federal Courts,* 27 CLEV. ST. L. REV. 173, 184-85 (1978) (discussing the need for rules of evidence that are readily ascertainable during trial).

279. *See supra* notes 218-22, 232-37 and accompanying text.

280. For example, Professor Berger has criticized as "confusing" the drafting of Rules 404, 608(b), and 613(b). *See* Berger, *supra* note 1, at 262-63 nn.37-38. Professor Berger also has pointed out to us an interesting anomaly—a problem created as the unintended consequence of the gender-neutralizing amendment process. Rule 804(b)(2), the dying declarations rule, formerly read:

> *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause of circumstances of what he believed to be *his* impending death [is not excluded by the hearsay rule if the declarant is unavailable as a witness]

In conducting its review, an Advisory Committee on the Federal Rules should pay particular attention to plain meaning. If it is diligent in monitoring the Rules for clarity and consistency with actual trial practice, deviations between plain meaning and the general expectations of the bench and bar are less likely to occur. We note that occasionally the current Advisory Committee notes deviate from plain meaning.[281] Given the Supreme Court's plain meaning approach, the status of such extra-rule advice is questionable.

The Supreme Court's method of interpreting the Federal Rules has not been entirely consistent. To the extent that it has adhered to a rigid plain meaning approach, its reading arguably assumes the existence of a responsive rulemaking body. Indeed, a court that relies upon plain meaning and eschews judicial lawmaking should welcome a body that monitors the clarity and precision of the Rules. To the extent that the Supreme Court has engaged in more expansive interpretation of the Rules, based upon public policy and congressional intent, the guidance and responsiveness of a Committee is essential.

A Committee's monitoring must also address circuit splits and correct judicial excesses.[282] It is particularly important to identify questions upon which the circuits have diverged. Such divergence undermines the uniformity and predictability of trials in federal courts. Because the Supreme Court rarely grants certiorari,[283] a Committee will play an important role in resolving conflicts. Moreover, courts can fill gaps and resolve conflicts only when presented with a case or controversy. A Committee would not be so limited.

Second, in addition to correcting mistakes and addressing problems, a Committee should be in the forefront of debates on important evidence issues. Use of expert testimony, the admission of hearsay statements by children who were victims of sexual abuse,

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FED. R. EVID. 804(b)(2), *reprinted in* 28 U.S.C. app. advisory committee's notes (1982) (emphasis added). The amended rule simply deleted the "his" before "impending death." FED. R. EVID. 804(b)(2). In the situation where there are two victims of a crime, and both die, the question may arise as to whether the statement of one victim concerning the cause or circumstances of the killing can be considered with respect to the death of the other victim. Under the original Advisory Committee Note, it seems clear that it could not—"his" referred to "his own" death. FED. R. EVID. 804(b)(2), *reprinted in* 28 U.S.C. app. advisory committee's notes (1982). Now, under the plain meaning approach, *see supra* part I, "impending death" might be that of *both* victims. This is the kind of problem that an Advisory Committee easily could correct.

281. *See e.g.*, FED. R. EVID. 803(4) advisory committee's notes (including statements relating to case preparation that are not in the language of the Rule on statements made for medical diagnosis); FED. R. EVID. 803(6) advisory committee's notes (including a business duty rule on the business records hearsay exception that is not in the text of the Rule itself).

282. *See supra* part V.

283. *See, e.g., supra* note 137 (noting the dissent of Justices Blackmun and White from the Supreme Court's denial of the petition for a writ of certiorari in *Christophersen v. Allied-Signal Corp.*).

applicability of the evidence rules to sentencing hearings—all deserve careful and organized attention from the bench and bar. This role is particularly important now because proposals for revision of the Civil Rules, designed to expedite the discovery and total litigation processes, are pending.[284]

Third, an Advisory Committee should keep abreast of recent developments in scholarship and case law. It should also monitor professional criticism, and serve as a clearinghouse for new proposals from the academy, bench, and bar.[285]

Finally, even if the Committee determines that certain areas of the Rules need not be revised, it should nevertheless provide assistance in understanding the Rules. Because Congress enacted (rather than adopted) the Federal Rules of Evidence, in the process making many changes of its own, the Advisory Committee notes and the accompanying House, Senate and Conference Reports are sometimes hard to follow. Occasionally, the Advisory Committee notes do not reflect the final changes made in the Rules and refer to rules that do not exist or that have been renumbered. More significant, some of the notes are out of date.[286] In addition to updates and clarifications in its notes, the Advisory Committee should incorporate more current case law interpreting and explaining the Federal Rules.

Not all of the problems we have identified in this Article must be dealt with by amendments to the Rules. Revisions to the Advisory Committee notes can signal approval or disapproval of case law trends. In addition, the Committee might sponsor, or request the Federal Judicial Center to sponsor, a publication analogous to the *Manual for Complex Litigation* that would give assistance to the bench and bar in administering the Rules.[287]

The only remaining question might be why we propose an Advisory Committee as opposed to some other mechanism. We firmly believe that the monitoring and revision functions we have outlined

284. For example, the proposed amendment to Rule 32 of the Federal Rules of Civil Procedure will make depositions automatically admissible at trial without the need to show unavailability of the witness. *See* 60 U.S.L.W. 2158-59 (U.S. Sept. 10, 1991) (describing the proposed change to Rule 32). Facilitating the introduction of deposition testimony may be beneficial, but it has the net effect of depriving the factfinder of demeanor evidence. This trend underscores the need for an Advisory Committee on the Rules of Evidence to monitor the impact of changes in other rules on trial evidence.

285. *See generally* Roger C. Park, *Evidence Scholarship, Old and New,* 75 MINN. L. REV. 849, 859-71 (1991) (discussing how doctrinal scholarship improves evidence law). In discussing the nature of evidence scholarship, Professor Park muses why it has, compared to civil procedure and other practice-oriented subjects, suffered from a malaise in scholarship. In addition to the reasons Professor Park presents, we add another: the lack of a responsible responsive Advisory Committee dampens interest in evidence scholarship.

286. For example, the Advisory Committee Note to Rule 201 cites the case of Hawkins v. United States, 358 U.S. 74 (1958), as an example of a case that establishes a legislative fact. Ironically, however, much of that case and the policy embodied in the legislative fact has been reconsidered by the Supreme Court in Trammel v. United States, 445 U.S. 40 (1980).

287. *See* FJC, REPORT, *supra* note 2, at 4-5 (discussing the idea of a formal manual on evidence).

can be accomplished properly only by an Advisory Committee on the Rules of Evidence operating under the aegis of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.[288] First, there is good evidence that such a regime works. The models provided by the other Advisory Committees—those for the Criminal, Civil, Appellate and Bankruptcy Rules—validate this system of monitoring and proposing changes in the various procedural rules.[289]

In addition, there is simply no other body that can do the work we suggest. Certainly, none has confronted the task in the sixteen years since the Rules emerged.[290] Neither Congress nor the Courts (sans Advisory Committee) possess sufficient institutional interest or power to pursue the job. Congress is too busy to focus on day-to-day monitoring. Its attention can be drawn by the headlines—such as in the "Hinckley amendment to Rule 704," prohibiting expert testimony on the ultimate issue of sanity. In less sensational cases, it is very hard to capture Congress' attention and even harder to sustain it through the long process of drafting and revision. In addition, the Federal Rules pertain to the operation of trials and admission of evidence—areas outside the interest or expertise of the legislative branch. Of course, Congress has the last "say" on the Rules,[291] but the proposal of amendments by an Advisory Committee would stimulate a dialogue between the judiciary and Congress that is best effectuated through the rulemaking process.

The courts also face inherent limitations upon their ability to correct problems with the Federal Rules. First, they are increasingly limited by plain meaning analysis, resulting in their having to acquiesce to poor drafting. Although the courts possess the power to

288. As we have explained, *see supra* notes 6-17 and accompanying text, assignment of the responsibility for the Federal Rules of Evidence to the Advisory Committee on Civil or Criminal Rules is problematic, and the Standing Committee would not appear to have the time to handle the task. A recent letter addressed to Chief Justice William Rehnquist and the Chairs of the Standing Committee, the Criminal Rules Committee, and the Civil Rules Committee, signed by over 75 law professors, expressed "disappointment over the lack of focus on particular problems of evidence in the procedure for amending the Federal Rules of Civil and Criminal Procedure and of Evidence." Letter from Law Professors to Chief Justice William Rehnquist and the Chairs of the Standing Committee, Criminal Rules Committee, and Civil Rules Committee 1 (Feb. 11, 1992) (copy on file with *The George Washington Law Review*). The letter urged "specialized scrutiny" of amendments to the Civil and Criminal Rules for their effect on the Rules of Evidence. *Id.* The letter proposed as one possible solution to this lack of coordination and oversight the "reconstitution of the Advisory Committee on the Rules of Evidence." *Id.*

289. Another analogy might be to the United States Sentencing Commission, which is charged with ongoing review of cases construing the Sentencing Guidelines so as to be in a position to refine the Guidelines on a continuing basis. *See supra* note 151. In view of the role of the Supreme Court's plain meaning jurisprudence in the dialogue, this type of review is best performed by an agency within the judicial branch.

290. *See supra* note 4 and accompanying text.

291. *See* 28 U.S.C. § 2074 (1988).

interpret the Federal Rules and create federal common law surrounding ambiguous terms, those interpretations are not always uniform, and circuit splits fester. Finally, courts are limited because they must decide case and controversies, not abstract legal issues. Concrete problems do not always present the issues in the best form; courts do not always have access to experts, and their ability to find facts generally is restricted by the positions of the parties in the cases before them.

By contrast, an administrative body such as the Advisory Committee we propose would have the resources, time, and interest to monitor the Rules and propose changes. Objections that an Advisory Committee is somehow undemocratic are untenable. Of all the possible sources, an Advisory Committee is likely to reflect the most diversity. The Advisory Committee is also the forum most likely to be responsive to other disciplines.[292] Law has much to learn from the social sciences—the Rules of Evidence would benefit from the knowledge acquired in psychology, for example[293]—but we need an attentive body with a mission in order to respond to outside ideas. That mission should not be of wholesale change for change's sake, but, rather, the kind of responsible monitoring and selective revision suggested in this Article.

We recognize that it is easier to identify problems than to correct them. We have no illusions about the enormity of the task we have described. But the Rules need careful attention, and an Advisory Committee on the Rules of Evidence is essential to fulfill the statutory mandate. For that reason, we suggest the need for a new Committee, and rescribe the ancient homily: "The day is short, the work is great, the reward is much, and our Master is insistent."[294]

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292. *See, e.g.*, J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155 (1991) (comparing developments in jury instructions emerging from courts, legislatures, and administrative bodies and concluding that the administrative bodies were most likely to learn from other disciplines).

293. *See* Park, *supra* note 285, at 849-51 (discussing why evidence does not seem to learn from other disciplines).

294. ETHICS OF THE FATHERS 2:20 (statement of Rabbi Tarfon).