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A Legisprudential Analysis of Evidence Codification: Why Most Evidence Rules Should Not Be Codified—But Privilege Law Should Be

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A LEGISPRUDENTIAL ANALYSIS OF EVIDENCE CODIFICATION: WHY MOST RULES OF EVIDENCE SHOULD NOT BE CODIFIED—BUT PRIVILEGE LAW SHOULD BE

*Paul F. Kirgis**

I. INTRODUCTION

After a long and tortuous history, the movement to codify the law of evidence has both succeeded and stagnated. The Federal Rules of Evidence are now firmly established. They are an accepted and integral part of federal practice, and most states have adopted evidence codes based on them.[1] Even the Uniform Rules have been amended, in most respects, to replicate the Federal Rules.[2] On the other hand, the states that have not adopted versions of the Federal Rules have largely abandoned efforts to do so.[3] Moreover, although an Advisory Committee exists to tweak the Federal Rules, it seems disinclined to push for any significant changes.[4] In short, broad changes to the basic structure of evidence law, by way of revision, retraction, or expansion of the current Rules, seem unlikely at best.

Furthermore, public choice theory teaches that legislation is

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1. Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 293 (1990).

2. *Id.* at 298.

3. *Id.* at 293 (noting that thirty-four states have codified a version of the Federal Rules, three have considered and rejected proposed codifications based on the Federal Rules, and ten have not seriously considered adopting a code based on the Federal Rules).

4. *See* Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 819–23 (2002).

frequently the product of interest-group manipulation.[5] The Federal Rules of Evidence have sometimes appeared to be a laboratory for testing and proving that theory. At their inception, the Rules almost foundered amid the political wrangling over the proposed privilege rules.[6] More recently, the Advisory Committee on the Federal Rules of Evidence has devoted considerable time and effort to fending off ill-considered Congressional amendments to the Rules, many of which represent blatant pandering to powerful constituencies.[7]

Given this combination of legislative inertia punctuated by interest-group maneuvering, academic efforts to change the basic rules of evidence through the invocation of either theory or policy norms can seem hopelessly naïve. The Rules are entrenched, and if an attempt at fundamental change ever made headway, the resulting law would almost certainly reflect further interest-group wrangling. That is a disheartening thought, and one that might easily lead evidence scholars to focus on easier targets: the courts. Not surprisingly, much evidence scholarship addresses issues that the courts can resolve, such as the proper way to assess expert testimony[8] or the intersection of the confrontation clause and the hearsay rule.[9]

The law of evidence, however, like most areas of law in this age of statutes,[10] is now primarily a legislative creature. The federal courts, including the Supreme Court, interpret the Federal Rules as a

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5. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 875–83 (1987) (discussing conceptions of legislation in public choice theory).

6. *See* Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002).

7. *See* Symposium, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 742 (2002) (comments of Paul Rice).

8. *See, e.g.*, *Expert Admissibility Symposium*, 34 SETON HALL L. REV. 1 (2003).

9. *See, e.g.*, Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763 (2000); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over*, 21 QUINNIPIAC L. REV. 1013 (2003).

10. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

statute;[11] they do not believe they are empowered to depart from the text of the Rules.[12] The Advisory Committee, itself a judicial creation, is empowered to suggest changes to the basic rules, but has declined to do so.[13] State courts seem to have followed the federal model in hewing to the text of their respective codes of evidence, most of which are legislatively prescribed.[14] The reality is that if significant change in the law of evidence is to come, it will have to originate in the offices of legislators. So if evidence scholars abandon efforts to speak truth to the legislative power, they abandon most of the field of evidence.

As this symposium suggests, evidence scholars have not completely abandoned the field. Led by some of the participants in this symposium, scholars have debated questions such as whether the Rules constitute a statute,[15] and if so, how they should be construed,[16] and whether the Advisory Committee should take a more proactive role in promoting evidence reform.[17] The topic of this symposium—whether privilege law should be codified—remains

11. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) (describing Federal Rules of Evidence as a "legislative enactment" to be interpreted according to "traditional tools of statutory construction" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987))).

12. *See* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1311–18 (1992).

13. *See* Rice, *supra* note 4.

14. There is relatively little literature which studies state courts' interpretations of their evidence rules. One example is Robert G. Lawson, *Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?*, 87 KY. L.J. 517 (1999), which tentatively concludes that Kentucky courts have construed Kentucky rules of evidence to supersede common law. *See id.* at 573–75. An outlier state is Ohio, which codified a modified version of Rule 102 designed to ensure that its courts do not deviate from the common law as codified in the state rules. *See* Michael Lepp & Christopher B. McNeil, *The Trial Judge as Gatekeeper for Scientific Evidence: Will Ohio Rule of Evidence 102 Frustrate the Ohio Courts' Role Under* Daubert v. Merrell Dow?, 27 AKRON L. REV. 89, 103 (1993).

15. *See* Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994).

16. *See* Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389 (1996); Eileen Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

17. *See* Rice, *supra* note 4.

a hot-button issue three decades after the proposed inclusion of privilege rules nearly scuttled the entire codification project.[18]

The topic of privilege codification presents an opportunity to revisit the subject of evidence codification more generally—to rethink assumptions about evidence codification even while recognizing the implausibility of radical change. Whether privilege law is codified, and what form a codification will take, will depend on the usual Congressional machinations. But whether a proposed codification has widespread support in the legal community—academic or otherwise—will depend on the perceived benefits of codification as compared with the *status quo*, or other options.

In this article, I will suggest standards for use in assessing a proposed codification. Although the standards I will identify are useful for evaluating a proposed codification of privilege law, they are also more generally applicable. Indeed, I will use them to examine the codification of evidence law in general. First, I will ask whether, as a normative matter, the law of evidence should be codified. I will then focus on the individual rules of evidence, most notably the privilege rules, to draw conclusions about whether those standards are met.

I address the topic of codification from a particular legisprudential perspective. I take as my premise that, in our system rooted in the common law, legislation must be justified in relation to its effect on the common law. Relying on Hayek, Calabresi, and other scholars, I will argue that legislation is justified when it serves one of two functions: an "ordering" function, directed at ensuring the efficiency and fairness of existing common-law rules; and a "remedial" function, directed at correcting errors in the common law. I will analyze the rules of evidence—both the codified rules and the uncodified rules of privilege—to assess whether codification is justified according to my criteria. I will conclude that most rules of evidence do not meet the criteria for codification, but that the law of privilege does.

My practical objectives are two-fold. First, as I suggested, I hope to bolster the case for the codification of privilege by showing why it, more than almost any other area of evidence law, satisfies the standards for codification. Second, while I acknowledge that repeal

18. *See* Broun, *supra* note 6, at 769.

of the various evidence codes is unlikely and might not even be justified by the cost, I hope to sound a cautionary note about further codification efforts. With some important exceptions, most notably the law of hearsay, the current rules of evidence are vague enough to allow for development of the law through case-law evolution. For that evolution to occur, though, two conditions must be satisfied. We must leave the rules essentially as they are, without attempting to "fix" minor problems of application that might arise. And the courts, including the Supreme Court, must take seriously Rule 102's command to interpret the Rules so as to secure the "promotion of growth and development of the law of evidence."[19] I hope to encourage both of those developments by suggesting reasons why case-law evolution is generally superior to codification in the evidence context.

I begin in Part II with a critique of traditional arguments about the value of evidence codification. I show why those arguments do not provide adequate support for the codification of evidence law. In Part III, I offer a set of standards for use in evaluating codes. I argue that American codes are simply legislation and that the provisions of a code must be justified in relation to the common law. I explain the "ordering" and "remedial" functions and how legislation can satisfy them. Finally, in Part IV, I evaluate the rules of evidence according to those standards to reach my conclusions about which rules should be codified and which should not.

II. A CRITIQUE OF THE TRADITIONAL ARGUMENTS FOR CODIFICATION

Throughout the nineteenth century, Americans engaged in a protracted national debate about the relative merits of the common law and of codes.[20] The debate seems to have begun about the time that Jeremy Bentham wrote to President James Madison in 1811,

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19. FED. R. EVID. 102. For a debate about the role of Rule 102 and court interpretation of the Federal Rules of Evidence, compare Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1565–67 (1999) with Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse Than Myopia*, 40 WM. & MARY L. REV. 1595, 1605–12 (1999).

20. *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT 98 (1981).

beneficently offering to draft a code to remove "the yoke of . . . wordless, as well as boundless, and shapeless shape of common, alias Unwritten law" from about the necks of the young American states.[21] Bentham favored a comprehensive code in the mold of the Napoleonic Code, one that would entirely supplant the common law.[22] Code proponents who followed him varied in their devotion to the comprehensive model.[23] But the most prominent among them, David Dudley Field, was also one of the strongest supporters of comprehensive codification.[24] In addition to his codes of civil and criminal procedure adopted in the early 1850s, Field and his commission produced codes between 1859 and 1865 purporting to cover the whole of public law (the Political Code), criminal law (the Penal Code), and private civil law (the Civil Code).[25]

Field's codes were widely debated and were adopted almost whole in the Dakota and Montana Territories and, more importantly, in California.[26] By that time, extensive codes had already been adopted in Georgia and Louisiana.[27] Eventually, Field's Penal Code and part of his Political Code were adopted in modified form in New York.[28] But the movement for comprehensive codification to supplant the common law ultimately failed.[29] A number of reasons seem to account for that. First, while Americans were disenchanted with the English political system, in general they respected the common law. Many Americans believed that Parliament and the Crown denied them the rights that should have been guaranteed to them by the common law.[30] Second, the French Civil Code appeared on the scene in 1804, too late to be incorporated into the first laws of

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21. *Id.*
22. *Id.*
23. The Massachusetts commission on codification led by Justice Joseph Story, for example, concluded that codification was both possible and desirable in only certain areas of the law. *See* Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 360–61 (1999).
24. *Id.* at 361.
25. *See* COOK, *supra* note 20, at 196.
26. *See* Morriss, *supra* note 23, at 356.
27. *See* COOK, *supra* note 20, at 57, 198
28. *See* Morriss, *supra* note 23, at 356, 364–66.
29. *See id.* at 356.
30. *See* COOK, *supra* note 20, at 4.

the new states.[31] Whatever the reasons, by the end of the century, the momentum behind Field's codes had died and no voice for codification of comparable stature and influence emerged.[32]

For nineteenth-century proponents of comprehensive codification, the philosophical justification for codification was political. Codifiers were skeptical of a common law formulated and guarded by an elite, unaccountable judiciary and accessible only to professional lawyers.[33] They saw codification as a route to democratization of the law.[34] Codification, in their view, would simultaneously transfer law-making power from the judges to the elected legislatures and make the law available to untrained laypersons.[35]

In the twentieth century, as the movement for comprehensive codification faded, the philosophical arguments for selective codification turned utilitarian. Proponents of codification emphasized more prosaic benefits tied to the functional deficiencies of the common law. For example, in his 1946 multi-part tome on the sources of law, Roscoe Pound identified five defects in the common law: want of certainty, inefficiency, lack of knowledge of the law on the part of legislators, irrationality, and confusion.[36] He predicted that these defects would ultimately lead to widespread codification.[37] Similarly, continental lawyers evaluating the common law system advocated the ability of a code system to improve predictability and

31. In 1808, however, Louisiana, a state with powerful French cultural influences, did adopt a code based on the *Code Napoleon*. R. Lee Warthen, *The Non-Emergence of the Anglo-American Law Code*, LEGAL REFERENCE SERVICES Q., Spring/Summer 1986, at 129, 148.

32. *See* Morriss, *supra* note 23, at 358–60.

33. *See id.* at 370–74 (describing nineteenth century arguments in favor of codification).

34. *See* Mark D. Rosen, *What Has Happened to the Common Law? Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1122–23 ("[P]roponents [of codification] argued that allowing unelected judges to make law was inconsistent with democracy, and, therefore, codification was a necessary bulwark against what amounted to illegitimate judicial legislation.").

35. *See* Morriss, *supra* note 23, at 371–74.

36. Roscoe Pound, *Sources and Forms of Law IV: Codification*, 22 NOTRE DAME LAW. 46, 77–78 (1946).

37. *Id.* at 76.

coherence in the law.[38] These arguments carried the day in helping garner widespread acceptance of the Uniform Commercial Code,[39] the Model Penal Code,[40] and other codification efforts.[41] Where comprehensive codification, with its broad rejection of the common law, had foundered, partial codification of specific doctrinal areas of the law succeeded.

For the law of evidence, a similar progression occurred, though over a longer period of years. Field had included sections dealing with the law of evidence in his draft codes.[42] But those sections were rejected in New York and other states even as his Code of Civil Procedure was widely accepted.[43] Thereafter, efforts to codify the law of evidence lay dormant for several decades. When the evidence codification movement began again in earnest in the twentieth century, the arguments for evidence codification echoed the arguments for codification more generally in emphasizing practical benefits. In its 1960 report on the advisability of promulgating rules of evidence, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States focused on the need for a uniform system of evidence law to replace the patchwork of federal and state laws then in effect and on the potential for codification to

38. *See* G. de Grooth, *Codification and Case Law*, 3 KAN. L. REV. 333, 335, 341 (1955); *see also* Warthen, *supra* note 31, at 133–34 (explaining that later codification movements intended codes "to provide a harmonious meeting of practice and doctrine, to replace judicial discretion with legislative control, and to simplify and clarify the language of law so that even the common person could understand it").

39. *See* UNIF. COMMERCIAL CODE, 1 U.L.A. 1 (Supp. 2004) (listing jurisdictions adopting the U.C.C.).

40. *See* Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998) (noting that within two decades after its publication, the Model Penal Code had served as the basis for new codifications of criminal law in more than two-thirds of the states).

41. *See, e.g.*, UNIF. P'SHIP ACT, 6 U.L.A. 58 (Supp. 2004) (listing adopting jurisdictions); UNIF. ARBITRATION ACT, 7 U.L.A. 60 (Supp. 2004) (listing adopting jurisdictions); UNIF. PROBATE CODE, 8 U.L.A. 1 (Supp. 2004) (listing adopting jurisdictions).

42. *See* Stephen A. Saltzburg, *The Federal Rules of Evidence and the Quality of Practice in Federal Courts*, 27 CLEV. ST. L. REV. 173, 177 (1978).

43. *Id.*

improve the law of evidence.[44] Most of the scholarly literature discussing the history of the Federal Rules of Evidence also stresses those dual objectives of uniformity and improvement of the law of evidence.[45] Ultimately, those arguments prevailed. After a series of failed codification efforts,[46] a successful codification of evidence finally took hold with the adoption of the Federal Rules of Evidence and their subsequent dissemination among the states.[47]

The utilitarian objectives of uniformity and improvement of the law may make sense as justifications for codification in many areas historically reserved for the common law. But for a number of reasons, they do not make sense as justifications for a broad codification of evidence law. I explain those reasons in this section, as a prelude to offering an alternative standard for assessing the utility of codification in the next section.

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44. *See* Thomas F. Green, Jr., *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 98 (1962).

45. *See* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 260 (1984). Professor Berger, assessing the rules a decade after their promulgation, pointed to three primary benefits that proponents attributed to codification: uniformity, improvement in the quality of the bench and bar, and flexibility in decision making. *Id.* Professor Steven Saltzburg described these perceived benefits of adopting uniform rules of evidence for the federal courts:

> [L]awyers would have an easier time in dealing with a set of rules rather than attempting to order all existing common law authorities; . . . the states might begin to improve the condition of their laws of evidence; and lawyers and judges who tried federal cases in more than one state would not have to be familiar with the multifarious evidence rules found in the several states.

Saltzburg, *supra* note 42, at 181; *see also* Kenneth Williams, *Do We Really Need the Federal Rules of Evidence?*, 74 N.D. L. REV. 1, 5–7 (1998).

46. The first significant twentieth century codification effort, Dean Wigmore's mammoth code of evidence, was never even seriously considered for adoption anywhere. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §1.2, at 4 (3rd ed. 2003). The Model Code of Evidence, proposed by the American Law Institute in 1947, was taken more seriously, but was never adopted in any jurisdiction. *See id.* Compared with those earlier efforts, the Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws in 1953, were a relative success; they were adopted in three states, the Virgin Islands, and the Canal Zone. *See id.* at 4 & n.6.

47. *See id.* at 4 & n.2 (noting that, as of 2002, forty-two states had adopted codes based on the Federal Rules of Evidence).

A. Uniformity

With the national rejection of comprehensive codification in the nineteenth century, uniformity was also rejected as an overarching value. The decision to retain a common-law system entailed a decision to embrace a multiplicity of legal standards over a set of uniform standards. Consequently, for uniformity to provide a rationale for codifying any particular area of the law, some definable benefit must flow from the realization of uniformity in that area. Proponents of evidence codification have identified three benefits flowing from uniformity: efficiency gains to attorneys from having only one body of law to learn;[48] procedural justice for litigants who should be able to expect the same law to apply in different courts;[49] and predictability in areas of legal uncertainty.[50] I consider them in turn.

1. Does Uniformity Promote Efficiency Across Jurisdictions?

In an area such as commercial law, obvious and substantial efficiency gains can be realized by increasing uniformity among different jurisdictions. For example, a lender may take a security interest in the property of a commercial actor—a retailer, for instance—conducting business operations in many states. To the extent the laws of those states differ in matters such as the types of property in which security interests may be taken or in the procedures for perfecting security interests, the complexity, and hence the costs, of the transaction increase.[51] Making the laws of the various states uniform, as the Uniform Commercial Code (U.C.C.) did, will unquestionably reduce costs and increase efficiency.

In contrast, in the law of evidence, the efficiency gains from increased uniformity are much harder to see. Trial attorneys do not sell a one-size-fits-all product the way merchants, issuers of commercial paper, and secured creditors do. They prepare each case individually, working with the evidence that is available to them given the facts of that case. Differences among courts regarding the

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48. *See* Green, *supra* note 44, at 109–10.
49. *See* Saltzburg, *supra* note 42, at 189.
50. *See* Berger, *supra* note 45, at 264–65.
51. *See, e.g.*, GRANT GILMORE, 1 SECURITY INTERESTS IN PERSONAL PROPERTY §15.2, at 466–71 (1965) (describing different regimes for perfection of security interests by filing prior to the adoption of U.C.C. Article 9).

admissibility of evidence may affect the choices attorneys make about the uses of evidence, but the mere fact that different rules apply will not make litigation in general more expensive. There may be some cost associated with determining the governing rules, but that cost will be relatively minor. In any event, because of the laws limiting the courts before which attorneys can appear, most attorneys appear before a handful of courts, for which they can easily master the governing rules—assuming the governing rules are sufficiently clear.

In any area of the law, promoting national uniformity has a superficial appeal. Academics in common-law systems tend to be slightly embarrassed by the prospect of contradictory legal rules within what is ostensibly a single legal regime. Again, however, we have made a national decision to accept the occasional incoherence of a common-law system. Cogency alone is not a good enough reason to codify. Efficiency might be; but in the realm of evidence law, the efficiency gains have not been demonstrated.

2. Does Uniformity Enhance Procedural Justice?

The most articulate proponent of the procedural justice rationale for evidence codification is Professor Steven Saltzburg. He has described the "system" of evidence law prior to the passage of the rules in these terms:

> Prior to the adoption of the Federal Rules of Evidence, every practicing lawyer knew that when he or she walked into a courtroom, . . . that judge's own set of evidence rules was likely to be employed . . . . Trial judges often established rules of thumb for their courts because they had no other rules to guide them. When it came to evidence rulings, appellate courts did little to minimize the impact of the idiosyncrasies of a trial judge. In some jurisdictions there were probably almost as many sets of evidence rules as trial judges.[52]

Professor Saltzburg concluded that "[t]here is something terribly wrong with a single system that allows cases to be tried differently in different courtrooms, so that different rules govern the way in which the evidence that is necessary to resolve the case will be

52. Saltzburg, *supra* note 42, at 189.

presented."[53] He extolled the Federal Rules for rectifying this problem.[54]

It seems beyond debate that all litigants in a single system should be subject to the same rules of evidence. But it does not necessarily follow that those rules must be in the form of a code. The chaos reigning in the federal courts prior to the rules resulted from the absence in federal law of any clear statement of the source of the governing evidentiary standards. As of the 1960s, different and deliberately vague rules applied in criminal and civil cases in federal court.[55] In civil cases, Federal Rule of Civil Procedure 43(a) provided:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.[56]

The rule provided this helpful tiebreaker: "In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."[57]

The rule in criminal cases, governed by Federal Rule of Criminal Procedure 26, was a little more straightforward, though not necessarily more instructive:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.[58]

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53. *Id.*
54. *Id.* at 190.
55. For example, admiralty courts had their own set of procedural rules and typically followed a general common law of evidence, except in prize cases. *See* Green, *supra* note 44, at 93.
56. *See id.* at 90.
57. *Id.*
58. *Id.* at 92.

This language, of course, remains with us today in Federal Rule of Evidence 501.[59]

Given these commands as to the sources of evidence law, it is no surprise that the situation evolved as described by Professor Saltzburg.[60] Judges in civil cases had license to use virtually any rules they chose, bounded only by their own conceptions of convenience.[61] Judges in criminal cases were directed to follow the common law, but were given no instruction as to which sources of common law should be considered authoritative and were given leave to depart from common-law precedent as needed "in light of reason and experience."[62]

Adopting a federal code of evidence was certainly one way to deal with the confusion and inconsistency engendered by those rules. But other options existed. Most obviously, the rules could have been amended to direct federal courts to follow the rules of evidence applicable in state courts in the states in which the federal courts sit.[63] In terms of procedural justice, this solution has obvious advantages over the promulgation of uniform rules for federal courts. It seems a much greater injustice for two similarly situated litigants in the same state to face different courtroom procedures than for two similarly situated litigants in different states to face different courtroom procedures. Adopting uniform rules of evidence for federal courts addresses the latter concern, but not the former.

Of course, in any state that has adopted a version of the federal rules as its state code of evidence, the former concern is also addressed. Given that forty-two out of fifty states have adopted a version of the federal rules, concerns about intrastate uniformity seem, at first blush, to be moot.[64] But it is a bit misleading to simply count the states that have adopted codes like the federal rules, because many of the most populous states—including California,

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59. FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

60. Saltzburg, *supra* note 42, at 175–83, 189.

61. *See* Green, *supra* note 44, at 83–84.

62. *See id.* at 85.

63. *See* Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. PA. L. REV. 594, 605, 625–28 (1974).

64. MUELLER & KIRKPATRICK, *supra* note 46, §1.2, at 4 n.2.

New York, Illinois, Massachusetts, Virginia, and Missouri—do not fall into that category.[65] As a result, roughly one-third of the nation's population lives in states that have not adopted a version of the federal rules.[66] Therefore, intrastate non-uniformity is still a significant concern.

The primary argument against incorporation of state law through an enforced intrastate uniformity is that it would leave federal judges without clear guidance as to what the governing rules are.[67] State law might be equally as chaotic as federal law had been. Federal judges would struggle with whether they were required to follow the decisions of lower state courts and with what to do when there was no state court decision on point.[68]

But these concerns frequently arise in federal court diversity actions in which state law supplies the rule of decision. Federal courts applying the *Erie* doctrine[69] already engage in educated guesses about ambiguous state law.[70] They manage. As for the argument that state law may be in as bad or worse condition as pre-Rules federal law, the states have just as much incentive as the federal government to ensure clear and workable rules of adjudicative procedure.[71] Moreover, the states that have not adopted the federal rules of evidence do not seem to be in crisis about the condition of their laws of evidence. California has its own code, which is entrenched and widely accepted.[72] New York[73] and

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65. *See id.* The other states are Georgia and Kansas. *See id.*

66. For current population estimates, see the U.S. Census Bureau's website, http://www.census.gov/.

67. *See* Saltzburg, *supra* note 42, at 192–93.

68. *See* Green, *supra* note 44, at 96–97 (referring to questions arising under the pre-Rules version of Federal Rule of Civil Procedure 43(a)).

69. The doctrine gets its name from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that a federal court must follow state substantive law when sitting in diversity. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 218–19 (3d ed. 1999).

70. *See* FRIEDENTHAL ET AL., *supra* note 69, at 224–29 (describing federal court strategies for determining content of state law).

71. *See* Weinberg, *supra* note 63, at 627–28.

72. *See* MUELLER & KIRKPATRICK, *supra* note 46, §1.2, at 4.

73. *See generally* Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992) (examining New York's efforts to adopt a version of the Federal Rules of Evidence).

Massachusetts[74] have recently considered and rejected proposals to adopt versions of the Federal Rules, concluding that their own common laws of evidence are functioning at least as well.

Procedural justice is an important goal. Uniformity is an aspect of procedural justice. But the most important type of uniformity for procedural justice is uniformity among courts within a single state. The Federal Rules of Evidence do not accomplish that goal, at least not directly or completely. More clear guidance on the sources of common law by which federal courts should abide could achieve equivalent gains in procedural justice without sacrificing the flexibility of the common law.

3. Does Uniformity Produce Efficiency Gains by Increasing Predictability and Certainty?

Uniformity increases predictability and certainty across jurisdictions because it allows legal actors to predict that the law applied in one jurisdiction will be substantially the same as the law applied in another jurisdiction. For the reasons described above, I am not convinced of the efficiency gains from that kind of predictability when applied to evidence law. Scholars have also discussed uniformity as promoting predictability and certainty within a single jurisdiction.[75] Predictability and certainty do promote efficiency in that context, although the uniformity created by the Federal Rules of Evidence is largely irrelevant in achieving those benefits.

In its 1962 preliminary report on the advisability of promulgating uniform federal rules of evidence, the Committee on Rules of Practice and Procedure of the Federal Judicial Conference lamented the "spawning mass of rulings and statutes which tend increasingly to clog trial machinery."[76] The Committee concluded that "[u]niformity and simplicity are the only cure."[77] Similarly, in discussing uniformity as an advantage of evidence codification, Professor Margaret Berger argued that the resolution of uncertain evidentiary issues "in a non-uniform manner forces counsel to learn

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74. *See* R. MARC KANTROWITZ, MASSACHUSETTS EVIDENCE FROM A TO Z (2003).

75. *See* Berger, *supra* note 45, at 264.

76. Green, *supra* note 44, at 110 (internal quotation marks omitted).

77. *Id.*

different rules for different judges, and to raise numerous procedural issues on appeal."[78] The uniformity that the Committee and Professor Berger extol is a uniformity in the law applicable in a given jurisdiction. Again, efficiency is the underlying value. The idea is that judges and litigants should know with a fair degree of certainty what rules of evidence will govern the particular case at bar, so that the trial judge is sufficiently guided and so that appeals are less frequent.[79]

This uncertainty is a genuine concern, although it seems misleading to talk about it as a problem of uniformity. The real problem here is lack of certainty in the law. This is a problem that exists independently of whether the law should be the same in different jurisdictions. If the law is uncertain in any particular court system, individuals acting in the shadow of the law in that jurisdiction will not be able to predict which behaviors will be met with judicial approval and which will be met with judicial reproach. They will, as a consequence, resort to the judicial machinery more frequently in order to get answers to those questions. This will, in turn, increase social costs.

The extent of the cost, however, depends on the availability and expense involved in resorting to the judicial decision-making machinery. In the commercial context, the cost is high because resort to the judicial machinery involves commencing a law suit. That is why arbitrary rules like the "mailbox rule" and the "perfect tender rule" make sense in the law of contracts. An unambiguous rule addressing a common source of dispute reduces the incidence of expensive litigation, lowers transaction costs, and makes transactions more efficient.

For most rules of evidence, in contrast, the judicial decision-making machinery is right at hand. The parties are already in litigation, and in fact are frequently standing in front of a judge when the evidentiary issue arises. Of course, as Professor Berger points out, there is the potential for increased appellate litigation where the rules enforced by the trial judge are uncertain.[80] But that cost is also relatively minor. First, litigants normally do not appeal if the only

78. Berger, *supra* note 45, at 269.
79. *See id.*
80. *See id.* at 259.

issue is the interpretation of an uncertain rule of evidence.[81] The deference that appellate courts afford trial judges on evidentiary issues makes such single-issue appeals imprudent.[82] Where, as more commonly occurs, an evidentiary issue is raised as one of several issues on appeal, the additional cost to decide the evidentiary issue is negligible.

Furthermore, for any single issue, the cost of appellate litigation will be finite, because the consequence of appellate litigation is an increase in certainty. The first few litigants to appeal an issue will bear some cost, but usually those appeals will produce a more or less certain decision on the issue. Issues that are not subject to resolution through the appellate process probably are not subject to resolution through the legislative process either. The law on the admissibility of prior acts is a good example. The issue is highly fact-sensitive, so it continues to come up in different forms on appeal.[83] The "codification" of this area in Rule 404(b) simply has not made much difference.[84] The Advisory Committee on the Federal Rules of Evidence cannot address the infinite variety of prior acts issues any better than the courts can.

To be sure, there are issues that are considered part of the body of evidence law that demand certainty. These are the parts of evidence law that implicate what is sometimes referred to as "primary conduct"—that is, activity not related to the trial process. Whenever rules have to be interpreted at a remove from the point of enforcement, efficiency gains will result to the extent the rules are made more certain. So where real-world behavior is affected by the possibility of evidentiary admissibility, the rules should be as certain as possible and codification may be warranted. Notably, privilege is the area of evidence law that most implicates this principle. For

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81. *See* Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 893 n.2 (1992).

82. *Id.* at 894 ("Although more than twenty thousand cases a year were tried in the federal courts in the twenty-four month period between July 1, 1988 and June 30, 1990, I could find only thirty cases decided in 1990 in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial.").

83. *See* M.C. Slough & J. William Knightly, *Other Vices Other Crimes*, 41 IOWA L. REV. 325 (1956).

84. FED. R. EVID. 404(b) advisory committee's notes on December 1991 amendment.

privilege law to have its desired effect, the people in a position to invoke a privilege must know what kinds of conduct will receive protection. Yet privilege is the one area of evidence law that has not been made certain through codification.

I will return to these points in Part IV below in applying my proposed standard for codification to the law of evidence.

B. Improvement in the Law and Legal Practice

The argument that the Federal Rules of Evidence improve the law and legal practice takes several different forms. At the most basic level, it is argued that the rules and standards incorporated in the Federal Rules improve substantively on prior law, mainly by relaxing stringent exclusionary rules.[85] Another claim is that the existence of clear and uniform rules puts pressure on trial judges to make better-reasoned decisions, since they can no longer hide behind a morass of ambiguous and confusing decisional law.[86] Finally, some contend that the rules provide a valuable function as an evidentiary "pocket bible," making available a handy reference for trial objections and rulings.[87]

1. Do the Rules Improve Substantively on Prior Law?

The argument that the Federal Rules of Evidence mark a clear improvement over prior law is not objectively provable. To a large degree, the beauty of evidentiary rules lies in the beholder. But the rules certainly have liberalized a number of common-law rules that seemed to limit unnecessarily the admissibility of useful evidence. It never made sense to bar opinions on the "ultimate issue," to give one example, and it was an advance for Rule 704 to do away with that restriction.[88] One wonders, though, whether the same liberalizing results could not have been achieved by leaving the common law intact and advocating change by way of a Restatement of the law of evidence. That approach has, after all, worked fairly well to bring

85. *See* Berger, *supra* note 45, at 269–70.

86. *See* Williams, *supra* note 45, at 5–6; Saltzburg, *supra* note 42, at 191.

87. *See* Williams, *supra* note 45, at 6.

88. MUELLER & KIRKPATRICK, *supra* note 46, § 7.12, at 636–37 (describing problems with pre-rules objections to opinion evidence on the ultimate issue); *see* FED. R. EVID. 704 ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

fields such as the law of torts up to date.[89]

Even conceding its liberalizing benefits, codification has probably imposed a cost in the reification of law. As codifications go, the Federal Rules are much less detailed than most. Many of the provisions set out general standards rather than specific rules. Because of that structure, judges can exercise wide discretion while still nominally acting within the scope of the rules. In many cases, however, judges have simply decided cases in ways that contradict the plain text of the Rules.[90] So the Federal Rules probably present less risk of reification than other codes. Nonetheless, in several areas codification has served to cement evidentiary doctrines that make little sense.

The hearsay rules are a good example of this danger. The Federal Rules of Evidence contain seven rules dealing with hearsay, with almost 50 subparts.[91] There are eight hearsay exclusions and 28 specific hearsay "exceptions," plus an amorphous and mostly misused residual exception.[92] Where the common law of hearsay had been imprecise and thus highly elastic, the Federal Rules provide a wealth of detailed guidance on the admissibility of out-of-court statements. Eddie Morgan's goal of eliminating the use of *res gestae* in evidence discourse has largely been achieved through the Federal Rules of Evidence.[93] But it is not clear whether that represents a success for evidence law or a failure. Ambiguity can be an avenue toward advancement in the law. Several evidence scholars have persuasively argued that concerns about out-of-court statements should be addressed by a flexible "best evidence" principle that recognizes both the value and the risks of different types of

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89. *See* Richard H. Gibson, *Credit Card Dischargeability: Two Cheers for the Common Law and Some Modest Proposal for Legislative Reform*, 74 AM. BANKR. L. 129, 135 (2000) (explaining that the Supreme Court has relied upon the *Restatement (Second) of Torts* "as the definitive source of common law fraud").

90. *See* Daniel J. Capra, *Case Law Divergence from the Federal Rules of Evidence*, 197 F.R.D. 531 (2000).

91. FED. R. EVID. 801–807.

92. FED. R. EVID. 803–804, 807.

93. EDMUND MORGAN, BASIC PROBLEMS OF EVIDENCE 328–77 (1961). *But see, e.g.*, People v. Coney, 98 P.3d 930 (Colo. App. 2004) (allowing evidence of defendant's other drug arrests as *res gestae*).

hearsay.[94] If we did not have Rules 801 through 805, with their many rigid subparts and exceptions to contend with, we might more quickly realize that objective.

Perhaps more significantly, the most important advancements in evidence law since the adoption of the Federal Rules have come not from the codifiers, but from the courts. The most prominent example is the law governing expert testimony. The original version of the federal rules gave trial judges only the vaguest guidance on the issue,[95] and many judges interpreted the lack of guidance as license to admit virtually any evidence colorably described as "expert."[96] Eventually, the Supreme Court stepped in. With its decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[97] *General Electric Co. v. Joiner*,[98] and *Kumho Tire Co. v. Carmichael*,[99] the Court resolved inconsistencies among the circuits and established a comprehensible and workable framework for ensuring the reliability of expert testimony. Only then did the Advisory Committee take action, amending Rule 702 to add three standards for courts to use in assessing expert reliability.[100] And the standards the Committee inserted are so general that they seem to add little or nothing to the

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94. *See* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893 (1992); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1960); George F. James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788 (1940).

95. The original version of Rule 702 provided that "[i]f 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." *See* FED. R. EVID. 702; *id.* advisory committee's notes. The rule left it entirely to the judge to decide whether evidence was sufficiently "scientific" and whether it would "assist" the trier of fact.

96. *See* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2–4 (1993) (describing proliferation of "junk science" in courtrooms as a result of loose standards for scientific evidence).

97. 509 U.S. 579 (1993) (holding that scientific evidence must be both reliable and relevant, but refusing to endorse traditional *Frye* test).

98. 522 U.S. 136 (1997) (holding that the abuse of discretion standard applies to appellate review of trial court's rulings applying *Daubert*).

99. 526 U.S. 137 (1999) (applying *Daubert* standards to all expert testimony).

100. *See* FED. R. EVID. 702 (advisory committee's notes).

Supreme Court's holdings.[101]

This sequence of events shows not only how the process of common-law development can work in the law of evidence, but also how fruitless codification efforts frequently are. When code language is specific, as it is in the hearsay rules, it hamstrings common-law development and reifies the law. On the other hand, when code language is general and framed as standards rather than definite rules, as in Rule 702, it frequently adds little or nothing to the law established through common-law precedent.

This, then, is the reason to be cautious in praising the Rules as an instrument of reform and improvement in evidence law. Because of codification, the liberalization of the law of evidence happened much more quickly than it would have if left in the hands of the courts. Once promulgated, though, codes can act as a drag on further development of the law. The Federal Rules of Evidence may have been a drag on the development of the law in at least some important areas. With some exceptions, the Advisory Committee has not shown the ability to identify and act upon areas of the law in need of transformation. It has devoted much of its energies simply to correcting drafting problems.[102] In the long run, the common-law process might lead to more effective development of the law.

2. Have the Rules Improved the Quality of Judging and Lawyering?

It seems likely that the Federal Rules of Evidence have

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101. *But see* UNIF. R. EVID. §702 (1999), 13A U.L.A. 140 (1999). In most instances, the revised Uniform Rules of Evidence track the language of the Federal Rules. The revised version of Uniform Rule of Evidence 702, however, provides additional detail, including sections establishing presumptions for and against unreliability depending on whether proffered "expertise" would satisfy the *Frye* test and a section listing seven other "reliability factors." *Id.* To date, no state has adopted this provision.

102. *See, e.g.*, FED. R. EVID. 608(b). Rule 608(b) was amended as of December 1, 2003, to correct a drafting error. The rule in its original form referred to limitations on the use of "prior acts" evidence to prove a witness's "credibility;" the rule was amended to make clear that it applies to such evidence used to prove a witness's "character for truthfulness." Considerable time and effort was expended trying to fix this "problem," which appears not to have thrown a single court off in applying the rule. *See* FED. R. EVID. 608 advisory committee notes (citing several decisions correctly applying the rule as originally intended and no decisions incorrectly applying it).

improved the quality of trial advocacy and the quality of judicial trial management. The rules are a concise and easily-accessible reference source for on-the-spot evidentiary determinations. Their availability probably makes attorneys more confident in making and responding to objections and probably makes judges more precise and consistent in issuing rulings.[103] The judges themselves seem to agree with that conclusion. In an informal survey of federal district court judges conducted by Professor Kenneth Williams, thirty-six out of the forty-five judges he surveyed said that the rules make their lives easier, and twenty-five out of forty-five said that the rules have improved the quality of lawyering.[104]

This argument cannot provide the only or even the primary rationale for codification, however. Codification does more than simply compile the law in a handy reference source. It reifies the law in a series of rules that the courts treat as legislative commands.[105] If our primary need is to make the basic principles governing evidence law accessible, that can be accomplished through measures short of codification. A Restatement of Evidence would do the trick. Private treatises can also fill that role. For decades in New York, *Richardson on Evidence* served the "pocket bible" function in virtually every state court.[106] *McCormick on Evidence* seems to have served a similar function in many courts around the country prior to the adoption and dissemination of the Federal Rules.[107]

In sum, the traditional arguments based on uniformity and improvement of the law, in their many variations, fall short as justifications for evidence codification. That does not mean, however, that no justifications exist. In the next part, I will suggest

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103. *See* Berger, *supra* note 45, at 260–61 ("Because a code of evidence is readily available, all judges and attorneys can approach an evidentiary problem from the same starting point.").

104. *See* Williams, *supra* note 45, at 31–32. Professor Williams only surveyed judges who had been on the bench prior to the adoption of the Federal Rules of Evidence. *Id.* at 31.

105. *See* Weissenberger, *supra* note 15.

106. *See* W.P. RICHARDSON, OUTLINES OF EVIDENCE (1911); JEROME PRINCE, RICHARDSON ON EVIDENCE (10th ed. 1973); RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE (11th ed. 1995). With the proliferation of other evidence treatises, *Richardson* seems to have lost some of its cachet as *the* bible of evidence in New York.

107. MCCORMICK ON EVIDENCE (John William Strong et al. eds., 5th ed. 1999).

justifications that might provide a better starting point for evaluating the codification of evidence law.

III. JUSTIFICATIONS FOR LEGISLATION IN A COMMON-LAW SYSTEM

One of the reasons that the traditional arguments in favor of codification—and particularly in favor of evidence codification—are not more compelling is that they try to prove too much. They focus on the value of codification as a general principle for a given doctrinal area. They try to answer questions about whether codification, in general, is good for the law of commercial transactions, or good for the law of estates, or good for the law of evidence. This way of evaluating codification efforts makes sense for comprehensive codes—that is, for codes that occupy an entire field and supplant any existing law. But American codes do not fit that model. Most scholars interested in codification contend that American codes fit into the type labeled the "perpetual index model."[108] Unlike comprehensive codes, perpetual index codes use the common law as a foundation and even allow the common law to continue to develop.[109] In the words of Justice Story, a code of this type "will thus become . . . a perpetual index to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time, bringing them together in a concise and positive form for public use."[110]

In theory, a perpetual index code should not hamstring the evolution of the law through the case method. Judges applying the code should interpret it in light of common-law principles and may even have license to depart from the code language to avoid unjust or illogical decisions.[111] This freedom, incidentally, arguably was expressly incorporated into the Federal Rules of Evidence in Rule 102, which provides that the rules "shall be construed to secure . . .

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108. *See* Rosen, *supra* note 34, at 1195; Weissenberger, *supra* note 19, at 1559.

109. *See* Rosen, *supra* note 34, at 1131–35. For a description of three other categories of codes, see *id.* at 1127–36.

110. *See* Joseph Story, *Story's Report*, *in* JEREMY BENTHAM ET AL., CODIFICATION OF THE COMMON LAW 25, 46 (New York, John Polhemus 1882).

111. *See* Weissenberger, *supra* note 19, at 1561 n.93.

promotion of growth and development of the law of evidence."[112]

In practice, however, American codes do not fit the perpetual index model much better than they fit the comprehensive model. Courts simply do not interpret American codes in the hermeneutic style indicative of a true perpetual index code. Rather, they tend to treat the codes as statutes, focusing mostly on the plain meaning, resorting to legislative history when convenient, but generally searching for legislative intent.[113] The Supreme Court has made this approach express with respect to the Federal Rules of Evidence, declaring that "[w]e interpret the legislatively enacted Federal Rules of Evidence as we would any statute."[114] In the United States, as it turns out, we do not really have codes at all, at least not in the sense understood by traditional code advocates. We have legislation, which can be more or less comprehensive within a doctrinal field, engrafted onto common law.[115]

Given that paradigm, it does not make sense to evaluate a code as a whole. A code is neither good nor bad. Instead, the *individual provisions* in the code are either good or bad (or neutral) depending on whether they meet some definable normative standard. The trick, naturally, is to define the appropriate normative standards.

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112. FED. R. EVID. 102 (emphasis added). For a cogent argument as to why the Federal Rules of Evidence should be construed as a perpetual index code, see Weissenberger, *supra* note 19. For the opposing viewpoint, see Imwinkelried, *supra* note 19 .

113. *See* Rosen, *supra* note 34, at 1141–60 (describing empirical study of how judges interpret the U.C.C. and the Federal Rules of Evidence). The author concluded that courts interpreting the codes rely overwhelmingly on the language of the codes, rather than on either pre or post-code case law. *Id.* at 1160; *see also* Bruce W. Frier, *One Hundred Years Of Uniform State Laws: Interpreting Codes*, 89 MICH. L. REV. 2201, 2210 (1991) (stating that, for the U.C.C., "both scholarly and judicial arguments still usually begin from the apparent meaning of the UCC's provisions, and move on to other types of interpretation only when no satisfactory answer is obtained").

114. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993). For a list of articles analyzing the Supreme Court's approach to interpreting the Federal Rules of Evidence, see Weissenberger, *supra* note 19, at 1541 n.7.

115. The arguable exception is the Federal Rules of Civil Procedure, which have been interpreted to allow judges to continue to use their inherent discretionary powers even in some areas specifically addressed by the rules. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 630–32 (1962) (holding that district court has inherent power to dismiss case *sua sponte* for failure to prosecute even though Federal Rules of Civil Procedure 41, governing dismissals, refers only to motions by plaintiff or defendant).

One way to think about the normative standards for evaluating legislation is simply to ask what makes a law good. This has been the strategy employed by the most preeminent political philosophers in the Anglo-American tradition. Locke, in the *Second Treatise of Government*, argued that the proper legislative function is to figure out the principles of natural law and then declare them to all.[116] "The obligations of the law of nature cease not in society," he wrote, "but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation."[117] Bentham, skeptical of both natural law and the common law,[118] assessed all "laws," whether made by judges or legislatures, according to his test of utility.[119] He asked whether the law increases pleasures and prevents pains for the greatest possible number of people.[120] Rawls emphasized the legislature's duty to do justice, defined according to his two principles—the principle of equal liberty and the difference principle.[121] Legislatures, in Rawls' vision, should act so as to ensure that all people have an equal right to liberty and that inequal social resources are used to help the least fortunate and are attached to positions that are open to all.[122]

Arguably, all legislation should concern itself with principles of natural law, social utility, and justice, however those ineffable concepts are understood. I want to suggest, however, that it must also do more. Because ours is a common-law system, all legislation must be assessed in light of its relationship to the common law. In this section, I will explain why that is so and then offer some standards for evaluating legislation in a common-law system.

A. The Place of Legislation in a Common-Law System

The rejection of comprehensive codification at the end of the

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116. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 135, at 71 (C.B. MacPherson ed. 1980).

117. *Id.*

118. *See* Warthen, *supra* note 31, at 142 (describing Bentham's reaction to Blackstone's Commentaries).

119. *Id.*

120. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Publ'g Co. 1948) (1823) (arguing that legislation should be based on maximizing utility).

121. *See* JOHN RAWLS, A THEORY OF JUSTICE 302 (1971).

122. *See id.*

nineteenth century meant there would be no widespread overturning of common law in favor of comprehensive, legislatively enacted codes. The common law would remain the default source of private civil law throughout the United States.[123] That fact in itself suggests that those arguing for legislation in any particular doctrinal area bear the burden of proving why legislation is justified. Given the proliferation of statutes over the twentieth century,[124] however, it is probably no longer sufficient to rely on the rejection of wide-scale codification as grounds for emphasizing the common law's primacy over legislation. Increasingly, legislatures rather than courts are the primary source of law.[125] So an argument that legislation must be justified in relation to the common-law area it impacts requires normative support.

The most eloquent recent proponent of the common law is Friedrich Hayek. Hayek described two possible types of social order: spontaneous order, or *kosmos*, and "made" order, or *taxis*.[126] Order in the *taxis* form tends to be relatively simple, concrete (in the sense of being readily perceived), and made to serve the purposes of the maker.[127] Order in the *kosmos* form may be far more complex, is frequently abstract (in the sense that it involves a structure of relationships that persists even as the affected elements change over time), and lacks a human-directed purpose.[128] Law, society's method for ordering itself, may be of either type. Common law is order in the *kosmos* form; legislation is order in the *taxis* form.[129]

For Hayek, "made" order—legislation—is inherently inferior to the spontaneous order of the common law.[130] Hayek was primarily concerned with the New Dealers and later architects of the modern welfare state. According to Hayek, they suffered under the fallacy of

123. *See* COOK, *supra* note 20, at 202–03 (explaining that ardor for codification died in large measure because the common law successfully adapted to the changing circumstances of the nineteenth century).

124. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (describing an "orgy of statute-making" in the twentieth century).

125. CALABRESI, *supra* note 10.

126. 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 37 (1973).

127. 1 *id.* at 38.

128. 1 *id.* at 38–39.

129. 1 *id.* at 45–46.

130. *See* 1 *id.* at 35–54.

"constructivism"—the hubristic belief "that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order."[131] The problem with constructivism, and the made order it leads to, is that it stifles progress because it lacks the ability to adapt to the unforeseeable.[132] Hayek's central thesis is that,

> a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, is likely to produce for them the best conditions for achieving their aims; and that such a system is likely to be achieved and maintained only if all authority, including that of the majority of the people, is limited in the exercise of coercive power by general principles to which the community has committed itself.[133]

Legislation is inherently inimical to that objective. Only the common law, with its ability to respond spontaneously to unforeseen circumstances and its natural resistance to broad impingements on personal liberty, can produce the conditions for free societal growth and development.[134]

Hayek's is a philosophical argument in favor of the common law over legislation. He was concerned about the tendency of legislation to lead increasingly to totalitarianism. Guido Calabresi has also argued against the encroachment of legislation on the common law, but in more pragmatic terms. In *A Common Law for the Age of Statutes*, Calabresi decried what he labeled the "statutorification" of American law.[135] He argued that the legal system is choking on statutes that have become obsolete and could not be reenacted, but that cannot be repealed because of legislative inertia.[136] Old statutes, in his view, have no greater claim to legitimacy than old cases. Whether or not they are entitled to current respect depends on whether they would command majoritarian support today.[137]

Calabresi's solution to this problem was to allow courts to treat

131. 1 *id.* at 14.
132. 1 *id.* at 54.
133. 1 *id.* at 55.
134. *See* 1 *id.* at 85–88.
135. CALABRESI, *supra* note 10.
136. *Id.* at 2.
137. *Id.* at 102–03.

statutes much like common-law precedents—as starting points from which deviations could be made as circumstances required.[138] In other words, he would treat all statutes as if they were part of a true perpetual index code.[139] Unfortunately, courts do not seem to have the inclination to operate that way, even for codes that were intended as perpetual index codes.[140] As a practical matter, Calabresi's solution has little chance of success. Still, his focus on the problem is instructive. He makes a persuasive case for why we should generally favor common-law development over legislation.

Legislation's claim of legitimacy is based on a presumption of majoritarian support at the time of its passage. Of course, public choice theory teaches us to doubt that premise.[141] But even if we assume majoritarian support at passage, we cannot assume that legislation retains that same support over time. Because of legislative inertia, legislatures rarely repeal laws, even when laws have become hopelessly out of step with current social values.[142] While judges are not subject to the same immediate majoritarian pressures, over time they are likely to produce rules consistent with the desires of the majority.[143] Calabresi explains:

> If a judge cannot find guiding principles or willfully ignores them, it is not the end of the world. On what basis would such a judge decide the case? If he or she responded to a delayed majoritarianism or to a guess about today's popular desires, we might say that other institutions would have guessed better, but we would not for all that have an absurd starting point. If, instead, judges sought to do what they thought was right for society, we might be concerned with their capacity to make that judgment, but again there would be limits to our concern. One judge's views would win out only if enough other judges either found that they conformed to the legal landscape or, finding no adequate guidelines in the landscape, still shared the judge's guess of

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138. *Id.* at 82.

139. *See id.* at 83 (equating Calabresi's suggested doctrine with John Norton Pomeroy's proposal for interpreting California's version of the Field Code).

140. *Id.* at 84.

141. Farber & Frickey, *supra* note 5.

142. CALABRESI, *supra* note 10, at 59–90.

143. *Id.* at 100.

> what the majority wanted or of what was right for the country.[144]

So the common law is not just better at keeping the law up to date; it may also better reflect democratic values over the long term.

In sum, there are at least three powerful reasons to hold a bias in favor of the common law; to, in other words, demand that any proposed legislation be justified in terms of its impact on the common law. First, as a matter of simple historical choice, we have rejected comprehensive codification as the basis of our legal system.[145] We have made a societal decision to retain the common law as the default position, and thus to put the burden of persuasion on those promoting legislation. Second, we have good reason to be skeptical of the ability of legislation to promote the public good, because of the inherent limits of human knowledge.[146] Order imposed by legislation is likely to be more restrictive of liberty and less conducive to growth and development than order arising organically from the common law. Finally, because of legislative inertia, it is the irresistible tendency of legislation to become obsolete and, eventually, undemocratic.[147] While the common law may appear to have an inferior democratic pedigree, in fact, it is likely to better reflect society's desires over time.

B. The Standards for Legislation

Common-law jurists and scholars have been suggesting boundaries for the proper scope of legislation for centuries. Frequently, these suggestions appear as rules of statutory interpretation. In the most famous early example, the sixteenth century *Heydon's Case*, Lord Coke laid down these rules for statutory construction:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:

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144. *Id.*

145. *See, e.g.*, Story, *supra* note 110, at 26–44 (discussing the genesis of common law in the United States and the impracticability and undesirability of comprehensive codification of Massachusetts common law).

146. 1 HAYEK, *supra* note 126.

147. CALABRESI, *supra* note 10, at 59–90.

> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[148]

In other words, under Coke's "mischief rule," all legislation must be understood in light of its common-law antecedents, and must not be allowed to intrude unnecessarily on common-law principles. Its application must be limited to the mischief the legislature sought to address. By implication, the legislature should act only where there is some clear mischief that the common law has failed to address.

Blackstone took Coke's "mischief rule" as his starting point in discussing the objectives of legislation. He divided statutes into two categories: those that are "declarative" of the common law and those that are "remedial" of some defects therein.[149] Declarative statutes arise where the "old custom of the kingdom is almost fallen into disuse, or become disputable," in which case parliament acts to "declare what the common law is and ever [has] been."[150] Remedial statutes, on the other hand, redress "such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, or from any other cause whatsoever."[151] Remedial statutes fall into two different types. Statutes that "enlarge" the common law provide a legal rule to govern an area not sufficiently addressed by

148. Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584) (footnotes omitted).

149. *See* 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 63 (Wayne Morrison ed. 2001).

150. *Id.*

151. *Id.* at 64.

the common law.[152] Those that "restrain" the common law bring under legislative control areas of the law that, in Blackstone's words, have become "too lax and luxuriant."[153]

Max Radin, writing in the mid-twentieth century about the functions of legislation in Blackstone's time, described a similar classification scheme.[154] He referred to three types of statutes instead of two. His first category, of statutes "declaring, restating, and emphasizing" the common law,[155] seems coterminous with Blackstone's first category. His second and third categories appear to correspond roughly to the subdivisions of Blackstone's remedial category. The second encompasses statutes "supplementing" the common law, and the third covers statutes "correcting" the common law.[156]

The dichotomy among remedial statutes posited by Blackstone and Radin does not hold up well to scrutiny. To take an example familiar to evidence scholars, does a rape shield statute "enlarge" the common law or "restrain" it? Does it "supplement" the common law or "correct" it? The answer would seem to depend on one's perspective. It probably makes more sense to think of two types of legislation: legislation that simply restates the common law and legislation that changes the common law.

Hayek, however, would not even go that far. He was too fearful of the overreaching legislator to condone legislation intended to declare the abstract rules already established by common law.[157] He did concede, however, that legislation was sometimes necessary to correct the inevitable errors in the common law.[158] First, he noted that common-law evolution can sometimes lead to "an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough."[159] Bad law can result. Because of the need for judges to uphold reasonable expectations by adhering to precedent, legislation will sometimes be the only way out of such an

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152. *Id.*
153. *Id.*
154. Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942).
155. *Id.* at 390.
156. *Id.*
157. *See* 1 HAYEK, *supra* note 126, at 87–88.
158. 1 *id.* at 88.
159. 1 *id.*

impasse.[160]

Bad law might also result from two other causes. First, the common law might simply fail to keep up with changing social needs. "[T]he process of judicial development of law is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances."[161] Second, the common law could be captured by certain interests or classes. In Hayek's words, bad law has resulted where "the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice."[162] He cited as examples the law of master and servant, landlord and tenant, debtor and creditor, and consumer law.[163]

Notwithstanding Hayek's reservations, it seems clear that there are two types of justified legislation. First, legislation can serve an *ordering function*. Legislation in the service of the ordering function declares the common law so that all are put on notice as to what rules govern in a particular area. Second, legislation can serve a *remedial function*. Legislation in the service of the remedial function changes the common law. The changes might be necessary because of simple judicial errors, because society has changed faster than the law, or because the common law has been captured by certain interests or classes.[164]

Simply announcing that a statute is intended to serve one of these functions does not suffice to justify it. The common law must actually *need* ordering or remedying for legislation invoking these functions to be warranted. I turn next to the circumstances that warrant either ordering legislation or remedial legislation.

1. The Ordering Function

The common law's advantage in flexibility comes with a cost in

160. 1 *id.* Legislation avoids the problem of upsetting reasonable expectations because it is declared publicly before it is applied. 1 *id.* at 89.

161. 1 *id.* at 88.

162. 1 *id.* at 89. Law and economics scholars have also conceded the need for legislation in such cases, which they describe as cases of "market failure." *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 367–70 (4th ed. 1992).

163. 1 HAYEK, *supra* note 126, at 89.

164. *See* 1 *id.* at 88–89.

opacity and ambiguity. As proponents of codification have long emphasized, case-generated legal rules can be difficult to ascertain and inconsistent with one another.[165] Where citizens need clear guidance as to the legal consequences of their actions, those drawbacks can become unbearable, and legislative intervention necessary.[166] That kind of legislative intervention serves the function of helping to order society by providing clear standards of conduct.

Whether legislative intervention is necessary to serve the ordering function depends on two variables. The first variable involves the subject matter of the proposed legislation. For certain areas of the law, concerns about either efficiency or justice dictate that citizens know in advance the legal consequences of their actions. The best examples are commercial law and criminal law. In commercial law, the existence of clear rules helps minimize disputes and therefore encourages bargaining and trade. In criminal law, the existence of clear rules gives citizens fair notice of the kinds of conduct that will trigger the imposition of sanctions by the state.

The subject matter is a particularly important variable where either the stakes are high—as in criminal law—or the governing law does not track a pre-existing social norm. In the area of contracts, for example, there is not a clear social norm that would tell a commercial actor what extent of nonconformity justifies rejection of goods tendered under a contract. The U.C.C.'s "perfect tender rule" resolves the dilemma by providing that any nonconformity justifies rejection.[167] In the law of torts, on the other hand, pre-existing social norms dictate that people should not intentionally hurt others, make intentional misrepresentations, or act unreasonably. For this reason, a code is largely unnecessary for the law of torts, though one is invaluable for commercial law.[168]

The second variable, which I touched on above in discussing the value of legal certainty, involves the cost of procuring authoritative

165. *See* 1 *id.* at 88.

166. *See* 1 *id.* at 88–89.

167. UNIF. COMMERCIAL CODE § 2-601, 1B U.L.A. 6 (1989).

168. Of course, legislation in the service of the ordering function has its place in the law governing non-commercial interpersonal relations. While it is sufficient in many circumstances to direct people to act reasonably, that instruction would not help people decide which side of the road to drive on. Arbitrary rules such as that one need legislative intervention.

decisions on disputed legal issues.[169] Whenever law must be interpreted at a remove from its point of enforcement, problems of unclear and ambiguous legal rules will be exacerbated. Most law governing the actions of people in society—in other words, most law—fits that description. The only way to get a definitive ruling spelling out the legal consequences of private conduct is to initiate litigation, a prohibitively expensive prospect under most circumstances. The value of clear rules, which, of course, may or may not result from codification, is increased in those cases.

So where the stated goal of enacted law is to bring coherence, clarity, and transparency to a doctrinal area—where codification is intended to serve the ordering function—we should expect to see a measurable benefit tied to efficiency or justice and the area of the law should be one in which case-by-case resolution of disputed issues is impracticable.

2. The Remedial Function

Legislation undertaken in the service of the ordering function presupposes that pre-code law, or at least some incarnation of it, is meeting society's needs. The objective of the legislator is to make the law apparent so that everyone may be more easily guided by it. Legislation in the service of the remedial function assumes that the common law is failing to meet the needs of society.[170] When used legitimately, it is the means by which legislatures correct conflicts between the common law and prevailing social norms.

Probably the best examples of large-scale remedial legislation come from the law of torts.[171] After a long lag, the common law of torts ultimately caught up to modern realities in dealing with the relationship between producers and consumers.[172] Common-law rules dealing with privity had operated for decades to deny recovery to remote consumers injured by defective products.[173] Courts ultimately recognized that those limits on liability were not

169. *See supra* Part II.A.2.
170. *See* 1 BLACKSTONE, *supra* note 149, at 63.
171. *See generally* HARRY W. JONES ET AL., LEGAL METHOD: CASES AND TEXT MATERIALS 132–217 (1980) (presenting cases showing the evolution of "the law relating to a manufacturer's liability for damages caused by its products").
172. *See id.*
173. *See id.* at 138–209.

sustainable in a modern commercial economy. The courts changed the law accordingly; the common law worked as it should.[174]

The law failed, however, to evolve quickly enough to keep up with changing social norms regarding the relationships between employers and employees and between industrial producers and the public.[175] As to the former, the law governing the feudal master-servant relationship was assumed to govern all employer-employee relationships, with the consequence that employees had little recourse when they were injured at work.[176] As to the latter, courts relied on the law of nuisance to determine when an industrial polluter was subject to civil liability.[177] Because of collective action problems, the victims of industrial pollution were unable to use the courts effectively to protect themselves, and the wealthy polluters were able to mold the common law to their advantage.[178]

These disparities between the needs of the members of modern society and the redress provided by the common law were filled through legislation.[179] Congressional legislation establishing wage and hour standards[180] and providing for safe and healthful working conditions addressed the worst inequities of the employer-employee relationship.[181] Later, both state governments and Congress enacted legislation to address the growing public outcry against discrimination in the workplace.[182] The federal government eventually set up a comprehensive legislative and regulatory scheme to address the problem of industrial pollution.[183] Enacted law thus

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174. *Id.* at 132–217.

175. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 269, 270 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

176. *See id.*

177. *See generally* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974) (discussing the history of nuisance law).

178. *See* Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 218–19 (1982).

179. *See id.*

180. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000).

181. *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. §§651–678 (2000).

182. *See, e.g.*, Equal Opportunity Act, 42 U.S.C. §§ 2000e1–17 (2000).

183. *See, e.g.*, Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. §§ 7401–7671 (2000); Water Pollution Prevention and Control (Clean

changed each of these important relationships by supplanting common-law legal standards that had become obsolete.[184]

The key to assessing legislation undertaken in the service of the remedial function is the size and persistence of the gap between what society demands and what the common law provides. Again, the value of the common-law system lies in its flexibility. In many contexts, the common law has successfully evolved to account for social changes. In the law relating to products liability, judge-made law adapted quickly enough to meet society's needs.[185] Where common-law evolution is working, legislatures should refrain from acting. But where courts have repeatedly or conclusively refused to act despite mounting social agitation for change, legislation in the service of the remedial function is appropriate.[186]

IV. APPLYING THE STANDARDS FOR LEGISLATION TO THE RULES OF EVIDENCE

In Part II above, I discussed in general terms why the traditional arguments for codification lack force when applied in the evidence context. In this Part, I delve into the rules in more detail to determine the extent to which evidence codification is justified under the standards for legislation just described in Part III. I discuss the

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Water) Act, 33 U.S.C. §§ 1251–1387 (2000); National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2000); *see also*, Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 261 nn.260–263 (1996) (citing cases in which courts referred to environmental legislation as "remedial").

184. Still, some common law supporters argue that environmental concerns would be better addressed through case law. *See, e.g.*, Roger E. Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 49 (1998); H. Marlow Green, Note, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541 (1997); Todd J. Zywicki, *A Unanimity—Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961 (1996).

185. *See supra* text accompanying note 171.

186. Divorce law is a good example. Until 1970, when California enacted the first no-fault divorce law, courts in every state required a showing of one party's "guilt." *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 6–10, 15 (1985). By 1980, all but two states had adopted some form of no-fault divorce law. *Id.* at 20.

rules that are currently codified in the Federal Rules of Evidence first. The most important of these are the rules covering judicial notice, character evidence, the policy-based relevancy rules in Article 4, competency, expert testimony and opinion evidence, hearsay, authentication, and the "best evidence" rule. I then turn to the uncodified rules, with by far the most important being the rules on privilege.

For each rule considered, I will analyze whether codification of the rule is justified under either the ordering or remedial function. In addressing the ordering function, I will evaluate the subject matter, to assess whether the rule impacts an area in which efficiency or justice concerns are implicated, and the extent to which case-by-case resolution of contested issues is practicable. In addressing the remedial function, I will try to assess the extent to which the common-law failed to keep pace with changing social and legal norms.

A. The Codified Rules

Most of the codified rules of evidence enacted versions of the law prevailing at common law.[187] They did not change the law. For those rules, the justification must lie in the ordering function. For the rules that did change the law, the justification must lie in the remedial function.

1. Justification Under the Ordering Function

Whether the law warrants legislative intervention in the service of the ordering function depends on the subject matter in question and on whether case-by-case resolution without legislation is impracticable. As to subject matter, the central inquiry is whether concerns about efficiency and/or justice rise to a sufficient level to warrant legislation.

Efficiency concerns may justify legislation in the service of the ordering function when the existence of clear, codified rules would significantly reduce transaction costs by allowing people to know ahead of time the rules that govern their behavior.[188] Because most rules of evidence simply govern how lawyers prepare for trial, the

187. *See* Rosen, *supra* note 34, at 1123–24.
188. *See* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988).

main costs associated with inefficiencies in the law of evidence will be litigation costs.[189] At least in civil cases, most litigation costs are concentrated in the pre-trial stage, during which the parties gather evidence and use discovery to identify the other side's evidence. The rest of the cost is tied to the actual trial and any appeals. The rules of evidence could affect costs at both points, because admissibility determines the evidence that has to be gathered and discovered as well as the evidence that is actually introduced.

For most aspects of evidence law, the actual costs of uncertainty in the rules will be quite low. Take the rules governing character evidence and hearsay as an example.[190] Arguably these are the most important rules of evidence, at least if importance is measured in terms of space taken up in the rules, legal disputes generated, and time spent in discussions in law school evidence courses. Character evidence involves the personal characteristics and behaviors of people who had a hand in the events giving rise to the dispute at bar or who have knowledge about those events.[191] Hearsay involves out-of-court statements having relevance to the events in dispute.[192] For purposes of pre-trial litigation, parties have incentives to search out both kinds of evidence and to generate theories of relevance and admissibility for what they find. Even if the possibilities for admissibility initially seem slight, the parties will go through that process because the admissibility calculus can change depending on the other evidence admitted. Another party may open the door to character evidence that would otherwise be inadmissible.[193] And evidence that was hearsay for one purpose might become relevant for a non-hearsay purpose as the facts of the case develop. Thus, for

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189. *See* Berger, *supra* note 45, at 264–69.

190. For character evidence, see FED R. EVID. 404–415; for hearsay, see FED. R. EVID. 801–807.

191. *See* GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 404.3, at 97 (2001) ("The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness.").

192. *See* FED. R. EVID. 801(a)–(c). Obviously, not all relevant, out-of-court statements are hearsay. But all are subject to hearsay *analysis* to determine whether they are hearsay and, if so, whether they are admissible.

193. *See* MUELLER & KIRKPATRICK, *supra* note 46, § 4.12, at 187 ("[I]f [an accused] gives an opinion on his own character or tries to present a portrait of himself as an honest or law-abiding or peaceful person, most courts properly admit rebuttal evidence offered by the prosecution.").

costs associated with pre-trial fact development, the existence of clear, codified rules on character evidence and hearsay will have little or no effect. The same is true for most other rules, including those governing authentication, the "best evidence" rule, and the rules on judicial notice.[194] For all these rules, the parties will likely expend the same resources preparing for trial whether or not clear, codified rules exist.

In some cases, serious questions may arise about the admissibility of evidence that could have a significant impact on pre-trial litigation costs. The admissibility of expert testimony is probably the best example. Parties spend large sums of money locating and educating experts, compiling expert reports, taking and defending expert depositions, and preparing experts for trial. If an expert's testimony is not admitted, the money spent in that process for that expert is wasted. Codified rules on expert testimony might make it easier for parties to assess the likely admissibility of an expert's testimony and so to reduce that possibility.[195] Or they might not. The rules as currently codified add little to the test set out by the Supreme Court, suggesting that common-law development would have done just as well.[196] More importantly, however, to the extent a party has a serious question about the admissibility of an expert's testimony, that issue can be resolved by way of a pre-trial motion. Pre-trial motions are not free, but they are relatively inexpensive as a share of the total cost of litigation, and their cost may be well worth

194. *See* FED. R. EVID. 201, 901, 1003.

195. *But see* Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 310 (2002) (discussing a Federal Judicial Center study of attorneys in 1000 federal civil cases prior to amendment of Rule 702 showing that most attorneys did not believe that problems relating to discovery involving expert witnesses significantly affected litigation costs).

196. *See* WEISSENBERGER & DUANE, *supra* note 191, § 702.4, at 367–71 (explaining *Daubert*, *Kumho*, and Rule 702's codification of their holdings). Rule 702 adds little because its language is even more general than the language in *Daubert* and *Kumho*, leaving courts no choice but to rely on the cases for guidance. And to the extent the rule has been understood to change the holdings of the cases, it has been criticized for making the test of reliability more difficult to apply. *See* Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho, *and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 347–51 (2000) (criticizing the three-part test of reliability in Rule 702 for confusing the holding of *Kumho*).

the increased value of having flexible common-law rules rather than stiff codified rules.

The other major source of litigation costs is trial itself. The existence of clear, codified rules of evidence could reduce the costs of trial by reducing the amount of time the parties and the judge need to research, argue, and decide evidentiary issues. Again, however, that cost seems minor. Judges and experienced trial attorneys learn the arguments for and against admissibility for the vast majority of evidence issues and seldom resort to the rules at all. For novice attorneys and for particularly difficult issues, many good treatises now exist, and existed before codification. In most cases, because the judge is always present and available to rule on disputed evidence questions, the trial-related efficiency gains from codification are likely to be miniscule for all aspects of evidence law. In the absence of codified rules, the judge's decisions may be misguided, but they will not be less efficient merely because they are based on codified law.

In comparison to other substantive areas of law, the need for codification for evidence rules is relatively low, because the cost of a judicial resolution of a disputed issue is relatively low. Again, these issues arise during the course of litigation, and very often during the course of trial itself. A judge is either on hand or available through a motion process. So uncertainty in the rules will not carry the same costs that it would in, say, the commercial law context.

A handful of the codified rules affect "primary" conduct, that is, real-world conduct rather than conduct in the course of litigation. These are the rules in Article 4 designed to effectuate certain public policies through exclusionary rules of evidence.[197] For these rules, the need for codification is increased because the rules must be interpreted and applied by private actors in the world outside of litigation.

Rule 407 excludes evidence of subsequent remedial measures

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197. *See, e.g.*, John R. Schmertz, Jr., *Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1 (1974) (identifying limitations on the introduction of certain behavior as an admission of liability in Rules 407–410 as the result of "policy considerations thought to outweigh the relevancy of such evidence").

undertaken to address injury-causing conditions.[198] Its purpose is to remove any evidence-related disincentive to fix dangerous conditions.[199] The rule is designed to affect the conduct not just of individuals, but also of commercial actors whose products injure others.[200] Those actors may face liability in many jurisdictions for the same defective product. To the extent the policy behind Rule 407 has validity, it cannot work unless a commercial actor knows that the protection for subsequent remedial measures applies in all, or almost all, of the jurisdictions in which suit might be brought.

Rule 408 excludes evidence of settlement negotiations in civil cases[201] and Rule 410 excludes evidence of plea negotiations that do not end in a guilty plea.[202] Settlement and plea negotiations can take place before the initiation of formal proceedings. In such a case, the uniformity provided by codification would help encourage settlement by providing assurance that a particular level of protection would apply no matter where suit is ultimately brought. In the vast majority of cases, however, the parties to a settlement negotiation either are already involved in formal litigation or know where formal litigation would take place.

For Rules 408 and 410, the main benefit of codification is clarity. The purpose of these rules is to encourage compromise instead of trial in civil and criminal cases by removing the possibility that compromise negotiations will be used as evidence of an admission of liability or guilt.[203] If litigants are uncertain of the degree of protection their statements will receive, they will say as little as possible. Uncertainty would undermine the purposes of the

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198. FED. R. EVID. 407.

199. *See id.* advisory committee's note ("The [principal] ground for exclusion rests on a social policy of . . . not discouraging [people] from taking steps in furtherance of added safety.").

200. This was not always clear. Debates grew up around the original version of the rule as to whether it applied to measures undertaken subsequent to injuries resulting from defective products. These debates were resolved in a 1997 amendment that made clear that the rule applies in product liability cases. *See id.* advisory committee's note to 1997 amendment.

201. *See* FED. R. EVID. 408.

202. *See* FED. R. EVID. 410(4).

203. *See* FED. R. EVID. 408 advisory committee's note; FED. R. EVID. 410 advisory committee's note.

rule.[204]

To varying degrees, then, codification in the service of the ordering function is justified for these rules on an efficiency rationale. In addition to concerns about efficiency, though, concerns about justice might also warrant legislation in the service of the ordering function. We codify criminal law because we want to ensure that everyone has fair notice of the behaviors that can trigger a punitive response from the state.[205] Because the rules of evidence govern the process through which criminal defendants are tried and convicted, the same rationale could be applied to them.

Again, though, these concerns seem relatively inconsequential for most areas of evidence law that have been codified. Whereas potential miscreants in society typically do not have a lawyer on hand when deciding whether to engage in anti-social conduct, defendants charged with relatively serious crimes always have access to legal counsel during the prosecution.[206] Virtually all criminal defendants accept public legal assistance or hire a private attorney.[207] Those that do not have made a choice to swim the waters of the legal system alone. Complaints these defendants might make about the difficulties of understanding the hearsay rule, navigating the character rules, and laying evidentiary foundations would ring comparatively hollow.

Furthermore, none of the codified rules that deal exclusively or primarily with criminal proceedings impact primary conduct—conduct outside the context of litigation. The rules deal with conduct

204. I leave aside FED. R. EVID., which excludes evidence of offers to pay medical expenses occasioned by an injury. Its purpose is to encourage offers to help others without imputing liability, and it could not serve that purpose unless it is both widely known and uniform. *See* FED. R. EVID. 409 advisory committee's note. Codification would perhaps be justified on that basis, except that the rule seems so unlikely to have any effect on anyone's actual behavior, whether codified or not.

205. *See* CALABRESI, *supra* note 10, at 78–79.

206. *See* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) (holding that the Sixth and Fourteenth Amendments require that counsel be provided for indigent criminal defendants in state, as well as federal prosecutions).

207. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000) (reporting that only 0.4% of felony defendants represented themselves in the largest seventy-five U.S. counties in 1996, and only 0.3% of felony defendants represented themselves in federal court in 1998), *available at* http://www.ojp.usdoj.gov/bjs/abstract/dccc.pdf.

at trial or in the pre-trial stage at which the commencement of formal proceedings has already been contemplated, if not initiated. Even if these rules lack clarity, a judge is usually close at hand to resolve disputes. Case-by-case resolution of disputed issues is seldom impracticable.

Probably the best case for codification on a justice rationale can be made for Rule 410, excluding evidence of plea negotiations.[208] Many suspects face an initial round of dialogue with a prosecuting attorney without counsel. To be sure, under *Miranda v. Arizona*,[209] those suspects must be made aware of their right to counsel,[210] but they are much less likely to insist on counsel than is a charged defendant facing a trial. Fairness suggests that clear and accessible rules should exist disclosing the protection—and more importantly, the lack of protection—afforded the statements they make to prosecutors in those meetings.[211]

2. Justification Under the Remedial Function

For codification to be justified under the remedial function, a persistent and relatively significant disparity must have existed between the common-law rule and evolving social or legal norms.[212] Several codified rules address areas that seem to meet that standard. Others purportedly needed to remedy problems in the judge-made law do not.

Examples of rules that made valuable and probably necessary changes to common-law practice include Rule 607,[213] Rule 613,[214] Rule 704,[215] Rules 803(6)[216] and 902(11),[217] and Rule 1003.[218]

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208. *See* FED. R. EVID. 410.

209. 384 U.S. 436 (1966).

210. *See id.* at 444.

211. *See* FED. R. EVID. 410(4). Statements made in connection with plea discussions that result in a guilty plea, for example, are not protected.

212. *See* 1 HAYEK, *supra* note 126, at 88.

213. FED. R. EVID. 607 (eliminating the "voucher rule").

214. FED. R. EVID. 613 (simplifying use of prior inconsistent statements to impeach).

215. FED. R. EVID. 704 (allowing opinions on the "ultimate issue").

216. FED. R. EVID. 803(6).

217. FED. R. EVID. 902(11) (simplifying the introduction of business records).

218. FED. R. EVID. 1003 (allowing duplicates to be used just like originals for purposes of the best evidence rule).

These are all relatively technical improvements in the way trials are handled. Although technical, the problems they addressed persisted over many years despite steady commentary advocating change.[219] These problems were examples, as Hayek described, of the common law working itself into corners from which it could not emerge.[220] Legislation was needed, and the codified rules have served well to rectify the problems they addressed.

A more significant remedial measure is Rule 412, widely known as the federal rape shield statute.[221] Rule 412 limits the introduction, in a civil or criminal case involving alleged sexual misconduct, of evidence of the victim's prior sexual behavior or sexual predisposition.[222] It overturns the long-standing defense practice in rape cases of attempting to show consent by showing the victim's predisposition to have sex.[223] That practice was rightly criticized for "putting the victim on trial," but judges seemed unwilling to address it.[224] Rule 412, and, more importantly, the state rape shield laws on which it was based, represent an overdue attempt to rectify this serious and persistent defect in the common law of evidence.[225]

If remedial legislation was necessary in those areas and has been relatively successful in practice, in other areas remedial legislation has clearly been a mistake. Rule 804(b)(3), which extends the

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219. *See* FED. R. EVID. 607 advisory committee's notes, 613 advisory committee's notes, 704 advisory committee's notes.

220. *See* 1 HAYEK, *supra* note 126, at 88.

221. *See* WEISSENBERGER & DUANE, *supra* note 191, § 412.1, at 172.

222. *See* FED. R. EVID. 412.

223. *See* Ann Althouse, *Themla and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 760 (1992) ("The defense commonly adopted the strategy of casting doubt on her characterization of the event in question by encouraging the jury to infer that if the victim had consented to sexual activity in the past it is more likely that she consented on this occasion as well.").

224. *See id.* at 760–61 (stating that although judges should have excluded most evidence of a victims past sexual behavior even before the advent of a rape shield law, their own prejudices and misconceptions prevented an objective treatment of such evidence).

225. *See id.* at 765 ("Rape shield rules . . . convey a strong message to judges that many persons who have considered the relevance of past sexual behavior have reached the conclusion embodied in the rape shield rule."). Despite the value of rape shield statutes as statements of public policy, Professor Althouse questions the extent to which rape shield statutes can actually change the behavior of judges. *Id.* at 766.

traditional hearsay exception for statements against pecuniary and propriety interests to statements against penal interest, is one important example. The Advisory Committee explained that the extension of the exception to statements against penal interest simply took the exception to its "full logical limit."[226] It saw the only real problem with an against-penal-interest exception as the risk that defendants might fabricate statements by third persons that implicate the third person and thereby exculpate the defendant.[227] In practice, the rule has proved problematic not when used to admit statements exculpating a defendant, but when used to admit statements inculpating a defendant.[228] Despite the Supreme Court's efforts to ensure that only a declarant's statements that are truly inculpatory when made fit within the rule,[229] courts have used the rule to admit an unjustifiably broad range of statements loosely considered "inculpatory."[230] The result has been an erosion of defendants' rights to confront their accusers. This is an instance in which the common law may not have been as illogical as it seemed.

Another example of misguided remedial legislation is the set of rules allowing evidence of a defendant's propensity to engage in sexual acts in cases alleging sexual misconduct.[231] These rules, enacted by Congress over widespread opposition,[232] purport to change the common-law proscription against the introduction of evidence of the defendant's character by the prosecution in its case-

226. *See* FED. R. EVID. 804(b)(3) advisory committee's note.

227. *Id.* The rule includes a requirement of corroboration for statements against penal interest used to exculpate a defendant to address concerns about the reliability of such statements. FED. R. EVID. 804(b)(3).

228. MUELLER & KIRKPATRICK, *supra* note 46, § 8.75 at 943–44.

229. *See* Williamson v. United States, 512 U.S. 594, 600–01 (1994).

230. *See* MUELLER & KIRKPATRICK, *supra* note 46, § 8.75, at 943 n.15 (citing several cases that use an expansive definition of inculpatory).

231. *See* FED. R. EVID. 413–415.

232. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995) (discussing the nearly unanimous opposition to Federal Rules of Evidence 413–415 from judges, lawyers, law professors, legal organizations, the Advisory Committee on Evidence Rules, and the Judicial Conference itself), *reprinted in* 159 F.R.D. 51, 52–54 (1995).

in-chief.[233] They suffer from several defects. First, they were poorly drafted, leading to much unnecessary litigation about basic issues, such as whether evidence of sexual predisposition can be excluded as unfairly prejudicial under Rule 403.[234] Second, they increase the risk of false convictions and weaken the presumption of innocence by raising the possibility that defendants might be convicted on the basis of past behavior rather than evidence of the charged offense.[235] Finally, Congress had no empirical grounds for concluding that propensity evidence is more probative in sex offense cases than other cases or that highly probative evidence was being routinely excluded in those cases.[236] In short, this "remedial" legislation did not even address a genuine problem and was deeply flawed in its execution. The law should have been left in the hands of judges.

B. The Uncodified Rules

Evidence law in the federal courts includes a handful of rules or standards governing the admission of evidence at trial that are simply not mentioned in the rules. For example, longstanding custom disallows tactics such as the argumentative question, the question that assumes facts not in evidence, and the "asked and answered" question.[237] The Federal Rules of Evidence do not mention these objections. In addition, one type of evidence that comes up frequently at trial but that is not expressly covered by the rules is impeachment through the demonstration of bias.[238] It is arguably "covered" by Rule 611, which leaves the judge with broad discretion

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233. *See id.* (stating that Rules 413 and 414 provide that evidence of prior sex acts may be "considered for its bearing on any matter to which it is relevant").

234. *See* James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 118–19 (1994).

235. *See* Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 73–74 (1995).

236. *See* Duane, *supra* note 234, at 97–99.

237. *See* MUELLER & KIRKPATRICK, *supra* note 46, § 6.56, at 568–70 (explaining that Federal Rule 611 merely gives judges discretion to control the questioning of witnesses, but does not bar specific forms of questions).

238. *See* United States v. Abel, 469 U.S. 45, 50 (1984) (recognizing demonstration of witness's bias as a "permissible and established basis of impeachment" under the federal rules even though no rule expressly condones it).

to regulate matters in the courtroom.[239] But it is not "codified" in any meaningful sense.

For the same reasons that most rules of admissibility—such as the rules addressing hearsay and character evidence—do not warrant codification, these customary rules are better left to case-by-case development. The rules affect only the behavior of attorneys and litigants during trial. When questions involving them arise, a judge is present to answer them, negating efficiency concerns. And while in a perfectly just world all judges would rule the same way on objections about the form of questions, minor differences in the formalities of courtroom procedure seldom raise serious concerns about either efficiency or justice. Remedial legislation might be needed if the rules were not functioning properly, but there is no reason to think these are matters on which judges have gone irretrievably off course.[240]

If these unmentioned customary rules are essentially trivial, the one area of evidence law that has been expressly designated for common-law development is far from trivial. That is the law governing privilege,[241] the focal point of this symposium. Privilege law was left uncodified not because of any legisprudential determination that it was better suited to case-by-case evolution, but because of political considerations.[242] Interest groups have incentives to seek privileges protecting relationships in which they are involved and to oppose privileges protecting the relationships of their adversaries. The proposed privilege rules provoked intense

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239. *See* FED. R. EVID. 611(a); *see also* MUELLER & KIRKPATRICK, *supra* note 46, § 6.56, at 567 ("The court has discretion to control the mode of questioning witnesses under FRE 611 . . . .").

240. One uncodified problem area I have identified elsewhere is the judicial certification of expert witnesses. *See* Paul F. Kirgis, *Curtailing the Judicial Certification of Expert Witnesses*, 24 AM. J. TRIAL ADVOC. 347 (2000). There is no good reason for judges to insert themselves into the witness credibility calculus by declaring on the record that a witness is an "expert." Witnesses who have been shown to have the necessary qualifications to testify to specialized matters should simply be allowed to testify. Yet many judges believe they are required to state expressly their conclusion that a witness has been qualified as an expert. This practice has persisted long enough that legislative intervention might now be warranted.

241. *See* FED. R. EVID. 501.

242. *But see* Broun, *supra* note 6, at 775–77 (noting that some academics opposed the proposed privilege rules on the ground that they would stifle the development of new privileges).

opposition among certain interest groups who felt their relationships were not sufficiently protected while others' relationships were inordinately protected.[243] Rather than sort out the competing claims, Congress rejected the proposed privilege rules as a whole and punted privilege law to the courts.[244]

Whatever the political necessities of the time may have required, that was not a legisprudentially sound decision. Assuming that we believe privileges are valuable and should be maintained—an assumption I do not dispute for purposes of this article—the law of privilege is probably the area of evidence law most in need of legislation in the service of the ordering function. Leaving aside the possibility that aspects of privilege law need remedial attention—a prospect that would be as controversial today as it was in the early 1970s—efficiency and, to a lesser extent, justice concerns strongly favor the codification of privilege law. More than any other area of evidence law, moreover, privilege issues arise when no judge is available to provide a quick decision.

The purpose of privilege law is to encourage free communication in a variety of interpersonal relationships.[245] The underlying rationale may be instrumental—to secure social benefits from free communication—or humanistic—to protect the privacy of individuals.[246] The rules protecting privileged communications from disclosure in discovery and admission at trial work by removing a disincentive that people might otherwise have to communicate freely.

For privilege law to have its desired effect, people must know, at the time they communicate, whether their communications will receive privileged status.[247] If the law is unsettled or unclear, people are likely to err on the side of caution. They may curtail their communications in order to avoid the possibility of a later disclosure at trial or in pre-trial discovery. Assuming we have correctly identified the relationships that should be privileged, social costs will

243. *See id.* at 776–77.

244. *See id.* at 777.

245. *See* Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 248 (2002).

246. *See id.* at 243–44.

247. *Id.* at 243.

increase as a result.

Even if the law of privilege is absolutely clear, it cannot perform its desired functions if it is not uniform within and among jurisdictions. If people know that their communications will be protected in one court system to which they might be haled but not to others, they will behave as though the communication has no protection at all. Currently, the federal courts employ a different law of privilege than their state counterparts[248] and do not even conform to a single standard among each other. For example, splits among the circuits exist with regard to important questions such as whether communications between corporate officers and corporate counsel are protected by the attorney-client privilege in an action brought by shareholders,[249] whether the crime-fraud exception to the attorney-client privilege applies to intentional torts other than fraud,[250] and whether a qualified journalist's privilege applies to non-confidential material.[251] Again assuming we have correctly identified the relationships to be protected, this lack of uniformity, like a lack of certainty, will increase social costs.

Justice concerns also play a role in the consideration of privilege law, particularly with respect to the attorney-client privilege. The existence of the attorney-client privilege is an essential ingredient in assuring criminal defendants the right to effective assistance of counsel.[252] To the extent different courts provide different degrees

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248. The most notable difference between federal and state privilege law involves the physician-patient privilege. Most states have a codified physician-patient privilege applicable in state courts and in federal courts where state law supplies the rule of decision. *See* Broun, *supra* note 6, at 807 (noting that forty states have codified the physician-patient privilege). The Supreme Court implicitly rejected a federal general physician-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Court recognized a psychotherapist-patient privilege.

249. *See* Broun, *supra* note 6, at 786–87.

250. *See id.* at 787.

251. *See* Anthony L. Fargo, *Reconsidering the Federal Journalist's Privilege for Non-Confidential Information:* Gonzales v. NBC, 19 CARDOZO ARTS & ENT. L.J. 355, 370–71 (2001).

252. *See* Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) ("[T]he Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding.").

of protection for attorney-client communications, for example because of differences in the application of the crime-fraud exception, defendants receive different treatment from the justice system. Whereas a defendant in one jurisdiction might feel comfortable raising an issue with his attorney, a similarly-situated defendant in another jurisdiction might withhold the same information from his attorney. Those differences could produce real disparities in the representation the defendants receive.

For all privileges, those designed to foster personal relationships, as well as those designed to foster professional relationships, the need for codification is significantly greater than for most other evidence rules because privilege law affects primary conduct. We disallow the introduction into evidence of privileged matter in order to remove a disincentive that people might otherwise have to communicate freely outside the courtroom. In most cases, no judge is present when a potentially privileged communication is made. The people involved cannot easily obtain a judicial ruling on whether the privilege applies. Consequently, case-by-case resolution of privilege issues is impracticable.

Indeed, case-by-case resolution of privilege issues would not be desirable even if it were practicable. Privileges exist to protect communications that people do not want disclosed. Frequently, the nature of the communications at issue is so sensitive that the people involved try to avoid divulging the information even to a judge. For privilege law to serve its desired function, people must be able to anticipate, before making the communication and without consulting anyone else, whether a communication will be privileged. This is yet another reason why it is so important to make privilege rules apparent and uniform through codification.

Of course, saying privilege law should be codified raises an entirely new set of questions about what privileges should be codified, what cases a codified federal law of privilege should govern, and how the codification should be drafted. Other commentators have addressed those topics in detail, and I will not revisit them here.[253] For my purposes, it should suffice to emphasize that my conclusion that codified privilege rules would be justified under the ordering function implies that the rules should have a

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253. *See* Broun, *supra* note 6, at 805–12.

broad enough scope to produce uniformity and enough detail to produce certainty of application.

V. CONCLUSION

Because privilege law is the glaring omission from the Federal Rules of Evidence, debates about the desirability of codifying rules of privilege will almost certainly continue indefinitely. Codification proponents will continue to push for the codification of privilege law for the foreseeable future—or until they succeed. But the fact that privilege law remains uncodified should also push us to reconsider, from time to time, our assumptions about codification in general.

Our system is one of common law with a statutory overlay. We have rejected comprehensive codification of our law, and there are important normative grounds for maintaining a preference for common law over legislation. Any proposed legislation should be justified in relation to the common law it would displace. For most rules of evidence, that justification simply has not been demonstrated.

Of course, it is probably too late in the day to reverse the codification of evidence law in general. Given the widespread acceptance of the rules, the cost of repeal might exceed the benefits even if repeal were politically possible. But we can use the same legisprudential tools for evaluating evidence codification in general to analyze the desirability of proposed expansions and revisions of the evidence code. We can ask whether further codification is justified either by the ordering function or the remedial function. I suggest that we should meet most proposed additions and amendments with skepticism. In the case of privilege law, however, my analysis suggests that codification is justified.