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EVOLVING EVIDENTIARY NEEDS: A NEGLECTED RESPONSIBILITY

*Paul R. Rice**

I. INTRODUCTION

In his article entitled *The Case for Selective Abolition of the Rules of Evidence*, Professor David Crump presents a number of thought-provoking ideas about evidentiary rules that may have outlived their usefulness, at least in the manner in which they currently are employed. While I support many of his proposals in theory, his proposed focus on cost effectiveness has a tendency to overshadow the many shades of fairness that our rules were designed to protect. In my decades of teaching evidence, I have come to respect the wisdom of many of the common law evidentiary principles and have seen too many unintended consequences when those principles have been disturbed. Certainly an overabundance of concern for fairness, or a distorted sense of trustworthiness and reliability, may have led to many cumbersome rules that safely could be scaled back without serious consequence for fairness. While reading his article, however, I often felt as though I was reading Justice Powell's opinion in *United States v. Inadi*,¹ where cost and efficiency were taken to an extreme.

Writing for the majority in *Inadi*, Justice Powell justified not requiring the government to call available co-conspirators as witnesses under the Confrontation Clause when co-conspirator admissions are used against a criminal defendant because (1) it would be an onerous burden for the government, and (2) it would serve little useful purpose for the defendant because the co-conspirator/declarant "will be . . . wary of

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1. 475 U.S. 387 (1986).

coming to the aid of his former partners in crime.”² In other words, efficiency for the government was justified because the Court was willing to presume the defendant guilty! While Professor Crump would never consciously advocate such an outrageous position, neither, in all probability, would Justice Powell. The heavy prosecution slant of his article made an old criminal defense attorney feel a bit uncomfortable.³

Overcoming my initial discomfort, I studied Professor Crump’s ideas more closely and concluded that they could be the catalyst for a national debate about the Rules of Evidence, the principles upon which they were built, and the manner in which they have been applied. While I may not believe that efficiency is as important a consideration as Professor Crump urges, there is certainly much room for improvement. For example, two changes surprisingly not mentioned by Professor Crump in his drive to achieve more cost effectiveness were the abandoned common law foundation requirement for the introduction of evidence of prior inconsistent statements and bias.⁴ Rule 613 of the Federal Rules of Evidence eliminated the foundation requirement for prior inconsistent statements—directing only that the witness be given a chance at some stage of the trial to confront and explain the alleged inconsistency.⁵ In the metaphor of a foundation for a structure, the rule now requires only a roof. Since there is little reason for not laying such a foundation, and many advantages (for example, discovering other inconsistent statements and further demonstrating the witness’s lack of credibility if they lie about the inconsistency under oath), reimposing the requirement would make the trial more efficient because if the bias or inconsistency were admitted during the foundation it would eliminate the need for calling additional witnesses.

2. *Id.* at 395.

3. My discomfort with Professor Crump’s article, fueled by the *Inadi* reasoning, stemmed from my experience as a young man having the same name (including the same middle initial) as a criminal in my hometown who had defrauded many individuals and businesses. I received many irate telephone calls from abused women and was mistakenly confused in job interviews with the other individual. Had I been charged with a crime involving co-conspirators of this other individual, I would have benefited greatly from their appearance at trial, since being innocent I would not know who they were, and once called, the co-conspirators could testify that I was not the Paul R. Rice they knew without incriminating themselves.

4. While the majority of common law jurisdictions required a foundation to be laid before inconsistent statements could be proven, many courts did not require a foundation before bias evidence would be accepted. See Paul R. Rice, *Back to the Future with Privileges: Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739, 760 (2004) [hereinafter Rice, *Back to the Future*].

5. FED. R. EVID. 613(b).

Because there is no bias rule in the evidence code, other than Rule 404(b),⁶ that permits the introduction of prior act evidence to show motive, there has been unnecessary litigation about a foundation requirement. Some courts have looked to Rule 613 for guidance and refused to impose a foundation requirement for bias evidence also.⁷ Perversely, other courts have looked to Rule 613 to find justification for imposing a foundation requirement!⁸ We need a bias rule for the sake of clarity and foundation requirements reimposed for the sake of efficiency.

Unlike the narrow focus of Professor Crump's article, however, I believe that all options for improving the rules should be on the table, not just ones that increase the cost effectiveness of trials. In the more than thirty-five years of existence of the Federal Rules of Evidence, there has been no code-wide reassessment of basic principles and approaches. Periodically, the Advisory Committee surveys the code for problems that need to be addressed, but because their mantra has been "If it ain't broke, don't fix it" and it apparently "ain't broke if it ain't stopping traffic," more issues have been ignored rather than addressed. Therefore, any revision effort with a narrow focus, whether Professor Crump's or someone else's, would be wasting a valuable opportunity to substantially improve the evidence code.⁹

In the brief space that I have to comment, I will discuss a few of the topics mentioned by Professor Crump and identify a range of other issues that also need attention.

II. HEARSAY AND ITS EXCEPTIONS

Professor Crump identifies many of the problems with hearsay and inconsistencies in our concerns about hearsay juxtaposed with the unreliable exceptions that are recognized. Without question, many more forms of hearsay might be admitted at trial without jeopardizing the accuracy of its results. Indeed, many may even improve accuracy and

6. FED. R. EVID. 404(b).

7. See, e.g., *United States v. McCabe*, No. 96-30092, 1997 U.S. App. LEXIS 33704, at *19-20 (9th Cir. Nov. 26, 1997). But see *United States v. Leslie*, 759 F.2d 366, 379-80 (5th Cir. 1985) (imposing the requirement).

8. See, e.g., *United States v. Hudson*, 970 F.2d 948, 955-56 (1st Cir. 1992); *United States v. Lynch*, 800 F.2d 765, 770 (8th Cir. 1986); *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1522-23 (11th Cir. 1986); *United States v. Harvey*, 547 F.2d 720, 720 (2d Cir. 1976).

9. Of course, the Advisory Committee is not a stranger to narrow revision efforts that are a waste of resources. In the mid-1980s the Committee activated the revision process solely for the purpose of making the evidence rules gender neutral. As important as that revision effort may have been, it was not justified to the exclusion of all substantive problems that existed, and still exist, within the code.

fairness of the trial. The best example of this is the prior deposition testimony upon which he focuses.¹⁰ If the deposition was videotaped, it is difficult to appreciate how the concerns of the hearsay rule are furthered by requiring the witness to be unavailable at trial before the videotape is admissible.

I also like the suggestion that the unavailability requirement for all of the exceptions now codified in Rule 804¹¹ be reexamined. While I certainly understand a preference for live testimony, I see no reason to exclude good hearsay simply because live testimony has been offered. For too many of the old common law exceptions, the elements were identified from the facts of the cases in which they originally were recognized. Often the availability or unavailability of the declarant was of no consequence to the judges' decisions, but it came to be identified as an element. It would seem that the availability of the declarant *adds to* the reliability of all hearsay because he can be cross-examined about his prior statement. Strangely, however, a category of hearsay exceptions requiring *availability* has never been recognized.¹²

A substantial amount of hearsay not falling within any of the delineated exceptions have indicia of reliability either because of the context in which they were made or the unique contexts in which they are being used. By the same token, however, many forms of hearsay that are currently admissible under established exceptions are of questionable reliability and should be excluded. Are these existing rules inappropriate? Are the fact patterns posed by Professor Crump reflecting a broader problem for which a rule needs to be promulgated, or are they only anecdotal and worthy of attention when they arise? The problem in creating evidence rules with universal application is a difficult one of definition and balance within a set of rules that fosters consistency and predictability while achieving a desired level of reliability and fairness. Every proposal has obvious advantages. Identifying and quantifying the disadvantages is the challenge. That is what a national debate could do.

I will *not* attempt to identify and balance the advantages and disadvantages of each of Professor Crump's proposals. Instead, I will

10. David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 596-97 (2006).

11. *See id.* at 644.

12. The closest we have come to a category of hearsay exceptions requiring *availability* is Rule 801(d)(1)(A)-(C), which makes prior inconsistent statements, prior consistent statements and prior identifications admissible after the declarant has testified. However, these statements are not classified as exceptions to the hearsay rule—they are excluded from the definition of hearsay. *See* FED. R. EVID. 801(d)(1)(A)-(C); *see also* PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 4.02, at 341-48 (5th ed. 2005).

attempt to identify some of the unaddressed problems within the current rules to demonstrate the depth of issues that need to be considered along with Professor Crump's intriguing proposals.

Rule 801 apparently was a revisionist's playground in the early 1970s when the Federal Rules of Evidence were promulgated. There were extensive revisions to the hearsay rule with too little concern for either logic or consistency. And since their adoption, the Advisory Committee has not been inclined to confront and resolve them because, among other reasons given, it would disrupt established expectations and require a re-education of the bar.¹³

First, for example, subsections (a) and (c) of Rule 801¹⁴ unnecessarily encumber the definition of hearsay with an assertive/nonassertive distinction that ignores three of the four dangers of hearsay simply because the implied assertion was not intended by the declarant. While unintended assertions may not directly involve the hearsay danger of insincerity, they indirectly involve sincerity problems because if the direct message asserted and intended was insincere, the indirect message taken from it is no more trustworthy than the direct message.¹⁵ Aside from this indirect sincerity problem, such statements still carry the dangers of faulty perception and memory as well as ambiguity. Proponents argued that the other hearsay dangers could be considered by the fact-finder on the question of weight,¹⁶ but they never explained how a rational assessment would be possible when the declarant is unavailable and there is no way of quantifying each danger. Apparently, they were comfortable leaving this assessment completely to jury speculation.

13. See Rice, *Back to the Future*, *supra* note 4, at 750-51; see also 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, 821 (2002); Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 678 (2000) (discussing the "hands-off approach adopted by the Evidence Advisory Committee").

14. Subsection (a) defines the word "statement," which subsection (c) employs in the definition of "hearsay." A "statement" is defined as an oral or written assertion, or conduct, if it was intended as an assertion. FED. R. EVID. 801(a), (c).

15. For example, if a declarant uttered the statement, "Has anyone seen my umbrella?" that could be construed as an indirect or unintended assertion that it is raining. If, however, the statement was a prearranged coded message meaning, "Today is the day we will commit the robbery," the misleading use of the words would give rise to an indirect message that is completely unreliable. The same, of course, is true of insincere direct messages. For example, if an uncle satirically said, "Isn't my nephew, John, a special kid!" when everyone knows that John is a pain in the posterior because he is a drug addict and an ex-convict who has stolen from his parents and siblings, the indirect, unintended message that could be read into the statement, "I am particularly fond of John" would be completely unreliable.

16. See Rice & Delker, *supra* note 13, at 689.

Second, the grammatical structure of the definition of a “statement” in subsection (a) is ambiguous.¹⁷ It is not clear whether the last clause, “if it is intended . . . as an assertion,” modifies only conduct as hearsay, or oral and written assertions as well. As a consequence, the assertive/nonassertive distinction recognized by the clause has been applied illogically to words—oral and written—as well as conduct.¹⁸ Applying this distinction to words is illogical because the very use of a word, written or oral, involves the intent to communicate the direct message uttered.¹⁹ Having intended to communicate something to someone, the danger of insincerity is injected back into the mix, even though the indirect message that the statement is being used to establish was not intended.²⁰ Two state courts have correctly concluded that an indirect message can be no more reliable than the direct message from

17. Rule 801(a) provides:

The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

FED. R. EVID. 801(a).

18. The clause was originally extended to words in *United States v. Zenni*, 492 F. Supp. 464, 465-69 (E.D. Ky. 1980). That precedent has subsequently been followed without serious questioning. See, e.g., *United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990).

19. See *supra* note 15.

20. See generally Paul R. Rice, *Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529, 531 (1992) (arguing that the “assertive/nonassertive distinction” is “misguided”).

Other anomalies and inconsistencies exist within Rule 801, but are less significant to its rational application. I will give three examples. First, the common law admissions exception has been excluded from the hearsay rule under subsection 801(d)(2) on the premise that it differs from all other hearsay exceptions in that it is based on the adversarial nature of the process—you speak at your own risk—rather than the inherent reliability of the statement. See FED. R. EVID. 801(d)(2) advisory committee’s note. At the same time, however, other hearsay exceptions not premised on reliability have been left in the rule. Specifically, this would include ancient documents in Rule 803(18), and forfeiture by wrongdoing in Rule 804(b)(6). Second, prior consistent statements have been made admissible for their truth under subsection (d)(1)(B) for no logical reason. Their only value is the credibility that they provide for the witness who already has placed the evidence into the record (if the jury believes the witness, the record has been made through his testimony, and if the jury does not believe the witness, placing his prior consistent statement into the record twice serves no purpose because the jury will not believe either statement). Third, Rule 801(d)(1)(A)-(C) excludes certain statements from the hearsay rule (prior consistent and inconsistent statements, as well as prior identifications) only if the declarant is present and testifying. In substance, this subsection actually creates a third category of hearsay exception where the *availability* of the declarant is material. Were it acknowledged as such, it would be an appropriate place to codify the past recollection recorded exception, which requires the declarant to be present to authenticate the writing but absent in that he had insufficient recollection to testify fully and accurately. Declarations against interest might also be placed in such a category in order to minimize the problem of fabricated declarations.

which it is inferred.²¹ It is time for Rule 801 to be revised to acknowledge the same.

Because there are so many exceptions to the hearsay rule, the problems, correspondingly, are too numerous to discuss. I will mention only a few.

First, far too many exceptions have been created on little more than assurances of sincerity. Excited utterances in Rule 803(2) and dying declarations in Rule 804(b)(2)²² are examples. Too often this has led to statements being admitted into evidence with only the assurance that they are sincerely erroneous, and the finder of facts is being given no basis upon which to assess reliability. Therefore, contrary to the proposals of Professor Crump, perhaps there are many hearsay statements currently being admitted that should be excluded, rather than the converse.

Second, findings of fact by government agencies have been made admissible under Rule 803(8)(C)²³ even though the rules of evidence are often neither understood nor followed by the hearing officers, and their decisions are often influenced by special interest groups.²⁴ Paradoxically, judgments from judicial proceedings, where due process is afforded and the rules of evidence are followed, are only admissible under Rule 803(22) from criminal felony cases. All civil judgments are inadmissible to prove facts essential to those judgments.²⁵ Similarly, the opinions written and published by the judges in all of those cases have no evidentiary value. This seems to be a terrible waste of relevant and reliable evidence for no justifiable reason in light of Rule 803(8)(C).

Third, written present sense impressions recognized in Rule 803(1) nullify the limitations in the past recollection recorded exception codified in Rule 803(5).²⁶ As long as the written statement was made

21. The illogic of this practice has been recognized only by the Iowa Supreme Court in *State v. Dullard*, 668 N.W.2d 585, 594-95 (Iowa 2003) and the Maryland Court of Appeals in *Stoddard v. State*, 887 A.2d 564, 575 (Md. 2005). See PAUL R. RICE, EVIDENCE PRINCIPLES & PRACTICES: 150 THINGS YOU WERE NEVER TAUGHT, FORGOT, OR NEVER UNDERSTOOD 72-74 (2006).

22. FED. R. EVID. 803(2), 804(b)(2).

23. FED. R. EVID. 803(8)(C).

24. The public records exception in Rule 803(8)(C) has many additional problems that I discuss in a recent work. See RICE & KATRIEL, *supra* note 12, § 5.05, at 705-14. For example: (1) Does the entire government record, and not just the factual findings, come in for truth under the exception because the rule makes reports containing findings of fact admissible?, and (2) If the report predominantly incorporates evidence that supports the agency's findings, can the party against whom the findings are offered admit the remainder of the agency record for its truth under the rule of completeness?

25. FED. R. EVID. 803(22) (exempting final judgments in criminal but not civil proceedings).

26. FED. R. EVID. 803(1), (5).

contemporaneously with the event or condition being described, it is admissible as a present sense impression without the declarant being present at trial to authenticate it, vouch for its reliability, and establish that he has insufficient recollection to testify fully and accurately—all of the limitations in Rule 803(5). As a present sense impression, the writing also comes in as an exhibit, while past recollections recorded may only be read into the record. If the two exceptions are intended to serve different purposes, those purposes need to be clarified.

In addition, because this exception borrowed language from the common law excited utterance exception when it required that the statement “describing or explaining” an event or condition be made simultaneously with or “immediately” after the event perceived, courts have inappropriately expanded the time-frame within which statements will be considered “immediate.”²⁷ Unlike the excited utterances, however, the present sense impression does not have to be in response to an exciting event—it has no other indicia of reliability. Therefore, the time-frame that may permissively elapse must be narrowly construed. The rule needs to emphasize this construction.

Finally, because of the breadth of the residual exception in Rule 807²⁸ (which permits judges to admit hearsay statements that are inadmissible under the delineated exception in Rules 803 and 804 if those statements are shown to possess equivalent circumstantial guarantee of trustworthiness), judges have used it as an excuse for not critically analyzing whether statements are hearsay in the first instance, or fit within delineated exceptions if found to be hearsay. Courts will say that a statement may or may not be hearsay, and if it is found to be hearsay, it may or may not be admissible under this or that exception, but the court need not resolve those issues because it has decided to admit the statement under Rule 807.²⁹ While this may be cost effective

27. *But see* *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996) (examining the phrase “immediately thereafter” and concluding that it “was meant to suggest only that the description and the event need not be precisely simultaneous,” but that “[t]he language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded”).

28. FED. R. EVID. 807.

29. Illustrating the erroneous conclusion that something is not hearsay is *Dodart v. Young Again Prods., Inc.*, No. 03-CV-00035, PC, 2006 U.S. Dist. LEXIS 72122, at *77 (D. Utah Sept. 29, 2006), where e-mail messages had been received from customers inquiring about products sold by another firm. The e-mails were offered to prove customer confusion. Because the e-mails were circumstantial evidence of the senders’ state of mind, the court concluded that they were not hearsay. Therefore, it did not need to decide whether they were admissible under the state of mind or residual exception. Whether something is directly or indirectly stated is irrelevant to the hearsay character of the statement. Just because the customers did not say “I’m confused” does not alter the

for judges, it has serious consequences for our hearsay jurisprudence. Because substantive issues go unresolved, hearsay jurisprudence is not evolving today as it did under the common law. And with so many disparate applications, the rule has lost its predictability, thereby encouraging, rather than discouraging, litigation. Unlike the common law where courts sparingly exercised their inherent power to admit new forms of hearsay, evidence is now randomly being admitted without structure and analysis under delineated elements of established titles.

As a matter of practical reality, when inherent power is delineated, judges tend to be willing to use it more frequently. While Professor Crump believes that the residual exception is not being used enough, I would take the opposite position and advocate its abolition. If, however, it is to be retained, its random use by trial judges must be reined in through more restrictive language in the rule—not because it is creating unfairness, or is inefficient, but because our jurisprudence is being “dumbed down” to the easiest and most simple solutions for the sake of efficiency.

hearsay dangers present when their inquires about products are offered to indirectly prove the same thing—that they are confused.

Two cases illustrate the use of the residual exception when other delineated exceptions were applicable. In *United States v. Am. Cyanamid Co.*, 427 F. Supp. 859, 865 (S.D.N.Y. 1977), letters from corporate executives, responding to an inquiry by the government, were being offered to establish the nonexistence of an industry standard. Rather than admitting these letters under the state of mind exception to the hearsay rule, because the state of mind of the corporations' executives was the state of mind of their corporations, and collectively they reflected the industry standard, the court employed the residual exception. *Id.* In *United States v. Medico*, 557 F.2d 309, 314 (2d Cir. 1977), a bank teller was testifying about a license number that he had written down on a deposit slip after a bank robbery. This license number had been relayed to the teller by a customer standing at the front window, who was repeating the number being given to him by an occupant of a car who had witnessed the getaway. Rather than seeing the writing on the deposit slip as three levels of hearsay, and correctly analyzing each level under established exceptions, the court employed the residual exception to conveniently solve the multiple level problem. *Id.* at 313-14.

United States v. Am. Tel. & Tel. Co., 516 F. Supp. 1237, 1240 (D.D.C. 1981) involved a use of the residual exception that Professor Crump might applaud. The government's divestiture action was a collection of claims from eighty-two private causes of action. In their case the government was extensively using documents provided by those independent plaintiffs. In their defense, AT&T also wanted to use many of the internal documents maintained by those same companies. To authenticate each document as a business record, AT&T would have consumed months of trial time laying foundations for records that the government did not contest were business records. To avoid this time-consuming foundation process, the judge accepted the records under the residual exception and shifted the burden of persuasion to the government to show that they were not what they appeared to be—reliable records maintained in the routine of business. *Id.* at 1242-43. In extreme cases, extreme measures must be taken, but this problem could have been dealt with in the same way under the business records exception.

In the fact pattern posed by Professor Crump from *Leake v. Hager*,³⁰ the son of one of the parties made statements against his father's interests to the insurance investigator and then was out of the country when the investigator attempted to repeat his utterance when called as a witness. The testimony was held inadmissible on hearsay grounds.³¹ Professor Crump suggests that the facial reliability of the statement and the circumstances of its use should have made it admissible, particularly since the declarant was equally available to the opposing party.³² Of course, facial reliability was the reason for adopting the residual exception in Rule 807.³³ It is not clear, however, that such a rule would be either fair or cost effective since it would give rise to time-consuming litigation over the adequacy of notice to the opposing party and the level of the opposing party's accessibility, both physically and financially. There also is no inherent increase in the level of fairness, efficiency or cost effectiveness by shifting to the opposing party the costs of calling a witness.

A less extreme restriction of the hearsay rule would be to freely admit out-of-court statements when the declarant is testifying from present recollection about both the event and his own prior statement. Such statements technically fall within the definition of hearsay but pose none of its problems because the declarant is present, speaking under oath, and subject to cross-examination about the substance of the statement.³⁴ This would be treating such statements much like the statements that are currently being admitted as non-hearsay under Rule 801(d)(1)(A)-(C).³⁵ This modification, however, would change existing law under Rule 801(d)(1)(B), which restricts the admissibility of prior consistent statements to instances where the witness's credibility has been attacked by charges of recent fabrication, improper influence or motive. All such statements would be admissible for truth. This result, however, may fare poorly under Professor Crump's cost effectiveness analysis because consistent statements have little probative value over reinforcing the credibility of the witness whose testimony has already been heard.

30. 175 N.W.2d 675 (N.D. 1970).

31. *Id.* at 683.

32. See Crump, *supra* note 10, at 608-09.

33. See FED. R. EVID. 807 advisory committee's note.

34. Professor Edmund Morgan characterized this practice of excluding statements as hearsay when the declarant is testifying as a "pious fraud." Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 193 (1948).

35. FED. R. EVID. 801(d)(1).

On the flip side of this coin, Rule 801(d)(2)(D) makes statements of a former employee admissible against the former employer as vicarious admissions, even though the former employer has no access to the former employee.³⁶ Because the theory of the common law admissions exception (now excluded from the definition of hearsay) is that we each speak at our own risk, and must account for our own prior statements, vicarious admissions of former employees stretch that theory to its breaking point.³⁷ The former employer may, in fact, have less access to the former employee than the adversary offering the vicarious admission. In modern industry, it is not uncommon for that former employee to be working for the party now using his statement. That often is how the party offering the statement was made aware of the admission. Perhaps such statements should only be admissible as vicarious admissions if the proponent calls the former employee as a witness or demonstrates that the former employee is either unavailable or is available to the party against whom it is offered.

III. CONFRONTATION AND CROSS-EXAMINATION

Professor Crump demeans the value of face-to-face confrontation of witnesses. While his criticisms may have merit to the extent that fabrication often cannot accurately be detected, it ignores the fact that the value of confrontation may lie as much in the process—our perception of its fairness, reaction to it, and acceptance of results from proceedings in which it was available, rather than what it directly produces by way of credibility assessments. This, of course, is why we place such a high burden of persuasion on the government in criminal cases. It would certainly be a lot more efficient if we could convict people by a preponderance of the evidence, but we would not be as comfortable depriving them of their freedom for the remainder of their lives based on such adjudications. The right to confrontation and cross-examination seems to be of the same ilk.

IV. REPETITIVE BEHAVIOR EVIDENCE

While Professor Crump makes a number of interesting points about the law's inconsistencies in admitting repetitive behavior evidence, at least one of his arguments appears to be erroneous, and the breadth of

36. FED. R. EVID. 801(d)(2).

37. This is why the original Advisory Committee refused to recognize the common law privity admissions—statements made by a former owner of property while he still held title. See Paul Rothstein, *Teaching Evidence*, 50 ST. LOUIS U. L.J. 999, 1027 (2006).

his proposals are incomplete. His discussion of prior act evidence under Rule 404(b) and comparison to admissibility of prior similar acts of sexual misconduct under Rules 413 through 415³⁸ is questionable. He says that the 404(b) evidence of prior robberies will not be admitted in the robbery prosecution, while the sexual abuse evidence under Rules 413 through 415 will be admitted in the sexual assault prosecution.³⁹ I believe this is incorrect. While the prior robberies may not be admitted, there is no assurance that the prior sexual offenses will be. His conclusion assumes that an admissibility decision under Rules 413 through 415 will not be subject to the same Rule 403 unfairness balance that will be involved in the Rule 404(b) decision. While the language in these Rules may suggest otherwise,⁴⁰ judicial decisions have uniformly concluded that admissibility may involve a balancing act.⁴¹ As a consequence, results in both Rules 404(b) and 413 through 15 appropriately have been much the same.

His proposals are inadequate in that they advocate only the *expansion* of use against criminal defendants. Perhaps this again reflects his prosecutorial leanings, but the lack of relevance of prior act evidence reflected in prior felony convictions is as much in need of change as any of the examples Professor Crump has given us.

Rule 609⁴² perpetuates the common law division between felony and misdemeanor convictions when they are used for impeachment purposes. It admits all felony and misdemeanor convictions involving dishonesty or false statement. Felony convictions as a class do not have the same relevance that they did under the common law when this distinction was first recognized. After penal laws were codified, the definition of criminal conduct became a political football. Everything criminalized tended to be made a felony in order to demonstrate the politicians' deep concern about the problem and commitment to law and order.⁴³ By contrast, under the common law, only the most egregious

38. FED. R. EVID. 413-15.

39. Crump, *supra* note 10, at 629-31.

40. For example, Rule 413 says "[E]vidence of the defendant's commission of another offense or offenses of sexual assault is admissible . . ." FED. R. EVID. 413(a) (emphasis added). Rule 414 says: "[E]vidence of the defendant's commission of another offense or offenses of child molestation is admissible . . ." FED. R. EVID. 414(a) (emphasis added); *see also* FED. R. EVID. 415(a) (using similar language).

41. *See* United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

42. FED. R. EVID. 609.

43. *See, e.g.*, Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72, 77 (discussing the similar idea that "criminal law is increasingly used against purely

offenses—generally those that were *malum in se* (reflecting evil in themselves)—were classified as felonies.⁴⁴ As a consequence, the felony/misdemeanor distinction no longer has the same meaning. The admissibility of convictions should now turn on the nature of the conduct involved in the conviction (which it indirectly, albeit inadequately, did under the common law) rather than the penalties that were possible.

This proposal would effectively merge Rules 608(b)⁴⁵ and 609. While all prior acts reflecting on credibility could still be inquired about under Rule 608(b), the cross-examiner could not prove those acts through extrinsic evidence unless they were the subject of a conviction (the status of which—felony or misdemeanor—would be irrelevant).

While on the subject of Rule 608(b), its restrictive practice of requiring the cross-examiner to “take the answer” relative to denied prior acts reflecting on credibility might also be re-examined under Professor Crump’s push for relevancy, consistency, cost-effectiveness, and fairness. This practice was an off-shoot of the old collateral evidence rule that has been abandoned.⁴⁶ This should have been abandoned too. It was premised on a perceived need for efficiency—keeping the trial focused by not being sidetracked with additional disputes. This is an instance, however, where concern for efficiency and simplicity has produced an irrational practice that needs to be seen for what it is.

It does not make sense to allow the cross-examiner to inquire about a prior act that shows lack of credibility and then preclude the cross-examiner from proving the act once it is denied. Allowing inquiry and denial without proof simply accommodates sophisticated liars. While proof definitely involves a sidetrack, it seems to be far too critical to the trial’s fairness and accuracy to be excluded. Proof of the denied act is not only relevant to credibility because of the commission of the act, but,

regulatory offenses . . . to enlist the moral force implicit in criminal conviction for the sake of deterrence”).

44. See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, J. CRIM. L. & CRIMINOLOGY 1087, 1089-90 (2000) (“Other [common law] classifications, such as *malum in se* . . . also rely less on a concept of harmfulness than on the idea of moral wrongfulness (the degree to which an act violates a moral norm) or culpability (whether an actor intended her act or was mistaken or insane).”).

45. FED. R. EVID. 608(b).

46. See Michael J. Hutter, *Evidence*, 46 SYRACUSE L. REV. 601, 623 (1995) (“The collateral evidence rule permits the introduction of extensive evidence to refute a witness’ testimony, as well as cross-examination of the witness concerning prior statements that are inconsistent with the witness’ testimony, only when the extrinsic evidence or prior statement involves a non-collateral matter.”).

more importantly, because proof of it demonstrates that the witness has just lied under oath to the jury being asked to believe him.

When the credibility of a central witness is critical to the outcome of the trial, this type of evidence seems indispensable. Of course, there will be instances where both the inquiries and the proof will have marginal importance either because the witness's testimony is unimportant—making his credibility less significant—or the nature of the act has little probative value. In such instances, of course, a judge would have the power to avoid the distractions, confusion and delays of either the inquiry or the proof through a Rule 403 balance.

V. EXPERT WITNESS OPINIONS

Professor Crump touches on Article VII⁴⁷ without exploring many of its critical problems. To be sure, the Court's definition of "science" in its *Daubert*⁴⁸ decision was narrow, at best, and naive and wrong-headed, at worst. In *Daubert*, the Court again demonstrates that when judges step outside their discipline, and attempt to act like scientists, they tend to step on and into things that they do not understand.⁴⁹ Professor Crump has written a great deal on this subject and his opinions are important. He notes that through this decision and its progeny the Court has established a "long list of requirements for expert opinion evidence" that have proven to be hopelessly confusing, overwhelmingly difficult to apply, time consuming beyond belief, and costly beyond reason.⁵⁰ The purported "liberal" admissibility standard established in *Daubert* with its nonexhaustive criteria have proven to be just the opposite. Professor Crump insists that the standard must be simplified. To that I say amen. We should be far less intimidated by expert testimony than the standard we use for screening suggests that we are. It is only a relevance decision that is being made when screening expert opinion evidence: Jurors are more competent than the Court is willing to give them credit for and are

47. FED. R. EVID. art. VII.

48. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

49. The same problem was demonstrated when the justices attempted to act like historians in the *Crawford* decision, where they discovered a new definition of the right of confrontation through their historical examination of the Star Chamber proceedings that gave rise to the creation of the right. *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004). Concluding that the right only applies to testimonial type hearsay, the Court pinned its analysis on historical facts that were incomplete and inconsistent with its own analysis. *Id.* at 51-53. Contrary evidence was dismissively explained as being *sui generis* even though it was not in a class by itself. *Id.* at 56. For a more complete exploration of this opinion and its deficiencies, see RICE & KATRIEL, *supra* note 12, § 5.03, at 473-77 (5th ed. 2005).

50. Crump, *supra* note 10, at 600.

more than willing to reject the urging of charlatans; the adversarial system, with opposing experts, effectively exposes weaknesses; and the trial judge has the power to ensure fairness through directed verdicts and granting judgments notwithstanding verdicts. After the *Daubert* decision, rather than giving directions to trial judges by clarifying Rule 702, the Advisory Committee did little more than codify revisions that parrot the *Daubert* language of reliability.⁵¹ Surely they are capable of more.

Article VII, however, has many equally compelling problems. For example, Rule 703⁵² permits experts to rely on otherwise inadmissible evidence.⁵³ At the same time, however, the rule precludes the delineation of that otherwise inadmissible evidence unless the proponent can demonstrate that its probative value substantially outweighs its prejudicial effect. This relatively recent revision to Rule 703 creates a number of problems the Advisory Committee process has shown no inclination to address:

First, how are the jurors supposed to be the sole finders of facts, with the expert only assisting them, if the jury is not permitted to hear the basis of the expert's opinions?

Second, if the probative value of the otherwise inadmissible underlying evidence does not substantially outweigh their prejudicial effect (thereby precluding their delineation for the jury), why should opinions premised on those facts be admissible?

Third, if the otherwise inadmissible underlying evidence is delineated for the jury, can the jurors rely on that evidence for its truth if the expert has accepted it for its truth—creating what could be described as an open-ended exception to the hearsay rule?⁵⁴

Fourth, if creating an open-ended exception to the hearsay rule is intended, should not safeguards be established to ensure that the reliability of the evidence has been properly evaluated by the expert? Should not the expert be required to have personally examined and assessed the reliability of what she has accepted as true, rather than

51. EVIDENCE PROJECT, PROPOSED REVISIONS TO THE FEDERAL RULES OF EVIDENCE: COMMENTS AND PROPOSALS 3 (1998).

52. FED. R. EVID. 703.

53. *Id.*

54. This was proposed by the Evidence Project at the American University Washington College of Law over a decade ago. See *Evidence Project, Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330, 641-43 (1997). The proposal was summarily rejected by the Advisory Committee.

accepting it as a generic class of evidence that is generally relied upon by experts in the particular field?⁵⁵

Last, if the jurors are instructed that the otherwise inadmissible evidence they are being permitted to hear *cannot* be accepted for its truth (because the open-ended hearsay exception discussed above is not acceptable), how is that instruction logical if the jurors are permitted to accept the opinion of the expert premised on its truth?

As noted above, Rule 703 only addresses whether the otherwise inadmissible evidence can be delineated. If the basis is only admissible to explain how the expert arrived at his conclusions, this would be inconsistent with what the Evidence Code has done in Rule 803(4) with statements of medical history and causation made to medical expert witnesses.⁵⁶ Under the common law, the doctor could only repeat what the patient had said about history and causation, and the jury was instructed that the patient's statements were coming in *only* to explain the doctor's diagnosis.⁵⁷ This created an emperor-wearing-no-clothes problem that was ignored for decades—everyone knew that it could not realistically be done, but everyone became comfortable with acting like it could and ignoring the illogic. Eventually the irrational practice was eliminated by Rule 803(4), which made both history and causation admissible for truth. Is Rule 703 reviving this absurd practice for all expert witness, while the code has eliminated it for medical expert witnesses? Why? Since the expert is testifying, like the medical doctor, and can be examined about why she chose to credit that evidence, there

55. The rule proposed by the Evidence Project was:

Revised Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

....

(5) Statements employed in expert testimony. Statements employed by experts in developing testimony for trial, to the extent that such statements are (1) personally observed by the expert, or (2) if not personally observed by the expert, of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, and, in both instances, the expert has demonstrated to the presiding judge a basis for concluding that the particular statements possess substantial guarantees of trustworthiness.

Id. at 641.

56. FED. R. EVID. 803(4).

57. See John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353, 362 (1999) (explaining that “[t]he [common law] practice was that ‘[w]hile these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion,’” and that “[Rule 803(4)] abolished the distinction between simply allowing the jury to hear the statements that were used as the basis for the expert’s opinion and admitting the statements as substantive evidence”) (quoting FED. R. EVID. 803(4) advisory committee’s note).

is no logic in solving the problem for one and creating it for the other. With explanations of assessed reliability by the testifying experts, jurors should be able to evaluate both the expert and her evidence and intelligently use the evidence in the same way as the expert.

VI. SCIENTIFIC EVIDENCE SCREENING

While scientific evidence must now be screened under the test enunciated in the Supreme Court's *Daubert* decision, what neither the Court in *Daubert* nor the Advisory Committee in the Federal Rules of Evidence has addressed is how reliable the science—and technology after the *Kumho Tire*⁵⁸ decision—must be before it can be used in the courtroom. While the old *Frye*⁵⁹ test required that novel scientific principles have gained general acceptance in the relevant scientific community,⁶⁰ a fair assessment of the *Daubert* test suggests that it is little more than *Frye* in drag—dressed up to be made to appear to be something that it is not. Since judges are not scientists, their assessment of error rate, testing and its adequacy, and peer review requires judges to go back to the same relevant scientific community relied upon in *Frye* to evaluate and apply the factors enunciated in *Daubert*. This is why the decisions under the *Daubert* test are virtually the same as they were under the *Frye* test.⁶¹ Therefore, as in *Frye*, acceptability of science, the methodologies through which the science was used, and its application must meet a scientific field's standards of reliability. Since many of the hard sciences require an accuracy rate of over ninety-six percent, because they are looking for scientific truths, why are we restricting the use of science and technology in the courtroom to that level of accuracy? Since we are only resolving a social dispute by a preponderance of the evidence—a standard by which science never operates—should not a lesser standard of accuracy and reliability be acceptable? When the scientific results are considered with other evidence presented at a trial, why should scientific principles and methodologies that are only eighty percent accurate, for example, not be considered sufficiently helpful to be acceptable?⁶² This, of course, would create the awkward situation

58. *Kumho Tire Co., v. Carmichael*, 526 U.S. 137 (1999).

59. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

60. *See id.* at 1014.

61. Martin L. C. Feldman, *May I Have the Next Dance, Mrs. Frye?*, 69 TUL. L. REV. 793, 803 (1995).

62. While the mere fact of asking this question may demonstrate my woeful lack of understanding of science and its relevance in the resolution of social disputes, I am afraid that my mediocrity may be more the norm than the exception among the judiciary charged with this

where scientists would be asked to testify that scientifically speaking the principle in question is garbage, but “it’s good enough for you guys!”⁶³

The totality of the evidence code needs to be re-examined with the same mind-set that gave rise to the revolutionary changes in the best evidence or original writing rule in Article X of the Federal Rules of Evidence.⁶⁴ When the content of a material writing was being proven under the common law, the proponent had to produce the original of that writing or show how it was unavailable due to no serious fault of the proponent of secondary evidence. Best evidence objections were raised as a matter of course, even though there were no serious concerns about the accuracy of the content of the writing being proven. With the creation of the “duplicate” rule⁶⁵—basically encompassing all mechanically produced copies—which made those copies admissible as if they were originals unless a serious question about authenticity was raised by the opponent, best evidence objections virtually disappeared. This was true cost effective rule-making.

VII. LOGICAL RELEVANCE

With the many compelling problems identified by Professor Crump, his criticisms of the definition of logical relevance in Rule 401,⁶⁶ and the exclusion of relevant evidence that is permitted under Rule 403, is a bit too pedantic. Logical relevance is similar to the concept of obscenity—we know it when we see it, except that logical relevance may be easier to identify because it is measured against the issues being litigated. Professor Crump’s concern about marginally relevant evidence with minimal prejudicial effect seems easily addressed by the language

screening responsibility. I will happily, however, bear the badge of mediocrity if one of the more astute among us will provide an explanation of what seems to have been so obvious to so many for so long that it has never warranted even a comment.

63. The high standard that has been set for admissibility of scientific evidence seems to have placed a heavy hand on the scales of justice in favor of our industrial base relative to questions of causation in toxic tort cases. While I do not oppose such a protective measure as a social policy decision, this needs to be acknowledged for what it is and openly debated. Perhaps the protective standard is too high. Until we acknowledge what we are doing, we can never rationally control it.

64. FED. R. EVID. 1001(3), 1004.

65. Rule 1001(4) defines a duplicate as “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.” FED. R. EVID. 1001(4). Rule 1003 provides: “[A] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” FED. R. EVID. 1003.

66. See FED. R. EVID. 401.

of Rule 403 that authorizes the presiding judge to exclude relevant evidence if there is a substantial possibility that it will confuse or mislead the jury, create undue delay, or waste time.⁶⁷ While Professor Crump would counter that the requirement that these dangers “substantially outweigh” probative value diminishes the likelihood of exclusion, I would simply point out that a Rule 403 balance is a discretionary judgment call, and because the evidence in his hypothetical has only minimal probative value, a corresponding small amount of delay, distraction, or confusion can be seen as “substantially” outweighing that value. There are too many bigger fish to be fried. This one should be thrown back.

Closely related to the issue of logical relevance is the requirement of authentication. The proponent of evidence has to establish that the evidence is what he claims.⁶⁸ Professor Crump wants to relax this requirement so that items usually taken as authentic in our daily lives are accepted as authentic in judicial proceedings. He seems to be arguing for a broader concept of self-authentication.⁶⁹ I am sympathetic to this argument. Perhaps this could be accomplished by assuming authenticity if notice is given to the opposing side of each document that will be presented at trial, and the propositions that each will be offered to establish. If the opponent does not come forward before trial with serious objections to authenticity, or reasons why it would be unfair to forgo the foundation requirement—for example, he had no reasonable means of verifying genuineness—they are accepted as authentic. In substance, this would be doing for authentication what the duplicate rule did for the best evidence requirement—virtually eliminate most of the costly and time-consuming evidence that currently has to be produced.

VIII. PRIVILEGES

With his cost-benefit thesis, I was surprised that Professor Crump omitted any reference to privileges. Perhaps that is because his experiences have principally been as a prosecutor in criminal cases, and the privileges that confronted him were either the attorney-client privilege, which is thought to be sacred in the administration of justice in an adversarial system, or constitutional in origin and therefore outside the scope of his evidence rules proposals. In civil actions, however, particularly in the context of electronic evidence, the cost of privilege—

67. FED. R. EVID. 403.

68. See FED. R. EVID. 901(a).

69. See Crump, *supra* note 10, at 639-40.

especially the attorney-client privilege—and its waiver have become astronomical.⁷⁰ Concern for this, as well as problems of waiver, prompted corporations to use their influence through the ABA and Congress to pressure the Advisory Committee to propose rules to protect corporations from waiving privileges when they inadvertently disclose documents in a large discovery undertaking or selectively give them to government agencies in the spirit of cooperation during governmental investigations.⁷¹ I find these proposals particularly inappropriate because the Federal Rules of Evidence have not even recognized the privileges that the new rules are trying to protect. Clearly, this is another example of powerful special interests having their voice heard over all other voices in a codified rules process without all views and positions being seriously considered.

Most troubling about the proposal, however, is the fact that the propriety of even extending the attorney-client privilege to fictitious corporate entities is not even being discussed, much less seriously debated. The reason this is so troubling is the fact that in the corporate context, the fictitious legal entity is given the privilege, and those who speak for the entity are given no direct protection by it. As a consequence, the privilege cannot achieve its goal of open communications because it protects only the entity that cannot speak, and denies the protection to those who do.

Employees receive a protection from the corporation's privilege only indirectly—when the corporation elects to assert it, and that does not happen unless it is in the corporation's interests. The employees' interests are secondary at best. While corporations will argue that employees speak openly only because of the existence of the privilege, that is highly questionable. If they do not believe they are culpable, they will speak openly whenever corporate counsel inquires. When they are culpable, they speak openly only because they mistakenly believe that they are personally protected by the corporation's privilege. Whatever

70. See PAUL R. RICE, *ELECTRONIC EVIDENCE: LAW AND PRACTICE* 131-88 (2005) (discussing the complicated nature of the attorney-client privilege, and the ways in which technology is affecting this area of the law).

71. Actually, these corporate disclosures during governmental investigations are less in the spirit of cooperation and more a product of calculated advantage. They make the disclosures because it is determined to be in their best interests. This is a decision that individuals under the broad net of governmental investigations and prosecutions have had to make forever, not only with regard to privileges, but also with regard to turning state's evidence. Why should such calculated corporate decisions be permitted, thereby destroying the confidentiality upon which their privilege protection is premised, and achieving their calculated gain, without paying the cost of waiving the privilege protections that they have destroyed?

openness corporations currently experience in their counsels' communications with their employees, that same level of openness likely can be achieved through a corporate "talk or walk" ultimatum. No privilege is justified if its goals can be achieved without suppressing relevant evidence.

If the corporate privilege were abolished, hundreds of millions of dollars would be saved annually in litigation cost, not to mention the costs in maintaining the confidentiality of each communication in order to avoid waiver. Recently, these costs have been compounded with the creation of metadata—the data underlying each document—that is retrievable when documents are produced electronically without first being scrubbed.⁷² Of course the elimination of the privilege would also eliminate the overwhelming majority of privilege claims that judicial officers must review in camera and rule upon. The savings here are incalculable.

Having broached the subject of privilege, I cannot resist commenting on the waiver provisions the Advisory Committee has circulated for public comment. These rules would codify the prevailing views taken by most courts on the subject of inadvertent disclosures—the "oops" rule or claw-back provision—not effecting a waiver, and limited waiver—making disclosures to government agencies without effecting a broader waiver for the remainder of the world. These proposed rules are inappropriate. They are injecting the Advisory Committee codification process into the middle of a vital, evolving area of the law that heretofore has been left to development under common law principles. By doing this, the proposed rules would likely retard the evolution of the privilege that has been so vital under the common law over the past century.⁷³ It also would create the following problems:

First, after disclosures have been made to investigating governmental agencies, and those disclosures are used in enforcement proceedings against either the client or third parties, what happens to the privilege preserved by the proposed provision? Will the government not be permitted to use them? If not, what is the point of encouraging cooperation?

72. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 782 (2004) (defining metadata as "data hidden in documents that is generated during the course of creating and editing such documents . . . includ[ing] fragments of data from files that were previously deleted, overwritten or worked on simultaneously").

73. See generally Rice, *Back to the Future*, *supra* note 4 (advocating a rejection of the codification of privilege rules).

Second, if the disclosed communications are usable, after the confidentiality that historically formed the basis for the privilege has been destroyed, not only through the initial disclosure but also through them being broadcast to the world in subsequent proceedings, how can the privilege continue to survive if the concept of confidentiality has any meaning?

Third, if the privilege does not survive, why should the Advisory Committee create this labyrinth for only a temporary preservation of the privilege?

Another important question that the proposed waiver rules raise is why the law should encourage cooperation only with government agencies. While cooperation with governmental agencies is certainly in the public interest, that interest is often no more compelling than cooperation among adversaries in private litigation that dominates judicial dockets. In addition, the matters in controversy in many private cases, particularly those that are joined for pretrial discovery purposes under the Multi-District Litigation Statute,⁷⁴ may have far more at stake and greater implications for segments of society than matters investigated by the government. But even if a convincing argument could be made for cooperating in governmental investigations to the exclusion of private litigation, an existing remedy is available to corporations through a well-established body of law relating to protective orders that the proposed rules would also codify.⁷⁵ Such protective orders are preferable to a broad limited waiver provision because they are supervised and controlled by judicial officers.⁷⁶

Professor Crump says that he wants to get rid of rules of evidence “that exclude significant amounts of useful evidence” and that do not serve a positive purpose “that perceptibly exceed their effect in making trials more expensive.”⁷⁷ He must have been thinking about the corporate attorney-client privilege, and I think he makes an excellent point.

74. 28 U.S.C. § 1407 (2000). See generally Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33 (1979) (examining the details of multi-district litigation).

75. See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11:20, at 149-51 (2d ed. 1999).

76. For a broader discussion of protective orders, see *id.* §§ 11:20-:24, at 149-61.

77. Crump, *supra* note 10, at 588.

IX. ANOTHER RADICAL PROPOSAL

While radical proposals are being put forward, I offer another. Rather than abolishing selected rules of evidence, why not abolish the entire Federal Rules of Evidence as a *binding* code of procedure? Since the quasi-legislative process of rule making through an advisory committee process has proven to be cumbersome, politicized, and unresponsive, I propose that the Advisory Committee's rules be only what its name suggest—advisory. For centuries, the common law evidence rules have fared as well as the Evidence Code has over the past thirty-five years, if for no other reason than the fact that the common law rules evolved from judicial responses to the equities of individual cases, rather than the biases of advisory committee members and desires of special interest groups. If the rules of evidence were not binding on trial judges, the Advisory Committee would likely be far more willing to propose new and novel approaches because there would be no immediate consequences. Through this guidance, judges could be kept abreast of new ideas and approaches to common problems, and when needs and opportunities arise, they could try them on a limited basis. Through the successes and failures of their use, other judges could assess the likely costs and benefits when used in other contexts. Through this effort, rules and their use would probably develop at a faster rate than they are currently evolving in a codified system that is driven by the common law of judges operating outside the bounds of the rules because they are not being adequately maintained.

X. CONCLUSION

The underlying thesis of Professor Crump's article is a need for more trials. I do not share that view. Trials are not necessarily good things and more trials certainly are not necessarily better. Altering the rules of evidence to accomplish this end is a bit like using the tax code to encourage housing development. It might achieve its goal, but it can be short-sighted and have significant, unanticipated, and unfair consequences for the system. Cases that do not result in trials do not necessarily result in a less fair resolution of disputes. Indeed, settlement negotiations are a process in which there is complete party participation and control. For many, this produces a far quicker, less costly, more understandable, and therefore more acceptable resolution.

The proposals of Professor Crump, however, are a good jumping-off point for a national debate about a vast array of issues that need to be addressed in both the Federal Rules of Evidence and Federal Rules of

Civil Procedure. His concern for efficiency and cost effectiveness certainly has its place in those considerations, but I could not support it as a primary goal. Making democratic institutions operate is seldom easy, and achieving fairness in those institutions is not always efficient. Our rules have developed through centuries of experience. The wisdom reflected in those rules should not be lightly abandoned, particularly with a single, albeit important, goal in mind.

Supporting the common law tradition, I believe that the equities of individual cases should be the driving force behind evidence rules and their changes. Rules promulgated outside those bounds are too easily and too often influenced by vested interests that are adept at dressing up greed and self-interest as equity and fairness. As I have come to trust the wisdom of our predecessors, I also have come to trust more the wisdom of individual judges on a case-by-case basis where something concrete, grounded in equity, is at stake, than the product of committee deliberations, even committees of judges. Both ponder theoretical applications and implications of concrete rules and proposals, but committees do so focused on nothing in particular because nothing of consequence in the immediate is at stake and the lives and interests of real people do not hang in the balance.