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An Essay on Drafting Evidence Legislation and Rules: Challenging the Conventional Wisdom

Edward J. Imwinkelried

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**AN ESSAY ON DRAFTING EVIDENCE LEGISLATION AND
RULES: CHALLENGING THE CONVENTIONAL WISDOM**

*Edward J. Imwinkelried**

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An evidence code should be “a kind of evidence bible for busy trial judges and lawyers.”

– 7 California Law Revision Commission Reports 34 (1965)

I. INTRODUCTION

The last century has witnessed several major efforts at reforming and codifying Evidence law in the United States. As Part I of this Essay explains, those efforts have included the American Law Institute’s Model Code of Evidence,¹ several iterations of the Uniform Rules of Evidence originally promulgated in 1953 by the National Conference of Commissioners on Uniform State Laws,² the California Evidence Code,³ and, of course, the Federal Rules of Evidence.⁴ For decades, Evidence law had largely taken the form of common-law decisions, and Dean Wigmore’s monumental, multi-volume treatise surveying the common law had held sway in the United States.⁵ However, the common law of Evidence was troubled by numerous splits of appellate authority, and, in the words of the California Law Reform Commission, reformers believed that the judicial administration of Evidence law could be vastly improved by producing “an official handbook of the law of evidence—a kind of evidence bible for busy trial judges and lawyers.”⁶

Of course, to reduce the law of Evidence to such a handbook or code, the drafters would have to make numerous substantive choices resolving common-law splits of authority: Should the opponent be permitted to impeach a witness by questioning about untruthful acts that had not resulted in a conviction?⁷ For that matter, what types of convictions ought to be admissible for impeachment purposes?⁸ Should the scope of cross-

1. MODEL CODE OF EVIDENCE (AM. L. INS. 1942).

2. UNIF. R. EVID.

3. CAL. EVID. CODE (WEST 2023).

4. FED. R. EVID.

5. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, JULIE SEAMAN & ERICA BEECHER-MONAS, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 13 (8th ed. 2018).

6. RECOMMENDATION ON PROPOSING AN EVIDENCE CODE, 7 CAL. L. REFORM COMM’N 34 (1965).

7. ROBERT P. MOSTELLER, § 41 *Character: Misconduct, for which there has been no criminal conviction*, in MCCORMICK ON EVIDENCE (8th ed. 2020).

8. *Id.* § 42.

examination be limited to the matters covered on direct examination?⁹ Should there be a hearsay exception for statements of present sense impression?¹⁰ Should there be a residual hearsay exception for reliable out-of-court statements that did not fall within a traditional exception?¹¹ Should a presumption “burst” and disappear from the case as soon as the opponent presents evidence sufficient to rebut the presumed fact?¹² At common law, all these questions had produced sharp splits of appellate authority. If the drafters were to produce the desired handbook for “busy trial judges and lawyers,” the drafters would have to address and resolve those substantive questions in the wording of a statute or rule. The overwhelming majority of the commentary on the Model Code, Uniform Rules, Evidence Code, and Federal Rules addresses the wisdom of the resolutions proposed by the drafters.

However, the purpose of this short Essay is to discuss another choice facing the drafters: the manner or style in which the handbook’s provisions ought to be drafted. In his Foreword to the Model Code of Evidence, the great 20th-century reformer, Professor Edmund Morgan, put the matter succinctly: The choice was among a creed, a catalog, or a code.¹³ A creed would merely state aspirational goals and empower trial judges to exercise very wide discretion to make rulings that, in their mind, promoted those goals. At the polar extreme, a catalog would prescribe detailed evidentiary rules for every foreseeable trial situation and largely deny trial judges any discretion. In contrast, a code would state flexible principles that are more particularized than aspirational goals and grant trial judges limited discretion to apply those principles to specific fact patterns.

At first blush, the choice of a drafting style might seem inconsequential—certainly less important than the substantive policy choices entailed in resolving common-law splits of appellate authority. However, the selection of a drafting style has profound implications. As we shall see in Part II of this Essay, today the vast majority of cases do not go to trial; rather, they settle before trial.¹⁴ In some jurisdictions, only 1% of the cases that find their way into attorneys’ offices culminate in a trial.¹⁵ Before entering into serious compromise negotiations, the attorney

9. *Id.* § 21.

10. *Id.* § 271.

11. *Id.* §§ 326–27.

12. *Id.* § 344.

13. MODEL CODE OF EVIDENCE, *supra* note 1, at 13.

14. *See infra* notes 162–76 and accompanying text.

15. *See infra* note 169.

must attempt to assess the case's settlement value. To do so, the attorney attempts to predict the evidentiary rulings that a trial judge would make if the case went to trial. When the relevant evidence statute or rule is worded too broadly and vaguely, it can become difficult for the attorney to make that assessment. The United States may be the most litigious society in the world; we probably have more courtrooms, judges, and attorneys than any other nation.¹⁶ Nevertheless, our litigation system would be overwhelmed if we did not settle well more than 95% of the cases that could potentially necessitate a trial.¹⁷

One countervailing consideration is that phrasing evidence legislation and rules in too detailed a fashion could preclude the litigation system from adapting to the fast pace of technological change.¹⁸ The California Evidence Code took effect on January 1, 1967.¹⁹ The effective date of the Federal Rules of Evidence is January 2, 1975.²⁰ At that time, no court had ever confronted an evidentiary issue related to an e-mail, text message, social media post,²¹ digital photograph,²² or blockchain record.²³ Yet, today a huge percentage of communication and recordation takes those forms. If drafters opted for an inflexible, catalog format that precluded litigators from introducing evidence based on these useful technological innovations that emerged later, the courts would become a laughing stock.²⁴ Moreover, the rationales for most evidentiary rules rest on generalizations, and more flexible wording empowers the trial judge to adapt the application of the rule to do justice on the specific facts of the case.

16. As of 2022, there are 1,352,072 licensed lawyers in the United States, 143,400 lawyers in the United Kingdom, and 522,500 in the People's Republic of China. A Google search (last visited July 21, 2022). *See also* James Douglas Welch, *Settling Criminal Cases*, 6 LITIGATION 1, Fall 1979, at 32.

17. David Balabanian, *Concept of "Discovery Abuse" Has Been Oversold*, LEGAL TIMES, Nov. 12, 1984, at 14.

18. Edward J. Imwinkelried, *The Case Against Evidentiary Admissibility Standards That Attempt to "Freeze" the State of a Scientific Technique*, 67 U. COLO. L. REV. 887 (1996).

19. Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. U. L. REV. 279, 279 (1971).

20. UNIF. R. EVID., *supra* note 2, at 1.

21. EDWARD IMWINKELRIED, PAUL GIANNELLI, FRANCIS GILLIGAN, FREDRIC LEDERER & LIESA RICHTER, COURTROOM CRIMINAL EVIDENCE § 404 (6th ed. 2016).

22. *Id.* § 410.

23. *See supra* note 16.

24. Graham, *supra* note 19, at 307 (quoting Petition of Fla. State Bar Ass'n for Promulgation of New Fla. R. Civ. Proc., 145 Fla. 223, 230, 199 So. 57, 60 (1940) (Terrell, C.J.) ("It is inconceivable that litigants of the present who transact business at the press of a button . . . , traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam to travel the highway of justice on the back of an ass We owe it to society to hike the administration of justice off the ass"))

A conventional wisdom has emerged regarding how the drafters of evidence legislation and rules ought to strike the balance between these competing considerations. The received orthodoxy is reducible to two propositions. One is that the drafters should follow a catalog approach in one doctrinal area. As Part I explains, that area is privilege law.²⁵ Dean Wigmore's instrumental theory has long dominated that area. According to that theory, the typical layperson such as a client or patient is greatly concerned about subsequent, compelled judicial disclosure of his or her revelations to confidants such as attorneys and therapists. That concern is so acute that but for the assurance of privacy furnished by an absolute privilege, the layperson would not consult with or confide in attorneys and therapists. This theory views the creation of absolute privileges as an essential instrument or means of encouraging certain types of desirable, out-of-court communications. If the layperson knows that there is such a privilege, when the layperson has to decide whether to consult or confide, he or she can confidently predict that their revelation will remain confidential. To provide such assurance, the privilege must be a bright line, detailed rule drafted in a catalog style.

Part I also describes the second component of the conventional wisdom. That component is that a code format is the best approach to phrasing evidentiary rules controlling the other doctrinal areas.²⁶ A creed would grant the trial judge unfettered discretion and make it problematic for attorneys to intelligently engage in pretrial settlement negotiations. A mere announcement of abstract goals would make it hard, if not impossible, to predict trial evidentiary rulings and gauge the settlement value of a case. However, according to this view, attempting to extend the catalog approach to doctrinal areas other than privilege would be a mistake. Thus, rather than providing an exhaustive list of the means of authenticating evidence, the drafter should state a flexible standard²⁷ and then add an illustrative²⁸ list of examples.²⁹ Similarly, rather than codifying an exclusive list of admissible types of hearsay, the drafters ought to provide examples of reliable hearsay³⁰ but add a residual

25. See *infra* notes 35–58 and accompanying text.

26. See *infra* notes 59–120 and accompanying text.

27. E.g., FED. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).

28. FED. R. EVID. 901(b) (“The following are examples only—not a complete list—of evidence that satisfies the requirement”).

29. FED. R. EVID. 901(b)(1)–(10).

30. FED. R. EVID. 803–04.

exception³¹ giving the judge discretion to admit demonstrably reliable, necessary hearsay that does not fall within an enumerated exception. In a passage accompanying one of the original residual exception provisions in the Federal Rules, the Advisory Committee declared:

The preceding . . . exceptions are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. [R]oom is therefore left for growth and development of the law of evidence in the hearsay area³²

The original residual exceptions, therefore, authorized trial judges to admit hearsay that did not fall within an enumerated exception when the hearsay possessed circumstantial guarantees of trustworthiness “equivalent” to that of enumerated exceptions and the hearsay was the most probative evidence reasonably available to the proponent.³³

The thesis of this Essay is that subsequent developments have undermined both components of the received orthodoxy. Part I of this Essay is descriptive; it reviews both elements of the conventional wisdom in detail. Part I demonstrates that for decades, the prevailing sentiment has been that drafters should take a catalog approach to phrasing legislation or court rules governing privileges. Those rules supposedly must be set out in very detailed, bright-line terms. Part I acknowledges that beginning with the Model Code, there has been more controversy with respect to drafting rules for other areas of evidence doctrine, but the clear trajectory has been toward a code format rather than a catalog or a creed.

Part II of this Essay argues that subsequent developments have undermined both components of the conventional wisdom. While Part I describes the conventional wisdom, Part II represents a critical evaluation of the received orthodoxy. To begin with, the world does not revolve around the courtroom to the extent that Dean Wigmore assumed. In many cases, the layperson would communicate and confide even absent an absolute privilege set out in detail. Both common sense and numerous empirical studies show that in the moment, a troubled layperson is often focused on the “here and now” problem,³⁴ not the possibility of compelled

31. FED. R. EVID. 807.

32. Fed. R. Evid. 803(24) Adv. Comm. Note.

33. FED. R. EVID. 803(24).

34. Edward J. Imwinkelried, *Court Ducks Larger Privilege Issues Yet Again*, NAT'L L. J., July 20, 1998, at A22.

judicial disclosure years later in a lawsuit that might never be filed. The case for bright line phrasing of privilege statutes and rules is weaker than the orthodox view assumes.

Moreover, as Part II elaborates, in the years since the enactment of the California Evidence Code and the Federal Rules of Evidence, the number of cases taken to trial has declined precipitously. As previously stated, in some jurisdictions, only 1% of cases that find their way to attorneys' offices culminate in trial. In the vast majority of cases, attorneys do not turn to evidence legislation and rules during trial or even on the eve of trial to prepare to argue such issues. Instead, they put the legislation and rules to a very different use, namely, making a pretrial assessment of the case's settlement value. As the California Law Revision Commission observed, trial judges and attorneys may indeed be "busy," but in the macrocosm, they are busy settling cases, not trying them. A flexible rule stated in a code format might be desirable to allow a judge to adjust to an unanticipated development at trial, but the attorney preparing for pretrial settlement negotiation can be frustrated by the wording of such a rule. In most cases that will settle short of trial, the attorney would arguably prefer a statute or rule that provides clearer guidance.

Part III of this Essay synthesizes the analysis in Part II. Part III makes the case for convergence between the catalog approach reserved for privilege rules and the code approach typically taken to other areas of evidence doctrine. If the case for bright line privilege rules is weaker than it has been made out to be and the case for more specific rules for other doctrinal areas is stronger than it has been made out to be, perhaps the approaches taken to the two areas of evidence law should be modified. The approaches ought to move in the direction of convergence.

II. A DESCRIPTION OF THE CONVENTIONAL WISDOM: A CATALOG APPROACH FOR PRIVILEGES AND A CODE APPROACH FOR OTHER AREAS OF EVIDENCE DOCTRINE

A. *The Doctrinal Area of Privileges*

For decades, Dean Wigmore's approach to privilege law has dominated that area of American evidence. On numerous occasions, the United States Supreme Court itself has cited and endorsed Wigmore's approach.³⁵ Wigmore was a disciple of the great British utilitarian

35. *E.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996); *United States v. Zolin*, 491 U.S. 554, 562–63 (1989); *Fisher v. United States*, 425 U.S. 391, 402–04 (1976); *Wolfe v. United States*, 291 U.S. 12, 14 (1934).

philosopher Jeremy Bentham.³⁶ In his celebrated 1827 work, *Rationale of Judicial Evidence*, Bentham attacked most privilege as impediments to the search for truth.³⁷ He called for the abolition of most privileges, including the attorney-client privilege. Bentham forcefully argued that the priority for any judicial system must be rectitude of decision.³⁸

Wigmore embraced Bentham's argument.³⁹ However, Wigmore realized that Bentham's efforts had met with only limited success in the United Kingdom and the United States.⁴⁰ In the words of the 1962 Judicial Conference Committee's Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules for the United States District Courts, in the main the common law of privilege had "resisted" Bentham's thunderous attack.⁴¹ Therefore, rather than following in Bentham's footsteps and calling for outright abolition, Wigmore devised a different, more limited strategy. He proposed a set of criteria for recognizing privileges that would make it difficult for courts to either create new privileges or expand existing privileges.⁴² In an oft-quoted passage in his treatise, Wigmore wrote:

Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts required in a court of justice, and keeping in view the preponderance of extrinsic policy which alone can justify the recognition of any such exception . . . , four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

1. The communications must originate in the confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

36. See WILLIAM TWING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985).

37. EDWARD IMWINKELRIED, § 2.5 *Transition to Modern Privilege Doctrine*, in *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* (4th ed. 2022).

38. *Id.* § 3.2.2.

39. J. WIGMORE, *EVIDENCE*, § 2192, 73 (McNaughton rev. 1961).

40. TWING, *supra* note 36, at 99, 108.

41. COMM. ON RULES OF PRAC. AND PROC., U.S. JUD. CONF., *RULES OF EVIDENCE: A PRELIMINARY REP. ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIF. RULES OF EVIDENCE FOR THE U.S. DIST. CTS.* 43 (1962).

42. Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 *GEO. WASH. L. REV.* 1, 40–41 (1980).

4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized. These four conditions must serve as the foundation of policy for determining all . . . privileges . . .⁴³

The second criterion is the most important. In effect, the proponent of a privilege must demonstrate that but for the existence of a privilege, the average similarly situated person would be deterred from either consulting the third party or making necessary disclosures during the consultation.⁴⁴ This criterion enabled Wigmore to reconcile the recognition of a privilege with Bentham's priority of rectitude of decision:

In a perfect [Wigmorean] world, the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears . . . [T]he privilege would protect only . . . statements that would not otherwise have been made. [T]he privilege is . . . a but-for cause of all [privileged] communications.⁴⁵

In announcing this criterion, Wigmore was echoing some of the early English cases on legal advice (attorney-client) privilege.⁴⁶ If a proposed privilege could satisfy this criterion, the exclusion of a privileged communication at trial would be an evidentiary "wash"—the privileged statement would never have been made but for the court's prior recognition of the privilege.⁴⁷

After stating these criteria, Wigmore drew two important implications. First, as a general proposition, privileges had to be absolute. Although they could be waived and subject to exceptions announced beforehand, they could not be surmounted by a subsequent, ad hoc showing of need for the privileged information.⁴⁸ At the very instant the layperson has to decide whether to consult and confide, he or she must be

43. WIGMORE, *supra* note 39, at § 2285, 527–28.

44. I. H. DENNIS, *THE LAW OF EVIDENCE* 307 (1st ed. 1999) (without the privilege, the layperson would "hold . . . back").

45. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31.

46. *Greenough v. Gaskell*, (1833) 1 My & K 98, 103 (Eng.) ("If the privilege did not exist at all, every one would be thrown upon his own legal resources[]; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.").

47. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 999 (1999).

48. IMWINKELRIED, *supra* note 37, at § 3.2.4.

able to confidently forecast that there will not be a later, judicially compelled disclosure of the confidence he or she reveals. If a court could later override the privilege on the basis of a case-specific showing of need for the information, the layperson could not have that confidence. “The privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity, or any circumstances peculiar to the case.”⁴⁹

The second implication is one of more interest for our inquiry: The scope of the privilege and that of any exceptions to the privilege must be defined in clear, bright-line terms.⁵⁰ On several occasions, the Supreme Court has endorsed Wigmore’s view. In its 1981 decision in *Upjohn v. United States*,⁵¹ the Court declared that the participants in confidential conversations “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain, is little better than no privilege at all.” In 1998, in *Swidler & Berlin*,⁵² the Court wrote that “uncertain privileges are disfavored.” The second implication is closely related to the first. Again, the layperson supposedly must be able to predict that a court will later honor the privilege to protect the layperson’s revelation. If the scope of the privilege is stated in loose, vague terms, the layperson cannot have that confidence.

Positing the second implication, it is natural to prefer the catalog approach to drafting any statute or court rule stating a privilege. By way of example, the California Evidence Code contains detailed privilege provisions. The Code includes ten general privilege provisions on such matters as waiver of privilege and adverse comment on the invocation of privilege.⁵³ There are 14 specific provisions on attorney-client privilege,⁵⁴ 8 on the spousal communications privilege,⁵⁵ 18 on the medical privilege,⁵⁶ and 19 on the psychotherapy privilege.⁵⁷ The Advisory Committee, which prepared the draft of the Federal Rules that was submitted to Congress sympathized with that approach. Its draft Article V included lengthy, detailed provisions devoted to attorney-client privilege

49. *Los Angeles County Bd. of Supervisors v. Superior Court*, 235 Cal. App. 4th 1154, 185 Cal. Rptr. 3d 842, 850 (2015), *rev’d on other grounds*, 2 Cal.5th 282, 386 P.3d 773, 212 Cal. Rptr. 3d 107 (2016). See also PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2.2 (2d ed. 1999).

50. Smith, *supra* note 42, at 48.

51. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

52. *Swidler & Berlin v. United States*, 524 U.S. 399, 402 (1998).

53. CAL. EVID. CODE §§ 911–20.

54. *Id.* at §§ 950–62.

55. *Id.* at §§ 980–87.

56. *Id.* at §§ 990–1007.

57. *Id.* at §§ 1010–1027.

(proposed Rule 503), psychotherapy privilege (proposed Rule 504), and government privilege (proposed Rule 509). It is true that due to opposition from various special interest groups, Congress ultimately rejected those provisions.⁵⁸ However, the length and elaborate detail of proposed Rules 503, 504, and 509 demonstrate that, like the California Evidence Code drafters, the Committee shared Wigmore's belief that a catalog format is the optimal style for drafting privilege legislation and rules.

B. *Other Doctrinal Areas in Evidence Law*

As the Introduction pointed out, modernly, there is a general consensus that with the exception of statutes and rules dealing with privileges, evidence statutes and rules dealing with other doctrinal areas should follow a code format, stating flexible standards and granting trial judges discretion to adapt the standard to the specific facts of the pending case. After all, the trial judge is “the only lawyer in the courtroom [most] concerned about the public interest in justice.”⁵⁹ Rather than attempting to constrain the trial judge with “hard-and-fast rules,”⁶⁰ reformers sought to accord the judge “a large measure of discretion”⁶¹ in evidentiary rulings to see that “justice is done”⁶² on the specific facts of the case. The consensus with respect to privilege rules has existed for decades, but as we shall now see, the present consensus for other evidence statutes and rules in other doctrinal areas evolved in a gradual, halting fashion.

In the 19th century, a number of states adopted versions of the famous Field Code.⁶³ In California, some of those provisions found their way into that state's 1872 Code of Civil Procedure.⁶⁴ Many of those provisions

58. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41 (2006). Representative Hungate chaired the House committee that listened to one special interest group after another attack the proposed rules as either too broad or too narrow. He then became the first witness in the subsequent Senate hearings on the proposed rulings. He warned the Senate committee members that if they attempted to draft provisions on particular privileges, “the social workers and piano tuners” would line up to demand privileges. *Rules of Evidence, Committee on the Judiciary*, U.S. Senate, 93d Cong., 2d Sess. At 6 (June 4-5, 1974). Ironically, the Supreme Court later recognized a psychotherapy privilege extending to communications with licensed clinical social workers. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

59. Graham, *supra* note 19, at 290.

60. *Id.* at 299.

61. *Id.* at 307.

62. *Id.* at 299.

63. ROSCOE POUND, *David Dudley Field: An Appraisal*, in *FIELD CENTENNARY ESSAYS* 1 (A.Reppy ed. 1949); ALISON REPPY, *The Field Codification Concept*, in *FIELD CENTENNARY ESSAYS* 17 (A.Reppy ed. 1949).

64. *People v. Spriggs*, 60 Cal. 2d 868 (1964). Oregon also adopted some of the provisions of the Field Code. CARLSON, *supra* note 5, at 13.

reflected the influence of European civil law thinkers who favored lengthy, self-contained civil codes.⁶⁵ These provisions tended to be cast in the catalog mold, and American reformers faulted those provisions as “long and complex,” “difficult to read,” and “more difficult to understand.”⁶⁶

1. The Model Code of Evidence

The American Law Institute favored repealing those provisions and replacing them with a drastically revised code. In 1923, the ALI undertook to draft such a code.⁶⁷ Its efforts produced the 1942 Model Code of Evidence.⁶⁸ The drafters deliberately prepared several broadly worded provisions that gave trial judges enhanced power and discretion.⁶⁹ A Committee of the State Bar of California vigorously attacked the Code on the ground that the wording of its provisions could be construed as granting trial judges extraordinary, excessive power.⁷⁰ The report was a veritable diatribe against the Code.⁷¹ Many state bars shared that negative view, and the Code was never adopted in any state.⁷² Although there was widespread sentiment that the lengthy Field Code provisions went too far in the direction of a catalog, at this point in the 1940s, most viewed the Model Code as swinging the pendulum too far in the opposite direction, stopping just short of a creed or naïve act of faith in the trial judiciary. In 1949, the ALI passed the reform baton by referring the Model Code to the National Conference of Commissioners on Uniform State Laws.⁷³

2. The Uniform Rules of Evidence

In 1953 the National Conference released the initial version of its Uniform Rules of Evidence.⁷⁴ The Conference viewed the Uniform Rules as “a much more modest program of reform”⁷⁵ than the Model Code. The

65. Graham, *supra* note 19, at 293 n.58.

66. *Id.* at 292–93 nn.56–58 (quoting the California Law Revision Commission). See 7 CAL. L. REV. COM. REP. 30 (1965).

67. Graham, *supra* note 19, at 279.

68. AMERICAN LAW INSTITUTE, *supra* note 1.

69. *Id.* at 12.

70. Rep. of Comm. on Admin. of Just. on Model Code of Evidence, 19 CAL. ST. B.J. 262 (1944).

71. Graham, *supra* note 19, at 289.

72. *Id.* at 279.

73. B. WITKIN, CALIFORNIA EVIDENCE § 2, at 10 (5th ed. 2012).

74. Graham, *supra* note 19, at 279.

75. *Id.*

Rules followed the same basic outline as the Model Code.⁷⁶ Moreover, like the Model Code, several of the Uniform Rules stated relatively “broad rather than detailed rules.”⁷⁷ However, the Rules modified or omitted a number of the most controversial Model Code provisions that enhanced the trial judge’s power and discretion in evidentiary rulings.⁷⁸ The American Bar Association lent its support to the Uniform Rules.⁷⁹

3. The California Evidence Code

Although California lawmakers had rejected the Model Code out of hand, their initial reaction to the Uniform Rules was quite different; the California legislature directed the California Law Revision Commission to study the Rules with a view to deciding whether California should enact the Rules.⁸⁰ The Commission did so for eight years.⁸¹ Ultimately, though, the Commission recommended against adopting the Rules.⁸² The Commission criticized several Uniform Rules for their “extreme length.”⁸³ Instead, the Commission recommended a new restatement of California Evidence law with some innovations.⁸⁴ The Commission’s stated objective was to produce “in effect, an official handbook of the law of evidence—a kind of evidence bible for busy trial judges and lawyers.”⁸⁵ The end product of the Commission’s work was the California Evidence Code, which was adopted in 1965 and took effect on January 1, 1967.⁸⁶

In several respects, the California legislation follows a true code model. The code limits the ability of the courts to enforce uncodified restrictions or recognize new exclusionary rules of evidence. Section 351 declares that “[e]xcept as otherwise provided by statute, all relevant

76. WITKIN, *supra* note 73, at § 3, at 11. In 1974 and 1999, the Uniform Rules were amended to conform to the structure of the Federal Rules of Evidence. *Id.* at § 3, at 10-11. The amended section numbers now are the same as those of the Federal Rules; and like the Federal Rules of Evidence, the Rules are divided into 11 subjects. The latest version of the Uniform Rules “is the basis for the evidence statutes in a majority of states. *Id.*

77. *Id.* at § 3, at 11.

78. *Id.*

79. Graham, *supra* note 19, at 279. Kansas, New Jersey, Utah, and the Virgin Islands adopted some of the provisions of the Uniform Rules. Carlson, *supra* note 5, at 13.

80. Graham, *supra* note 19, at 179, citing 7 CAL. L. REVISION COMM’N REP. 29, 32 (1965).

81. *Id.* at 291.

82. *Id.* at 279.

83. 7 CAL. L. REVISION COMM’N REP. 29, 33, quoted in Witkin, *supra* note 73, at 23.

84. *Id.*

85. *Id.*

86. Graham, *supra* note 19, at 279.

evidence is admissible.”⁸⁷ Section 911 restates this principle with respect to privileges:

Except as otherwise provided by statute,

- (a) No person has a privilege to refuse to be a witness.
- (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
- (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.⁸⁸

In a very real sense, the decisions embodied in these provisions expanded the California trial judge’s power. The provisions not only freed the trial judge from the constraints of pre-existing common-law rules that were not codified but also deprived California appellate courts of the power to enunciate new categorical, case-law limitations on the trial judge’s power.

Dissatisfied with the appellate development of evidence law, the reformers not only wanted to generally expand trial judges’ power. In addition, they wanted to confer discretionary power on trial judges to enable them to adapt evidentiary norms to the specific facts of the case. Consequently, the Code contains many short, one-sentence provisions intended to grant the trial judge discretionary power, albeit not the extent of discretion granted by the Model Code. In the words of the Commission, “the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of law. As a general rule, the code permits the courts to work toward greater admissibility of evidence”⁸⁹ Two examples—authentication and hearsay—will suffice. For instance, § 1400 sets out the authentication standard in a single sentence: “Authentication of a writing means . . . the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is”⁹⁰ It is true that §§ 1411-21 restate a number of traditional authentication techniques.⁹¹ However, many of those provisions consist of a single, short sentence,⁹² and, more importantly, the list is preceded by § 1410 reading: “Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.”⁹³ Even when the text of the Code is not as

87. CAL. EVID. CODE § 351 (West).

88. *Id.* at § 911.

89. Witkin, *supra* note 73, at § 14, at 26, quoting 7 CAL. L. REVISION COMM’N REP. 29, 34.

90. CAL. EVID. CODE § 1400 (West 2023).

91. *Id.* at §§ 1411-21.

92. E.g., *id.* at §§ 1411, 1413, 1415, 1420-21.

93. *Id.* at § 1410.

explicit as the authentication provisions, the same result can obtain when Code provisions are read in context and in light of the legislative history. Thus, § 1200(b) announces that “[e]xcept as provided by law, hearsay evidence is inadmissible.”⁹⁴ At first blush, this provision might seem to deny the courts the flexibility to admit demonstrably reliable, necessary hearsay evidence that does not fall within an enumerated exception. However, § 160, part of the context of § 1200, reads: “‘Law’ includes . . . decisional law.”⁹⁵ In that light, the Senate Judiciary Committee’s revision of the Comment to § 1200 states: “Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law.”⁹⁶ The bottom line is that with the exception of the privilege area, the California drafters rejected the catalog model and moved sharply toward the code format although not as open-textured a statutory scheme as the Model Code of Evidence.

4. The Federal Rules of Evidence

In 1961, four years before the approval of the California Evidence Code, Chief Justice Earl Warren appointed a Special Committee on Evidence tasked with determining whether it was feasible and advisable to develop uniform evidentiary rules for all federal courts.⁹⁷ After that committee recommended the development of a uniform set of rules, in 1965, the Chief Justice appointed an advisory committee to draft proposed rules.⁹⁸ In late 1972 the Supreme Court approved the rules and authorized the Chief Justice to transmit the draft rules to Congress.⁹⁹

In the past, when the Court had proposed the Federal Rules of Civil and Criminal Procedure, Congress had permitted the draft rules to take effect without a single amendment.¹⁰⁰ However, in the case of the draft Evidence Rules, Congress reacted negatively—so strongly that its initial reaction almost doomed the entire Evidence Rules project.¹⁰¹ As previously stated, the draft Rules contained a lengthy provision on government privilege. That provision was a focal point of controversy:

94. *Id.* at § 1200.

95. *Id.* at § 160.

96. EDWARD J. IMWINKELRIED & ALBERT J. MENASTER, CALIFORNIA EVIDENCE CODE ANNOTATED 364 (Desktop ed. 2022).

97. Carlson, *supra* note 5, at 14.

98. *Id.*

99. *Id.*

100. *Id.*

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

[T]he Rules of Evidence reached Congress in the aftermath of Watergate—a time when many of its members sought to reclaim powers believed to have been lost by that branch to the executive and the judiciary. The timing was terrible; the draft Rules, including [the] broad government privilege provision, arrived on Congress’ desk at the very time that Congress was battling Richard Nixon in federal court over claims of executive privilege.¹⁰²

In early 1973 both houses of Congress quickly passed resolutions blocking the implementation of the draft Rules.¹⁰³ Both houses then proceeded to hold hearings on the draft. The House held its hearings first. The proposed government privilege was not the only target of criticism during the hearings; many witnesses also objected to the omission of a general medical privilege and a spousal communications privilege.¹⁰⁴ During the hearings, virtually every proposed privilege rule was attacked as being overly broad, too narrow, or both overly broad in some respects and too narrow in other respects. The denouement was that the House Judiciary Committee voted to delete all 13 specific proposed privilege provisions in Article V and replace them with a single Rule 501 directing the courts to determine privilege issues based on “the principles of the common law as they may be interpreted . . . in light of reason and experience.”¹⁰⁵ The House chair, Representative Hungate, was the first witness in the subsequent Senate hearings. In essence, he warned the Senate Committee that privilege issues were a political Pandora’s box; he told the Senate Committee that if it was foolish enough to open up that box, every special interest group, including “the social workers and the piano tuners,” would demand a privilege.¹⁰⁶ When the dust settled, the final legislative package approved by Congress in 1974 omitted all the provisions of draft Article V and included only Rule 501.¹⁰⁷ For present purposes, though, the point is that Congress did not reject draft Article V on the ground of its format or drafting style. Article V was doomed by the political reality that Congress did not perceive a national consensus on the substantive policy choices embodied in the draft privilege rules. Thus, while Congress rejected draft Article V, its reasons for doing so were not at odds with the first element of the conventional wisdom that if a

102. Carlson, *supra* note 5, at 14.

103. *Id.* at 15.

104. The New Wigmore, *supra* note 37, at § 4.2.2.b, at 273.

105. *Id.* at § 4.2.2.c, at 274–75.

106. COMM. ON THE JUDICIARY, 93D CONG., RULES OF EVIDENCE 3, 6 (Comm. Print 1974).

107. The New Wigmore, *supra* note 37, at § 4.2.2.f, at 284–85.

privilege rule is to be codified, it ought to be set out in detailed, catalog fashion.

Moreover, some commentators have observed that the final wording of the Federal Rules provisions in other doctrinal areas represents a triumph for the second element of the conventional wisdom that trial judges' discretion should be expanded¹⁰⁸ and that the wording of the provisions relating to those areas ought to be broad enough to support that discretion. Thus, the Federal Rules fit into a mold similar to that of the California Evidence Code. That should come as no surprise, since the timing allowed the Advisory Committee to consider the Code provisions that had recently been enacted. The Advisory Committee Notes to many Federal Rule of Evidence provisions expressly cite a Code provision as a drafting model.¹⁰⁹ The final version of the Federal Rules is replete with illustrations of that triumph. Like Evidence Code § 351, Federal Rule 402 purports to mandate the admission of all relevant evidence unless the Constitution, a federal statute, a provision in the Rules, or another rule prescribed by the Supreme Court is to the contrary.¹¹⁰ In general, the Supreme Court has construed Rule 402 as impliedly abolishing uncodified exclusionary rules and depriving the courts of the power to enunciate new categorical exclusionary rules.¹¹¹ As in the case of the Evidence Code, the net effect is to increase the trial judge's power to admit relevant evidence.

Many specific Federal Rule provisions parallel the Code Evidence and also reflect the code model. Like Evidence Code § 1400, Rule 901(a) prescribes a general standard for authentication: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."¹¹² Like Evidence Code §§ 1411-21, Rules 901(b)(1)-(10) list several satisfactory authentication foundations,¹¹³ and like Code § 1410, the introductory language in Rule 901(b) expressly states that the listed foundations are "examples only—not a complete list—of evidence that satisfies the [authentication]

108. Witkin, *supra* note 73, at § 5, at 12.

109. *See, e.g.*, the express references to California Evidence Code provisions in the Advisory Committee Notes to Fed. R. Evid. 102, 104-05, 201, 403-04, 406-09, 411, 605-07, 609-10, 613, 615, 701, 703-06, 801, 803-04, 806, and 901-02.

110. FED. R. EVID. 402.

111. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (the enactment of the Federal Rules impliedly abolished the traditional, general acceptance standard for the admission of scientific testimony).

112. FED. R. EVID. 901(a).

113. *Id.* at 901(b)(1)-(10).

requirement.”¹¹⁴ While the Evidence Code implicitly recognizes a residual hearsay exception once § 1200 is construed in the context of § 160, the current version of Federal Rule 807 explicitly allows the trial judge to admit hearsay that does not fall within a statutorily enumerated exception if, in his or her discretion, the judge finds that

1. the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
2. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.¹¹⁵

Some provisions, such as Federal Rules of Evidence 403, 412, and 609, give the judge the discretionary power to exclude relevant evidence balancing probative value against countervailing probative dangers.¹¹⁶ Rule 403 is the leading example, authorizing the judge to weigh “probative value” against the probative dangers of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”¹¹⁷—language that brings to mind Justice Scalia’s caution about the difficulty of determining “whether a line is longer than a rock is heavy.”¹¹⁸ Admittedly, Rule 403 does not expressly mention “discretion.” However, the nature of the balancing process is inherently discretionary since it is impossible to quantify or estimate these incommensurable factors on the same scale.¹¹⁹

The code model also underlies the provisions embodying rules of limited admissibility, such as Rules 404 and 407-09. These provisions bar the admission of particular types of evidence for certain purposes but empower the judge to determine that the specific facts of the case support an alternative, permissible use of the evidence.¹²⁰ These provisions announce an exclusionary rule but give the trial judge the flexibility to determine that on the specific facts of the case the exclusionary rule does

114. *Id.* at 901(b).

115. *Id.* at 807(a).

116. *Id.* at 403, 412, and 609.

117. *Id.* at 403.

118. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988).

119. *United States v. Coleman*, 930 F.2d 560, 563 (7th Cir. 1991); *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir. 1991).

120. *FED. R. EVID. 404, 407-09*, 28 U.S.C.A. Of course, on request, the trial judge must give the jury a limiting instruction. *Id.* at *FED. R. EVID. 105*. The negative prong of the instruction should identify the forbidden purpose while an affirmative prong ought to describe the permissible use of the evidence for the jury.

not foreclose the particular theory of logical relevance that the proponent has advanced. In all these cases, true to the code model, the wording of the Federal Rule is broad enough to expressly or implicitly confer discretion on the trial judge. These grants of discretion are generally more circumscribed than those in the Model Code, but the basic drafting format is a code, not a creed or a catalog.

III. A CRITICAL EVALUATION OF THE CONVENTIONAL WISDOM: THE DEVELOPMENTS THAT RAISE GRAVE QUESTIONS ABOUT BOTH PARTS OF THE RECEIVED ORTHODOXY

Part I describes the two-part conventional wisdom as to the manner in which reformers should draft evidence legislation and rules. One component is the proposition that because laypersons need to know whether they can safely confide in persons such as attorneys and therapists, privilege legislation and rules ought to follow a catalog format; the wording should be so detailed that at the very time he or she has to decide whether to consult and confide, the layperson can confidently predict whether their revelation will later receive privilege protection in court. The second component is the proposition that statutes and rules describing other evidentiary rules should be phrased more broadly. In other doctrinal areas of evidence law, following the code model, the wording ought to state flexible principles and give trial judges discretion to do justice by adapting the principle to the particular facts of the specific case. Part II undertakes a critical evaluation of both propositions.

A. The Doctrinal Area of Privileges

Concededly, Wigmore was correct in thinking that privilege legislation and rules should be phrased in a highly detailed fashion *if* laypersons are so concerned about subsequent compelled disclosure of the revelations that they will not consult or confide without the assurance of an absolute privilege. The need for such wording follows as a corollary of Wigmore's premise about the typical layperson's frame of mind. The crucial question, though, is whether that assumption about the layperson's state of mind is warranted. There is a long tradition of using available psychological research to critique the assumptions underlying traditional evidentiary norms.¹²¹ We shall now consider some of the pertinent

121. Michael Saks & Barbara Spellman, *The Psychological Foundations of Evidence Law* (2016); Graham, *supra* note 19, at 286; I. Daniel Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L.REV. 1; Robert

research and review some of the common sense doubts raised about Wigmore's instrumental paradigm for privileges.

In the case of privileges, quite apart from the relevant empirical research, there are reasons to be skeptical about Wigmore's premise. As Professor Edward Cleary, the Reporter for the original Federal Rules Advisory Committee observed, it is ridiculous to think that a patient would withhold necessary information from a physician if the patient thought that he or she were suffering from a life-threatening disease; if the patient believes that "life itself [is] in jeopardy," any rational patient will disclose even absent a privilege.¹²² In 2019, the New Mexico Supreme Court prospectively abolished the spousal communications privilege in that jurisdiction.¹²³ In rejecting an instrumental justification for the privilege, the court opined that many spouses are probably unaware of the existence of the privilege and that, in any event, it is unrealistic to assume that they rely on the privilege in the vast majority of their interactions.¹²⁴ During the Congressional hearings on the then-proposed Federal Rules, Professor J Francis Paschal of Duke University stated that perhaps the majority of attorney-client communications occur "pre-litigation."¹²⁵ In a classic English case on legal professional privilege, Lord Scott bluntly stated:

It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides.¹²⁶

There are not only common-sense doubts about the validity of the essential premise of the instrumental paradigm; there are also empirical

M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV.L.REV. 860 (1928).

122. *Fed. Rules of Evidence: Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Fed. Crim. L. of the S. Comm. on the Judiciary*, 93d Cong. 556 (1973). See also P. K. Waight & C.R. Williams, *Evidence Commentary and Materials* 246 (5th ed. 1998) ("The Statute Law Revision Commission in Victoria [Australia found that there was not even] . . . a tittle of evidence to support a somewhat loosely held belief that patients withheld information from their physicians" due to a lack of a medical privilege).

123. *People v. Gutierrez*, 482 P.3d 700 (N.M. 2019), clarified, 2021-NMSC-008 (N.M. Nov. 5, 2020).

124. *Id.* The court later reinstated the privilege to allow the bar and public to provide input to the decision whether to abolish the privilege.

125. *Fed. Rules of Evidence: Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Fed. Crim. L. of the S. Comm. on the Judiciary*, 93d Cong. 88–89 (1973).

126. *PJSC Tatneft v. Bogolyubov*, (2020) EWHC 2437 (Comm.) (Eng) (Mrs. Justice Moulder), quoting Lord Scott in *Three Rivers* (No. 6) [2005] 1 AC 610.

studies that challenge that premise. Some studies relate to the attorney-client privilege.

The pioneering research was reported in *Yale Law Journal* in the early 1960s.¹²⁷ The researchers surveyed several groups, including laypersons, lawyers, and judges. Question no. 6 asked the respondent laypersons whether the absence of a privilege would make them less likely to make free, complete disclosure to an attorney. Roughly half answered in the affirmative.¹²⁸ However, the survey instrument did not inquire further whether the absence of a privilege would have a major, moderate, or minimal impact on their willingness. Moreover, when asked directly whether there should be a legal privilege, perhaps surprisingly, fewer than half answered in the affirmative.¹²⁹ The laypersons' response to question no. 8 was particularly revealing. Only a third believed that the privilege allowed an attorney "to refuse to reveal the client's confidences whenever ordered to do so by a judge."¹³⁰ In other words, most lay respondents were willing to confide in attorneys even though they mistakenly believed that any judge could override any privilege.

Professor Fred Zacharias conducted the second study in the late 1980s.¹³¹ He undertook the study in part because the earlier Yale study called into question the conventional wisdom about the need for an absolute legal privilege. The Yale study and his research in Tompkins County, New York convinced him that "strict" privilege rules are inessential.¹³² He asked respondents whether they would still withhold information if the lawyer promised confidentiality except for specific types of information specified in advance; in response, only 15.1% stated that they would withhold.¹³³ Moreover, the survey responses indicated that laypersons are willing to confide even though they mistakenly think that privilege is much narrower than it is and subject to many exceptions. By way of example, in a series of 12 hypotheticals involving allegations such as fraud in the sale of a house, 40-60% of the respondents believed that the attorney could disclose relevant communications without the client's consent.¹³⁴ Most respondents not only erroneously assumed that the privilege is riddled with exceptions; fewer than a quarter of the

127. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privilege Communications Doctrine*, 71 *YALE L.J.* 1226 (1962).

128. *Id.* at 1262.

129. *Id.*

130. *Id.*

131. Fred Zacharias, *Rethinking Confidentiality*, 74 *IOWA L.REV.* 351 (1989).

132. *Id.* at 382.

133. *Id.* at 386.

134. *Id.* at 394.

respondents indicated that expanding the exceptions “would cause them to be less willing to consult an attorney.”¹³⁵

Professor Vincent Alexander was the lead investigator in the third major study.¹³⁶ Professor Alexander contacted corporate executives, in-house counsel, other corporate attorneys, and judges headquartered in Manhattan. To be sure, some of Professor Alexander’s findings cut in favor of sustaining a broad legal privilege. For instance, “a solid majority” of the lawyers stated that in “their experience,” the existence of the privilege encouraged candor on the part of corporate executives.¹³⁷ Furthermore, three out of four high-ranking executives shared that belief.¹³⁸ They added that they tended to be more cautious when the subject of the communication was a litigated matter.¹³⁹

Yet, on balance, Professor Alexander concluded that the findings in his study were at odds with “the broad scope” that the privilege presently enjoys.¹⁴⁰ The executives’ responses indicated that in their interactions with counsel, they relied more heavily on their personal trust in the attorney rather than any assumption about evidence law¹⁴¹ — a finding similar to the New Mexico Supreme Court’s observation about spouses’ interactions. The executives added that even if the privilege were abolished or curtailed, they would continue to consult attorneys they had found to be trustworthy.¹⁴² The privilege modification would have little effect on the frequency of consultation.¹⁴³ The executives’ oral communications with counsel would continue to be relatively candid,¹⁴⁴ but the executives might be more circumspect in written communication.¹⁴⁵ These results impressed Professor Alexander because corporate executives are sophisticated businesspersons with above average familiarity with the law, consultation is easy because in-house counsel are virtually “omnipresent,”¹⁴⁶ and executives do not incur any personal expense for the consultation. These results convinced Professor Alexander not only that the scope of the privilege is seriously over-

135. *Id.* at 395.

136. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191 (1989).

137. *Id.* at 261.

138. *Id.* at 246, 261.

139. *Id.* at 264.

140. *Id.* at 200.

141. *Id.* at 248.

142. *Id.* at 225, 263.

143. *Id.* at 248, 269–70.

144. *Id.* at 264.

145. *Id.* at 263–64, 370–71, 374.

146. *Id.* at 273.

inclusive¹⁴⁷ but also that there is a dubious case for an absolute privilege,¹⁴⁸ especially in transactional work.

Other studies relate to the psychotherapy privilege. In its 1996 *Jaffee* decision recognizing a psychotherapy privilege, the Supreme asserted that “studies and authorities” establish the need for a privilege.¹⁴⁹ However, on close examination the publications cited by the majority are much less impressive than the majority made them out to be. Some studies survey therapists without bothering to question subjects¹⁵⁰ while in other studies the wording of the survey question was deficient because it failed to specify whether the question relates to court-ordered disclosure.¹⁵¹ In other cases, the findings lend little support to the need for an absolute privilege. One pertinent research project was the Miller-Thelen study.¹⁵² That study found that the “level of confidentiality has little effect on client behavior.”¹⁵³ In a study led by Donald Schmid, only 33% of the respondents indicated that they would be upset by a court-ordered disclosure.¹⁵⁴ In another project, the researchers reported that prospective patients do “not [even] consider the issue of confidentiality unless specifically warned that it might be absent.”¹⁵⁵ When asked about their concern about the risk of unauthorized release of information to state agencies, patients responded that they “would not be deterred from seeking care by a threat (admittedly mild) to confidentiality.”¹⁵⁶ In a New Jersey study, only 22% “of the patients reported that they had held back from seeking psychotherapy because of a fear of disclosure.”¹⁵⁷ Although most of the studies were conducted in the United States, there is also pertinent Canadian research. In one Canadian study, “[o]nly seventeen percent” of the respondents replied that they “rely most strongly on privilege” law in deciding whether to disclose to their therapists.¹⁵⁸ After

147. *Id.* at 267.

148. *Id.* at 368, 384.

149. *Id.* at 10 n.9.

150. The New Wigmore, *supra* note 37, at § 5.2.2.a, at 405.

151. *Id.*

152. David Miller & Mark Thelen, *Knowledge and Beliefs about Confidentiality in Psychotherapy*, 17 J. PROF. PSYCHOL. RES. & PRACT. 15 (1986).

153. *Id.*

154. Donald Schmid, Paul S. Applebaum, Loren H. Roth & Charles Lidz, *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 HOST. & CMTY. PSYCHIATRY 353 (Apr. 1983).

155. Paul S. Applebaum, Gilead Kapen, Bruce Walters, Charles Lidz & Loren Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 109, 110 (1984).

156. *Id.* at 111.

157. *Id.*

158. Daniel W. Shuman, Myron F. Weiner & Gilbert Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. L. & Psychiatry 393, 407 (1986).

surveying the empirical data compiled in the studies, one group of commentators concluded “that the evidence for the proposition that a psychotherapist-patient privilege is necessary for effective psychotherapy is highly questionable.”¹⁵⁹ The strongest inference supported by the data is that “people do not look to [evidence] law for guidance in their decision to enter into therapy or make disclosures in therapy.”¹⁶⁰

The point is not that privileges should be abolished. Rather, the point is that the instrumental case for broad, absolute privileges has been overstated. Whether the layperson is a spouse, client, or patient, the data simply do not support the generalization that the layperson would not consult or confide without the assurance provided by an absolute privilege set out in detailed, catalog fashion. Part I pointed out that the California drafters worded their privilege statutes in that fashion and that the drafters of proposed Article V of the Federal Rules were obviously inclined to favor the same format. However, once common sense is brought to bear and the relevant empirical studies are considered, the case for a catalog approach is weaker than the conventional wisdom assumes. Bright-line, detailed statutes and rules would be needed if the instrumental model were valid and the average layperson would not consult or confide without the protection furnished by an absolute privilege cast in the catalog mold; without the benefit of such privileges, the typical layperson supposedly would not consult and confide. However, as we have seen, that supposition is more than suspect; and the need for a catalog approach to drafting privilege statutes and rules is, therefore, significantly weaker.

B. Other Doctrinal Areas in Evidence Law

One component of the conventional wisdom has been the belief that privilege statutes and rules ought to follow catalog format and be detailed and bright line. The other component has been the view that the provisions for other doctrinal areas in Evidence should be written in code style; when possible, those provisions should be drafted in broader, more flexible language to grant the trial judge discretion to make a ruling that serves the interests of justice defined by the specific facts of the case. This component prioritizes the use of these evidence statutes and rules at trial.

The objection to this approach to drafting statutes and rules in the other doctrinal areas of Evidence law is that looser¹⁶¹ wording increases the difficulty of settling cases short of trial. The more broadly the

159. *Id.* at 417.

160. *Id.* at 418.

161. Witkin, *supra* note 73, at § 2, at 10.

provisions are worded and the more discretion the trial judge enjoys, the harder it is for the attorney to predict the evidentiary rulings at a subsequent trial; and the more difficult it consequently is for the attorney to assess the settlement value of his or her case. That objection has never been more potent than it is today.

The pretrial phase, notably pretrial discovery, has become “the center of gravity” in modern litigation.¹⁶² Trial is no longer the name of the litigation game.¹⁶³ One commentator was guilty of only slight hyperbole when he wrote that, especially in civil cases, trials are “approaching extinction.”¹⁶⁴ Marc Galanter has referred to “the Vanishing Trial,”¹⁶⁵ and Professor Robert Burns has gone so far as to proclaim “the Death of the American Trial.”¹⁶⁶ The numbers bear out that proclamation. In 1938, roughly 20% of the cases filed in federal court led to a trial.¹⁶⁷ By 1962, that percentage had fallen to 12%.¹⁶⁸ By 2009, even considering both jury and bench trials, the percentage had plummeted to a bit more than 1%.¹⁶⁹ Statistics for state courts indicate that by 2003, the percentage of filed cases culminating in trial had fallen to less than 3%.¹⁷⁰ Moreover, these statistics relate to filed actions, and many civil disputes are settled before suit is ever filed. One commentator was probably close to the mark when he wrote that at least 97% of the cases that come through attorneys’ offices settle without a single day of trial.¹⁷¹ There has been a similar decline in criminal trials.¹⁷² Approximately 96% of arrestees who are booked plead

162. John W. Cooley, *Puncturing Three Myths About Litigation*, 70 A.B.A.J. 75, 76 (1984). See also Edward Imwinkelried, *The Need for Truly Systemic Analysis for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in “Litigation” Reform*, 32 REV. LITIGATION 201 (2013).

163. Rebecca Love Kourlis, *Overhaul Civil Litigation*, NAT’L L.J., Oct. 31, 2011, at 51.

164. Robert Burns, *What Will We Lose If the Trial Vanishes?*, 37 OHIO N. UNIV. L. REV. 575 (2011); Charles Maher, *Discovery Abuse*, 4 CAL. LAW. 44, 45 (1984) (quoting Professor Geoffrey Hazard, Jr. as stating that “[i]n big litigation today, pre-trial is the trial”).

165. Marc Galantner, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459, 460 (2004). See also P.L. Refo, *The Vanishing Trial*, 30 LITIGATION, Wint. 2004, at 1, 2 (the A.B.A. Litigation Section concluded a project entitled “The Vanishing Trial”; the project leaders were Dean JoAnne Epps of Temple University, Professor Steve Landsman of DePaul University, and Professor Bob Saylor of the University of Virginia; the project collected data from both federal and state courts); Leigh Jones, *Coping with Dearth of Jury Trials*, NAT’L L.J., Aug. 16, 2004, at 4 (the article discusses “The Vanishing Trial”).

166. Robert P. Burns, *The Death of the American Trial*, NW. FAC. WORKING PAPERS (2009).

167. Burns, *supra* note 164.

168. *Id.*

169. *Id.*

170. Steven Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, 29 LITIGATION, Wint. 2003, at 38.

171. Joseph Kelner, *Settlement Techniques—Part One*, TRIAL, Feb. 1980, at 46.

172. Refo, *supra* note 165.

guilty.¹⁷³ In 2012 in *Lafler v. Cooper*,¹⁷⁴ the Supreme Court remarked that “criminal justice today is for the most part a system of pleas, not a system of trials.”

Even with our thousands of courtrooms, judges, and attorneys, this relatively small number of trials strains our judicial system:¹⁷⁵

Existing court calendar backlogs and prosecutors’ and public defenders’ caseloads make the social costs of an even larger number of trials unacceptable, especially in view of the longer delays in civil dockets that would also inevitably result.¹⁷⁶

The Federal Rules already contain provisions calculated to encourage pretrial civil disposition by settlement and pretrial criminal disposition by plea: Rule 408 (compromise offers and negotiations)¹⁷⁷ and Rule 410 (pleas, plea discussions, and related statements).¹⁷⁸ However, the majority of jurisdictions have concluded that even those provisions do not go far enough in encouraging disposition without trial and removing disincentives to pretrial settlement. In order to promote alternative dispute resolution (ADR) mechanisms, many jurisdictions have adopted statutes or court rules creating privileges for mediation proceedings¹⁷⁹ and conciliation.¹⁸⁰ Some have gone so far as to create full-fledged privileges for settlement statements.¹⁸¹ Rule 408 is a rule of limited admissibility; while Rule 408(a) prohibits the use of compromise statements “to prove or disprove the validity or amount of a disputed claim,”¹⁸² in the next breath, Rule 408(b) allows the proponent to rely on alternative theories of admissibility “such as proving a witness’s bias or prejudice”¹⁸³ In sharp contrast, the jurisdictions that have created true settlement privileges bar any use of the privileged statements.¹⁸⁴

Of course, we must avoid exaggeration. Even with the currently worded statutes and rules dealing with evidentiary doctrines other than privilege, the system succeeds in settling the overwhelming majority of

173. George Beall, *Negotiating the Disposition of Criminal Charges*, TRIAL, Oct. 1980, at 46.

174. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

175. U.S. DEP’T OF JUST., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 4–10 (Apr. 2, 1990).

176. James Douglas Welch, *Settling Criminal Cases*, 6 LITIGATION 1, Fall 1979, at 32.

177. FED. R. EVID. 408.

178. FED. R. EVID. 410.

179. THE NEW WIGMORE, *supra* note 37, at § 1.3.12.a.

180. *Id.* § 1.3.12.c.

181. *Id.* § 1.3.12.b.

182. FED. R. EVID. 408(a).

183. FED. R. EVID. 408(b).

184. THE NEW WIGMORE, *supra* note 37, at § 1.3.12.b.

cases. Moreover, sometimes the uncertain wording of an evidentiary privilege can encourage settlement; if the stakes are great and the uncertainty relates to a pivotal item of evidence in the case, the uncertainty can have an *in terrorem* effect, pressuring the parties to settle.¹⁸⁵ However, on balance, there is a solid consensus that society should strongly encourage pretrial disposition of cases.

A tool should be suitable for its intended use. Evidence statutes and rules are tools of the litigation system. As we have seen, in the macrocosm, those tools are rarely used as the basis for evidentiary rulings at trial. Instead, in perhaps 95% or 97% of the cases,¹⁸⁶ those tools are employed as a basis for the pretrial evaluation of the settlement value of cases with a view to disposition without trial. If that is the predominant actual use of evidentiary statutes and rules, those provisions should be worded to facilitate settlement. In 1965, the California Law Revision Commission was correct in calling for an evidence bible that would be useful to “busy” lawyers.¹⁸⁷ However, in 2022, most of those lawyers are not busy trying cases; rather, they are busy settling cases. In the run-of-the-mill case, it complicates the task of those lawyers when a broadly worded evidence statute or rule makes it challenging to forecast a trial evidence ruling. If the provision is worded too loosely, there is less probability that the two sides’ assessment of the case’s settlement value will roughly coincide and, hence, less probability of settlement.

Part II.A argues that the case for bright line privilege statutes and rules is weaker than the conventional wisdom makes it out to be. Socially desirable interactions such as consultations between laypersons and their attorneys and therapists are likely to occur and be productive even if the consultations are not conducted against the backdrop of detailed privilege statutes and rules drafted in a catalog format. Part II.B contends that, likewise, the case for loosely worded statutes and rules governing other doctrinal areas in evidence is weaker than the received orthodoxy assumes. It is true that such phrasing grants the judge discretion and flexibility to make trial evidentiary rulings that increase the likelihood that justice will be served on the particular facts of the instant case. However, evidence statutes and rules are rarely used in the trial setting. Well over

185. EDWARD IMWINKELRIED & THEODORE BLUMOFF, *PRETRIAL DISCOVERY: STRATEGY AND TACTICS* (2021-2022 ed. 2021). (Before entering teaching, Blumoff, practiced with a large litigation firm. On several occasions he told me that his firm sometimes found itself in this situation: The firm has a case involving a huge amount of money, and there was uncertainty about a pivotal trial evidentiary ruling. The firm sometimes advised its client to settle rather than gambling on a favorable ruling at trial.)

186. Balabanian, *supra* note 17, at 14.

187. 7 CAL. L. REVISION COMM’N REPS. 34 (1965).

nine-tenths—probably something in excess of 95%¹⁸⁸—of the cases never find their way to trial, and it is in society’s systemic interest to maintain and perhaps increase that percentage. That interest is better served by tightening the wording of evidence provisions and making it easier for attorneys to gauge the settlement value of their cases.

IV. THE IMPLICATIONS OF THE WEAKNESSES OF THE CONVENTIONAL WISDOM: THE DESIRABILITY OF CONVERGENCE

Part I described the conventional wisdom that while statutes and rules governing privileges should be drafted in a detailed fashion to prescribe bright-line rules, provisions governing other doctrinal areas in evidence ought to be written in a broad fashion, giving trial judges discretion to tailor evidentiary rulings to do justice on the particular facts of the specific case. Part II explained why both components of the conventional wisdom are now suspect. The norm for privilege provisions has been undermined by growing evidence that the typical layperson is not as concerned about subsequent judicial disclosure as Wigmore’s instrumental theory supposes. In the average situation, the layperson has less need for exquisitely detailed rules that would permit him or her to predict with a high degree of confidence whether a court will later shield their disclosure. Likewise, the norm for other doctrinal areas has been undermined by the reality that, in most cases, those provisions are not used as the basis for rulings at trial. Rather, in the huge majority of cases, there will never be a trial; and the rules are used pretrial to help attorneys assess the settlement value of their cases. In that setting, broad language and flexible provisions can be an impediment to settlement. Given the analysis in Part II, both norms need to be revisited; and the result could be a limited convergence of the two norms.

A. Broadening the Wording of the Provisions Governing Privileges

Although common sense doubts and empirical research call into question the instrumental model, it does not follow that there should be a wholesale loosening of the language of privilege provisions. To a degree, the doubts about the instrumental model weaken the case for highly detailed privilege provisions. However, it would be a mistake to leap to the conclusion that the wording of these provisions should be loosened to the extent of provisions such as Federal Rules of Evidence 403 on discretionary balancing and Rule 807 on the residual hearsay exception.

188. Balabanian, *supra* note 17.

Although the original justification for a catalog approach to privilege provisions is now questionable, there is a second reason for maintaining that approach. As Part II.B demonstrated, the overwhelming majority of cases that enter attorneys' offices settle short of trial. To reach a settlement, the two sides must reach some general agreement about the case's settlement value. They need not arrive at exactly the same figure, but the two sides' assessment must be "in the same ball park." The availability of detailed rules to both sides increases the probability that the sides will come to similar assessments. In a given case, that assessment could turn on a privilege issue. In an adversary system such as ours, admissions of a party opponent are one of the most powerful types of evidence. Louis Nizer, one of the legendary trial attorneys of the 20th century, was famous for stating during closing argument that he had proven his case "out of the mouths of our very adversaries."¹⁸⁹ The party-opponent might claim that their allegedly damning admission is protected by the attorney-client, medical, or psychotherapist privilege.

In short, although the original rationale for taking a catalog approach to privilege statutes and rules is now questionable, there is still good reason to word these privileges in a detailed fashion. Thus, even if jurisdictions rethink the validity of Wigmore's instrumental theory, they might well decide to make few, if any changes to the manner of the wording of privilege statutes and rules.

B. Tightening the Wording of Provisions Governing Other Doctrinal Areas in Evidence Law

If there is to be a convergence, it will result not so much from the broadening of the wording of privilege provisions but rather from a tightening of the wording of provisions controlling other doctrinal areas in Evidence. One promising possibility is the formal approval of additional specific provisions on emerging alternative theories of logical relevance that satisfy rules of limited admissibility.

Consider one of the premier rules, namely, Rule 404(b) governing the admission of a person's uncharged misconduct. In pertinent part, Rule 404(b) reads:

(b) Other Crimes, Wrongs, or Acts.

189. Lane Goldenstein, *The Cardinal Principles of Cross-Examination*, in TRIAL LAWYER'S GUIDE 332, 338 (I. Goldstein ed., 1959); G. Christopher Ritter, *The 10 Reasons for Cross-Examination*, THE CHAMPION, May 2014, at 2, 23 ("That information carries extra weight because it came from someone who had . . . no reason to help the opposing side").

- (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.¹⁹⁰

This type of evidence can be so impactful that alleged errors in the admission of such evidence are the most frequently litigated issue on appeal.¹⁹¹ In some states, errors in the admission of such evidence are the most common ground for reversal on appeal.¹⁹² Although most of these appeals are in criminal cases, uncharged misconduct can also have a major impact in civil cases. For example, one study found that if a civil plaintiff succeeds in introducing evidence that the defendant has a criminal conviction, the plaintiff can expect a damages award 9% higher than normal.¹⁹³

Rule 404(b)(2) lists several traditional theories for admitting uncharged misconduct for noncharacter purposes, but the list is preceded by the two words "such as."¹⁹⁴ Every federal circuit court of appeals has held that because of those two words, Rule 404(b) codifies a flexible, inclusionary conception of the doctrine; that is, the proponent may introduce such evidence for any purpose other than the use expressly forbidden by Rule 404(b)(1), and the proponent need not pigeon hole his or her exception into one of the traditional theories mentioned in (b)(2).¹⁹⁵ Forty-four states have adopted evidence codes or rules patterned after the Federal Rules.¹⁹⁶ In most states, the wording of the pertinent provision is

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

191. Daniel Capra & Liesa Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 771 (2018); Comment, *They Did It Before, They Must Have Done It Again, the Seventh Circuit's Propensity to Use a New Analysis of Rule 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1058, 1074 (2016); Thomas Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 212 (2005); Crane McClennen, *Admission of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b)—It's Time to Start Following the Rules*, ARIZ. ATTORNEY, June 1990, at 13.

192. Patrick Wallendorf, Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 156 (1978).

193. David Herbert & Roger Barrett, *Attorney's Master Guide to Courtroom Psychology* 321 (1980).

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

195. 1 EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:38, at 351–57 (2022 ed. 2021).

196. CARLSON, *supra* note 5, at 16.

identical or virtually identical to that of the Federal Rule.¹⁹⁷ It is therefore no surprise that the clear trend in the state courts is also toward the inclusionary view.¹⁹⁸

The inclusionary construction of Rule 404(b) and its state analogs gives the proponent an incentive to proffer such evidence on novel, assertedly non-character theories. In practice, though, courts are sometimes reluctant to endorse such theories because they realize the high reversal rate for errors in admitting uncharged misconduct.¹⁹⁹ One novel theory is the so-called doctrine of objective chances.²⁰⁰ In the United States, the landmark, pre-Federal Rules decision on point is *United States v. Woods*.²⁰¹ In that case, the defendant was charged with infanticide. The deceased child had died of cyanosis, and the defendant claimed that the death was accidental. Over objection, the trial judge admitted prosecution evidence that during a 25-year period, 9 other children in the defendant's custody had experienced at least 20 cyanotic episodes. The defense contended that the evidence was logically relevant to show only the defendant's personal, subjective bad character. However, both the trial and appellate courts concluded that cumulatively, the incidents established an extraordinary coincidence—exceeding the baseline frequency for average, innocent persons—which was logically relevant as some evidence of an actus reus. The courts concluded that that theory did not necessitate any verboten assumption about the defendant's subjective character.

There is a longstanding dispute over whether the doctrine of objective chances is a legitimate noncharacter theory of logical relevance satisfying Rule 404(b).²⁰² Some courts have liberally admitted uncharged misconduct evidence under the doctrine not only to prove actus reus, as in *Woods*, and mens rea²⁰³ but also to negate a defendant's claim that the

197. 2 EDWARD. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE App. I (2022 ed. 2021).

198. 1 IMWINKELRIED, *supra* note 195, § 2:38, at 357-58.

199. *See supra* note 192 and accompanying text.

200. Edward Imwinkelried, *A Brief Essay Defending the Doctrine of Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N.M. L. Rev. 1 (2020).

201. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

202. 1 IMWINKELRIED, *supra* note 195, § 4:1.

203. Suppose that a defendant is lawfully stopped and the police find illegal drugs secreted in the automobile that the defendant is driving. Analogizing to *Woods*, a prosecutor can argue that the trial judge should admit evidence that on two other occasions when the defendant was stopped, illegal drugs were found in the defendant's car. Again, the thrust of the argument is that it would be an extraordinary coincidence for an innocent person to be found driving a car containing contraband drugs so many times. The objective improbability of that coincidence would furnish some evidence of mens rea.

alleged victim has fabricated the charge.²⁰⁴ Several courts have asserted that “most” jurisdictions now embrace the doctrine.²⁰⁵ Yet, while not repudiating the doctrine, other courts have found error in admitting uncharged misconduct evidence under the doctrine when the defendant did not expressly claim accident.²⁰⁶ Even if a trial judge would otherwise be inclined to rely on the doctrine as a basis for admitting uncharged misconduct evidence, the uncertain, conflicting appellate guidance and the risk of reversal can give a trial judge pause before doing so. Likewise, that uncertainty might make litigants reluctant to enter into a disposition agreement when uncharged misconduct evidence is crucial, but the state of the 404(b) jurisprudence in the jurisdiction is unclear. Of course, a motion *in limine* is a possibility, but in most instances, the trial judge has discretion whether to reach the merits of the motion before trial,²⁰⁷ and at trial, the judge has the power to change the *in limine* ruling even absent a request by a party.²⁰⁸ Without abandoning the flexibility of the language “such as,” a drafter can remove the uncertainty by proposing an amendment endorsing a sound, novel theory or at least indicating approval in an accompanying Note or Comment. Doing so would clear the way for both sides to make a more informed decision on whether to enter into a settlement or plea agreement to obviate the need for trial.

Like the area of uncharged misconduct, the doctrinal area of authentication illustrates the utility of tightening the wording of provisions relating to doctrinal areas other than privilege. Just as many rules of admissibility, such as Rule 404(b), do not limit the proponent to approved theories expressly mentioned in the Rule, Rule 901 does not restrict the proponent to the traditionally accepted foundations. Again, Rule 901(a) announces the general standard for authentication, Rules 901(b)(1)-(10) enumerates several acceptable foundations, but the introductory language in 901(b) expressly states that the enumerated foundations “are examples only—not a complete list”²⁰⁹ On the one

204. Edward Imwinkelried, *The Evidentiary Issue Crystallized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused’s Uncharged Misconduct Under the Doctrine of Objective Chances*, 48 SW. L. REV. 1 (2019).

205. *Miller v. Baldwin*, 723 Fed. Appx. 408, 411 n. 5 (9th Cir. 2018), *cert.denied*, 138 S.Ct. 2000 (2018); *State v. Atkins*, 304 Ga. 413 (2018).

206. Edward Imwinkelried, *Admitting Evidence of an Accused’s Uncharged Misconduct Under the Doctrine of Chances: Before a Judge May Consider Evidence of an Uncharged Incident to Decide Whether There Has Been a Suspicious Coincidence, Must the Accused Claim That the Incident Was an Accident?*, 99 DENV. L. REV. 1 (2021) (discussing the Oregon case law).

207. IMWINKELRIED ET AL., *supra* note 21, § 103.

208. *Id.*

209. FED. R. EVID. 901.

hand, the wording of the flexible principle, Rule 901(a), should not be changed. It ought to retain open-ended code language.

On the other hand, one of the repeating patterns in the history of American Evidence law has been a judicial reluctance to apply the broad authentication principle to new types of exhibits spawned by innovative technology. For example, due to a fear of manipulation, at common law courts were initially skeptical of movies and demanded elaborate foundations.²¹⁰ Some of the same skepticism has carried over into the Federal Rules era. Thus, rather than applying the standard set out in Rule 901(a), initially, several courts applied heightened standards for web pages,²¹¹ social media posts,²¹² and other forms of digital evidence.²¹³ Even today, some courts go beyond Rule 901(b) and demand unnecessarily strict foundations for audio recordings.²¹⁴

As previously stated, broadly worded authentication standards have the advantage that, in principle, the courts can readily adapt them to novel types of evidence produced by advancing technology. However, as the prior judicial experience with movies, audio recordings, and various types of digital evidence demonstrates, many courts are still hesitant to receive cutting-edge types of evidence even when the proponent can marshal enough foundational testimony to satisfy Rule 901(a)'s standard. Consequently, if the drafters conclude that a particular type of exhibit, albeit cutting-edge, complies with Rule 901(a), it can be advisable to supplement code format language with more detailed, catalog-like language permitting the receipt of that type of evidence. Rule 901(a)-(b)

210. 2 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 216, at 37–38 n. 4 (Robert P. Mosteller ed., 8th ed. 2020), citing *McGoorty v. Benhart*, 305 Ill. App. 458 (1940).

211. M. Anderson Bery & David Kiernan, *Authenticating Web Pages as Evidence*, <https://www.law.com/> (Jan. 21, 2010) [<https://perma.cc/G4KR-XJJZ>] (describing three schools of judicial thought, one school demanded testimony that the information was posted by the individual to whom the information is attributed. The courts insisted on a “statement or affidavit from . . . [the website’s] Web master or someone else with personal knowledge”; the courts refused to permit the proponent to rely on other forms of circumstantial evidence that would satisfy Rule 901(a)).

212. Paul Grimm, Lisa Yurwit Bergstrom & Melissa M. O’Toole-Loureiro, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 435, 441, 443, 455 (2013) (“an unnecessarily high bar”); Breaune M. Democko, *Social Media and the Rules on Authentication*, 43 TOL. L. REV. 367, 369, 371, 388, 391, 405 (2012) (“an extraordinarily high standard of authentication”).

213. *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774–75 (S.D. Tex. 1999).

214. The traditional approach was a seven-element foundation, but there is now significant movement away from that rigid view. See, e.g., *United States v. Lebeau*, 867 F.3d 960, 977 (8th Cir. 2017); *United States v. Reeves*, 742 F.3d 487, 501 (11th Cir. 2014); *United States v. Webster*, 84 F.3d 1056, 1064 (8th Cir. 1996); *United States v. Roach*, 28 F.3d 729, 733 (8th Cir. 1994); *United States v. Tartaglione*, 228 F.Supp.3d 402, 411 (E.D. Pa. 2017); *United States v. Credico*, 217 F. Supp.3d 825, 829 (E.D. Pa. 2016), *aff’d*, 718 Fed.App’x 116 (3d Cir. 2017), *cert. denied*, 139 S.Ct. 273 (2018).

is an excellent example of a code format supplemented with detailed illustrations. To its great credit, the Advisory Committee has advanced amendments to Rule 902 on self-authentication to pave the way for the admission of certified records generated by an electronic process or system²¹⁵ and certified data copies from an electronic device, storage medium, or file.²¹⁶ Those efforts should be ongoing and intensified. Technology continues to advance, and today, the courts face new challenges such as deepfakes²¹⁷ and records maintained in blockchain.²¹⁸

When the California Evidence Code and Federal Rules of Evidence were enacted, it was the conventional wisdom that the provisions governing doctrinal areas other than privilege should be drafted in code format, broadly stating flexible principles. The drafters seemingly wanted to prepare language to be used by “busy . . . judges and lawyers”²¹⁹ at the trial itself. However, as Part II.B demonstrated, that is no longer the primary use of those provisions. Rather, in most instances, the provisions are used pretrial as a basis for evaluating the settlement value of cases to dispose of the cases short of trial. That reality cuts in favor of, at the very least, supplementing code format language with more detailed, catalog-style wording facilitating pretrial case evaluation. Such supplementation can be useful to overcome the traditional judicial reluctance to embrace novel, alternative relevance theories and cutting-edge types of exhibits.

V. CONCLUSION

Perhaps, in the best of all possible worlds, lawyers and judges could work with two sets of evidentiary rules – a pretrial set with bright line wording to facilitate settlement and a trial set with more flexible wording

215. FED. R. EVID. 902(13).

216. FED. R. EVID. 902(14).

217. Molly Mullen, *A New Reality: Deepfake Technology and the World Around Us*, 48 MITCH. HAMLINE L. REV. 210 (2022).

218. DAVID A. SCHLUETER & EDWARD J. IMWINKELRIED, TEXAS EVIDENTIARY FOUNDATIONS § 4.13 (6th ed. 2020). Perhaps sensing that its judiciary might be hesitant to approve this new type of record maintenance, the Vermont legislature enacted 12 V.S.A. § 1913. Section 1913(b)(1) reads:

A digital record electronically registered in a blockchain shall be self-authenticating pursuant to Vermont Rule of Evidence 902, if it is accompanied by a written declaration of a qualified person, made under oath, stating the qualification of the person to make the certification and:

The date and time the record entered the blockchain;

The date and time the record was received from the blockchain;

That the record was maintained in the blockchain as a regularly conducted activity; and

That the record was made by the regularly conducted activity as a regular practice.

The provision is now incorporated in VT. R. EVID. 902(13).

219. 7 CAL. L. REVISION COMM’N REPS. 34 (1965).

to accord the trial judge greater discretion. Developing those two sets may not be as daunting as it might at first seem. To a degree, there are already differing sets of evidentiary rules—one for different types of trials and another for different stages of litigation. To begin with, today many jurisdictions apply different rules to appeals from evidentiary rulings in bench and jury trials.²²⁰ Moreover, some evidentiary rules are already applied differently in the pretrial and trial settings. By way of example, as a practical matter, the courts apply the Rule 103(a)(1)(B)²²¹ procedural requirement for a “specific” objection differently in the pretrial and trial settings; the courts demand greater specificity in pretrial than at trial where the issue may arise unexpectedly.²²² In addition, many courts apply the substantive Rule 702²²³ requirements for expert testimony more laxly at the pretrial class certification and summary judgment stages.²²⁴

Of course, the reader might think that this inquiry is much adieu about nothing because various forces, including inertia, might dissuade decision-makings such as legislatures and courts from undertaking to revise their evidence provisions. However, that seems highly unlikely. Consider the history reviewed in this brief Essay: the Model Code in 1942, the original Uniform Rules in the 1950s, the California Evidence Code in 1967, the Federal Rules of Evidence in 1975, and the adoption of codes or rules patterned after the Rules in 44 states. There have been no fewer than 30 substantive amendments to the Federal Rules since their enactment,²²⁵ and there are currently pending amendments to the Rules.²²⁶ Judge Calabresi was surely correct when he proclaimed that this is an age

220. 1 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 60 (Robert P. Mosteller ed., 8th ed. 2020).

221. FED. R. EVID. 103.

222. Edward Imwinkelried, *The Pretrial Importance and Adaptation of the “Trial” Evidence Rules*, 25 LOY. L.A. L. REV. 965 (1992). To begin with, it is more feasible to demand greater specificity pretrial. The setting is often a hearing on an *in limine* motion, which both sides have had days or weeks to prepare for. The issue has not arisen on the spur of the moment. Moreover, it is fairer to demand greater specificity before trial. At trial, the exchange is usually oral; and if the objection is sustained, the proponent can reframe on the spot. Before trial, the submissions are frequently written; and the written form of the submissions may make it difficult or impossible for the proponent to adapt on the spot.

223. FED. R. EVID. 702.

224. KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 13 (Robert P. Mosteller ed., Supp. 2022) (collecting cases).

225. G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 940–41 (2022).

226. ADVISORY COMMITTEE ON EVIDENCE RULES (May 6, 2022) (Federal Rules of Evidence 2022-2023 Edition pp. 26–27 (the proposed amendment to Rule 106), pp. 149–51 (the proposed amendment to Rule 615), and pp. 161–63 (the proposed amendment to Rule 702)).

of statutes.²²⁷ That is certainly true in the area of Evidence law. Today, for the most part an attorney does not turn to a judicial decision or a constitution to find a governing rule of law; rather, he or she looks for a statute codifying the rule.

For the foreseeable future, most jurisdictions are likely to have a single set of statutory provisions, such as the Federal Rules or the Evidence Code, which purports to apply to both pretrial and trial proceedings, and occasions will almost undoubtedly arise to revise those provisions. Those occasions will pose the same question that Professor Morgan asked American litigators sixty years ago: a creed, a code, or a catalog. For the most part, American litigators are not spending most of their time trying cases; instead, their time is consumed settling cases. In most instances, litigators consult evidence statutes and code primarily to help them determine the settlement value of their case. And the number of potential cases is so staggering that it is imperative that the system encourage settlement. The system can certainly do so by strengthening substantive rules of limited admissibility such as Rules 408²²⁸ and 410²²⁹ and considering the adoption of a full-fledged settlement privilege.²³⁰ However, the system should also do so by considering the format of its evidentiary statutes and rules. In one way or another the contemporary American litigator spends the vast majority of his or her time preparing for and engaging in settlement negotiations to obviate the need for trial. The legislatures and courts ought to frankly confront that reality; they should provide litigators with tools, including evidence statutes and rules, predominantly designed and suited for that use.

227. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1985).

228. FED. R. EVID. 408 (civil settlement negotiation).

229. FED. R. EVID. 410 (criminal plea bargaining).

230. THE NEW WIGMORE, *supra* note 37, § 1.3.12.c.