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ARTICLES

A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence

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Dean Calabresi has written that the present era is the "Age of Statutes." In his words, American law has undergone "statutorification."[1] Although at one time our law consisted primarily of common-law doctrine, statutes have now become the dominant source of American law.[2] This trend is certainly evident in the field of evidence law. Until recently, the American law of evidence was largely decisional in character; indeed, the decisions were so numerous that it took one of the most monumental common-law treatises, the multi-volume work by Dean Wigmore,[3] to synthesize the case law. Until the 1970's, comprehensive evidence codes existed in only a handful of states.[4] However, in December 1974, Congress approved the Federal Rules of Evidence. The Rules took effect in 1975, and their influence has spread. Thirty-five states have adopted evidence codes modeled directly after the Federal Rules.[5] The task facing the federal and state courts in those states that have adopted these evidence codes is the interpretation of the Rules.

In a number of cases, the United States Supreme Court has undertaken that task.[6] In these cases, the Court has adopted a moderate textualist approach to the construction of the Rules.

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

2. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 569 (1988).

3. RONALD L. CARLSON, EDWARD J. IMWINKELRIED & EDWARD J. KIONKA, EVIDENCE IN THE NINETIES 21 (3d ed. 1991).

4. *Id.* at 21-23.

5. *See generally* GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987) (4 vols.). A version of the Federal Rules will soon go into effect in Indiana.

6. United States v. Salerno, 112 S. Ct. 2503 (1992); United States v. Zolin, 491

In adopting the moderate textualist approach, most of the current Justices have rejected the traditional, legal process approach to statutory construction. Hart and Sacks, legal scholars, had been the leading advocates of that approach.[7] They viewed each piece of legislation as purposeful and rational.[8] They presumed that legislators are reasonable individuals acting in good faith to pursue social purposes.[9] If so, legislators would presumably endeavor to produce legislative history that accurately sheds light on the meaning of the statutory language they enact. Under this traditional approach in construing a piece of legislation, courts were not only permitted to resort to extrinsic legislative history, but were also encouraged to ascribe great weight to such material in the interpretive process. Indeed, according to the legal process school of statutory interpretation, these materials may readily trump the seemingly plain meaning of the statutory text.[10]

Many of the current Justices have been persuaded by the law-and-economics scholars' critique of the legal process approach to statutory interpretation. Those scholars believe that the legal process approach suffers from political naivete. They advocate the so-called textualist approach which conceives of statutes as compromises shaped by expediency.[11] In effect, when the legislature adopts a statute, it strikes a deal with the affected interest groups.[12] In the words of one court, a statute is "the eventual product of . . . competing political currents."[13] "The [legislative] body as a whole . . . has only outcomes."[14] The compromised statutory text is voted on, and that alone has the force of law. In construing a piece of legislation, the judge's task is to attempt to discern "the lines of [the] compromise" codified in the statutory language.[15]

Law-and-economics scholars are frankly skeptical of the legislative history extrinsic to the statutory text.[16] The most frequently used history

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U.S. 554 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); Huddleston v. United States, 485 U.S. 681 (1988); United States v. Owens, 484 U.S. 554 (1988); Bourjaily v. United States, 483 U.S. 171 (1987).

7. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144-47 (tentative ed., Cambridge, Mass. 1958).

8. Eskridge & Frickey, *supra* note 2, at 571.

9. *Id.* at 575-76.

10. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 628 (1990).

11. William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 703, 710 (1987).

12. *Id.* at 703-05.

13. Woodland Joint Unified School Dist. v. Commission of Professional Competence, 4 Cal. Rptr. 2d 227, 241 (1992).

14. Frank H. Easterbrook, *Statutes' Domain*, 50 U. Chi. L. Rev. 533, 547 (1983).

15. Richard H. Posner, The Federal Courts: Crisis and Reform 289 (1985).

16. United States v. Smith, 795 F.2d 841, 845 (9th Cir. 1986) (the court should

is a committee report,[17] but neither the legislature as a whole nor the committee votes on the report. The likelihood is that many, if not most, of the legislators have not even read the report. "[C]ommittee staff members and lobbyists often write [these documents]."[18] Rather than attempting to accurately describe the collective sense of the committee or legislature, the staff member or lobbyist may be trying to manipulate the legislative history.[19] The language may have been inserted in the report for the very purpose of misleading a court into giving a special interest group a victory by way of statutory construction that the full legislature would have refused to grant.[20]

Although the Justices are sympathetic to these criticisms of the legal process approach to statutory interpretation, they have balked at embracing the most extreme textualist position. The extreme textualists contend that the court should not even consult legislative history material until the court has first exhausted all possibilities of parsing a plain meaning from the statutory text. The court may turn to the extrinsic material only if the statutory language has no plain meaning on its face.[21] Strict textualists[22] believe that as the first step in statutory

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exercise caution in looking at legislative history), *cert. denied*, 481 U.S. 1032 (1987); United States v. Worstine, 808 F. Supp. 663 (N.D. Ind. 1992) (reliance on legislative material is precarious, and the court should view such material with circumspection); *In re* Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1200 n.16 (E.D. Mich. 1990) ("reliance on legislative history as a means of divining Congressional intent is a dubious enterprise, one to be taken cautiously . . . ."); Bresgal v. Brock, 637 F. Supp. 271 (D. Or. 1985) (when the court consults legislative history, the court should take the step cautiously), *aff'd in part, mod. in part*, 833 F.2d 763 (9th Cir. 1987).

17. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 299, 304 (1982).

18. Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005 (1992).

19. ESKRIDGE & FRICKEY, *supra* note 2, at 710, 715-17.

20. Hirschey v. F.E.R.C., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

21. Prisco v. Talty, 993 F.2d 21, 24 (3d Cir. 1993); United States v. Derr, 968 F.2d 943 (9th Cir. 1992) (the language of the statute is both the starting and ending point of interpretation when the meaning is clear); United States v. Green, 967 F.2d 459 (10th Cir. 1992) (if the statutory text has a plain meaning, the inquiry ends), *cert. denied*, 113 S. Ct. 435 (1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir. 1991) (the court should not draw upon legislative history unless there is an ambiguity), *cert. denied*, 112 S. Ct. 302 (1991); United States v. Evinger, 919 F.2d 381 (5th Cir. 1990)(if the statutory text is unambiguous, the court should not look beyond the express terms of the statute); *In re* Moore, 907 F.2d 1476, 1478-79 (4th Cir. 1990) ("Legislative history is irrelevant to the interpretation of an unambiguous statute"); Franklin Savings Asso. v. O.T.S., 821 F. Supp. 1414 (D. Kan. 1993); Koch v. Shell Oil Co., 820 F. Supp. 1336, 1340 (D. Kan. 1993) ("when the words of a statute are unambiguous, then the judicial inquiry as to legislative intent begins and ends with the language of the statute"); McDonald's Corp. v. Wilson, 814 F. Supp. 935 (D. Or. 1993); United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1992) ("[B]efore it can reach legislative history, the

construction, the judge ought to inquire whether the language bears a clear or plain meaning.[23] Finding a lack of plain meaning is a condition precedent to considering extrinsic material.[24]

Although the strict textualist approach is popular with some of the lower courts, the Supreme Court has embraced a more moderate version of textualism; as under the legal process tradition, the Court routinely considers extrinsic legislative history material.[25] However, the Justices otherwise have invoked a generally textualist approach to interpretation.[26] The lead opinion in each of the Supreme Court's opinions construing the Federal Rules of Evidence uses the expression "plain" meaning.[27] The majority has said in so many words that the Rules should be interpreted according to their plain meaning unless a literal construction would result in an absurd, perhaps unconstitutional, result.[28] In short, the presumption is that statutory language is to be given its plain meaning.[29] Albeit rebuttable, the presumption is a strong

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court must conclude that the plain language of the statute is ambiguous"); Harrisburg v. Franklin, 806 F. Supp. 1181 (M.D. Pa. 1992); Nunn Bush Shoe Co. v. United States, 784 F. Supp. 892 (U.S.C.I.T. 1992); Federal Deposit Ins. Corp. v. Haddad, 778 F. Supp. 1559, 1566 (S.D. Fla. 1991) ("only when a statute is inescapably ambiguous . . . .").

22. ESKRIDGE & FRICKEY, *supra* note 2, at 571.

23. Johnson v. Town of Trail Creek, 771 F. Supp. 271 (N.D. Ind. 1991).

24. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993); Guilzon v. C.I.R., 985 F.2d 819 (5th Cir. 1993); Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207 (3d Cir. 1991).

25. Government of Virgin Islands v. Knight, 989 F.2d 619, 633 (3d Cir. 1993) ("The plain meaning rule . . . is not absolute. A court may consider persuasive legislative history that Congress did not intend the words they selected to be accorded their common meaning. Watt v. Alaska, 451 U.S. 259, 266 . . . (1981)"); *In re* Brichard Securities Litigation, 788 F. Supp. 1098, 1101 (N.D. Cal. 1992) ("recent Supreme Court cases suggest that in all questions of statutory interpretation, a court may examine the legislative history in order to avoid an 'unreflective' reading of a statute"). *See also* Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818, 825 (1st Cir. 1992); Horan v. King County, Div. of Emergency Medical Services, 740 F. Supp. 1471 (W.D. Wash. 1990) (there is no absolute bar to considering legislative history). For example, in its recent decision, Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993), construing Federal Rule of Evidence 702 governing the admissibility of scientific testimony, the Court turned to "[t]he drafting history" immediately after analyzing "the text" of the rule.

26. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

27. *E.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989); Huddleston v. United States, 485 U.S. 681, 687 (1988); Bourjaily v. United States, 483 U.S. 171, 178 (1987).

28. Jonakait, *supra* note 26, at 761; Sullivan v. C.I.A., 992 F.2d 1249, 1252 (1st Cir. 1993). *See also* United States v. Sheek, 990 F.2d 150, 153 (4th Cir. 1993)("Even if

one,[30] yielding[31] only in extraordinary cases[32] when the legislative history manifests a very clearly expressed[33] contrary intention. Hence, under the moderate textualist view, although the judge may consider extrinsic legislative history material as a matter of course, the material is only a secondary interpretive aid[34] of far less importance and entitled to much less weight[35] than the apparent plain meaning of the statutory text. The text "enjoys preeminence."[36] The net result has been that if a common-law exclusionary rule has not been codified in the text of the Federal Rules of Evidence, the Court has uniformly held that the rule is no longer good law.[37]

While the Supreme Court seems firmly committed to applying a moderate textualist approach in interpreting the Federal Rules of Evidence,[38] in 1992 one highly respected commentator, Professor Weissenberger, questioned the Court's construction of the Rules.[39] Professor Weissenberger not only criticizes the outcomes in particular Supreme Court decisions;[40] more fundamentally, he advances the thesis that the

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the result appears to be anomalous or absurd in a particular case, the court may not disregard unambiguous language") (citations omitted).

29. Lever Bros. Co. v. United States, 981 F.2d 1330 (D.C. App. 1993); *In re* Continental Airlines, Inc., 932 F.2d 282, 287 (3d Cir. 1991); Singh v. Daimler-Benz, AG, 800 F. Supp. 260 (E.D. Pa. 1992); City of Highland v. County of San Bernardino, 6 Cal. Rptr. 2d 346, 352 (1992).

30. Guilles v. Sea-Land Service, Inc., 820 F. Supp. 744, 751 (S.D.N.Y. 1993); Gang v. United States, 783 F. Supp. 376, 380 (N.D. Ill. 1992).

31. Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992).

32. United States v. Knox, 977 F.2d 815, 820 (3d Cir. 1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1213 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 302 (1991); Malloy v. Eichler, 860 F.2d 1179 (3d Cir. 1988); U.S. Football League v. National Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986).

33. RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1460 (11th Cir. 1992); Johns-Manville Corp. v. United States, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). *See also* Cervantez v. Sullivan, 739 F. Supp. 517, 519 (E.D. Cal. 1990) ("[v]ery strong evidence"); Tello v. McMahon, 677 F. Supp. 1436 (E.D. Cal. 1988) (very strong evidence, if not explicit language).

34. *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 782 F. Supp. 481, 484 (C.D. Cal. 1991).

35. United States v. Shriver, 989 F.2d 898, 901 (7th Cir. 1992) ("the legislative history of a statute is of weighty import only when the statute is not clear or when the application of its 'plain language produces absurd or unjust results'").

36. Sterling Suffolk Racecourse Ltd. Partnership v. Burrellville Racing Ass'n, Inc., 989 F.2d 1266, 1270 (1st Cir. 1993).

37. *See generally* Becker & Orenstein, *supra* note 26, at 857; Jonakait, *supra* note 26, at 745.

38. Jonakait, *supra* note 26, at 761-62.

39. Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 Ohio St. L.J. 1307 (1992).

40. *Id.* at 1311 ("untoward ramifications").

Court has erred in applying the normal doctrine of "legislative intent" in construing the Rules.[41] Although Congress' enactment of the Rules was "the terminal point" in the process of the Rules' adoption,[42] Professor Weissenberger argues that the Rules are the product of "a multibranch process in which the subjective intent of the drafters is predominantly traceable to the judicial branch."[43] He believes that by emphasizing the words approved by Congress, the Court has slighted the essential design of the Rules[44]—namely, protecting the judiciary's "substantial inherent discretion in interpreting, expanding upon, and applying the Rules."[45] He asserts that "the preservation or engraftment of additional evidentiary doctrines and principles was not precluded, but rather, specifically contemplated as integral to the structural scheme of the Rules."[46] In other words, even if an exclusionary rule of evidence has no basis in the text of the Federal Rules, in its discretion a court may create the rule[47] and superimpose it on the statutory text.[48]

Professor Weissenberger's article is both thoughtful and thought-provoking. However, in the final analysis, his argument is flawed. The purpose of this Article is to unmask that flaw. Professor Weissenberger's argument amazingly overlooks the central importance of a Federal Rules provision cited nowhere in his article—Federal Rule 402. Once that provision is understood, it will become clear why both Professor Weissenberger's reading of the cases and his policy arguments are unsound.

The first Part of this Article focuses on the underlying error in Professor Weissenberger's position, namely, ignoring Rule 402. Part I reviews historical antecedents of Rule 402, discusses the history of 402's adoption, and mentions pertinent developments after its adoption. Part I concludes that Rule 402 is, to use Professor Weissenberger's expression, the key to "the structural scheme of the Rules."[49] It is Rule 402 that deprives the courts of the power to enforce uncodified exclusionary rules of evidence.

In that light, Part II of this Article turns to some of the more specific lines of argument that Professor Weissenberger presents to support his position. Just as Rule 402 undercuts Professor Weissenberger's basic position, it invalidates his related lines of argument. Part II dem-

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41. *Id.* at 1308-09.
42. *Id.* at 1319.
43. *Id.* at 1309, 1314.
44. *Id.* at 1310-11.
45. *Id.* at 1310.
46. *Id.* at 1330-31.
47. *Id.* at 1311.
48. *Id.* at 1318.
49. *Id.* at 1331.

onstrates that he has misread the leading Supreme Court precedents interpreting the Federal Rules precisely because he has overlooked the role Rule 402 played in those cases. In addition, while agreeing with Professor Weissenberger that the Rules were intended to grant the trial court discretion in administering evidentiary doctrine, this Part explains why the Supreme Court's textualist approach is the best protection for that discretion. As we shall see, historically the principal threat to trial court discretion has been appellate intervention announcing rigid, categorical exclusionary evidentiary doctrines which tie the hands of the trial judges—the very type of intervention from which Rule 402 shields the trial bench.

I. Rule 402 as the Keystone of the Federal Rules of Evidence

When the armed forces adopted their version of the Federal Rules of Evidence in 1980,[50] the version included a provision virtually identical to Federal Rule 402.[51] The Military Rules were accompanied by an official Drafters' Analysis. The Analysis accompanying Rule 402 remarked that "Rule 402 is potentially the most important of the new rules."[52] As the following section will demonstrate, that remark was prophetic as well as insightful. Rule 402 is—and should be—the keystone of the structure of the Federal Rules.

Rule 402 reads:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.[53]

Professor Weissenberger urges that rather than simply focusing on the statutory text approved by Congress, the courts should also weigh "the subjective intent of the drafters" of the Federal Rules.[54] However, if one does so, contrary to Professor Weissenberger's suggestion, the courts will conclude that they no longer possess the power to create[55] uncodified exclusionary rules and superimpose[56] or engraft[57] such rules onto the statutory language.

A well-accepted maxim of interpretation is embodied in the old Latin phrase *expressio unius est exclusio alterius*:[58] if a document provides for

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50. Stephen A. Saltzburg, Lee D. Schinasi & David A. Schlueter, Military Rules of Evidence Manual 1 (1981).
51. *Id.* at 174.
52. *Id.* at 175.
53. Fed. R. Evid. 402.
54. Weissenberger, *supra* note 39, at 1309.
55. *Id.* at 1311.
56. *Id.* at 1314.
57. *Id.* at 1330.

one thing, other things are impliedly excluded.[59] The maxim is frequently invoked in statutory construction.[60] However, the maxim is not confined to statutory interpretation. In the final analysis, the maxim has a common-sense basis.[61] If we can assume that a person chooses her words carefully, what she does not say can be "just as important" as what she says.[62] If she refers to certain items in a class but makes no mention of other items in the same class, the common-sense inference is that she does not intend to include the omitted items. The inference is a logical one whether the writing being interpreted is a statute or a private document such as a contract.[63] The inference is particularly strong when there is an affirmative indication that the person has selected her words carefully[64] rather than hastily.[65] In 1992, in *United States v. Salerno*,[66] the Supreme Court construed the hearsay provisions of the Federal Rules. The Court commented that the very detail of the provisions demonstrated that the drafters had made "a careful judgment"[67] as to which hearsay to admit.

Irrespective of whether we label Rule 402 a "judicial" or "legislative" document, the maxim gives us important insight into the intent of the drafters of Rule 402. Their words specifically list exclusionary rules of evidence based on four sources of law: "the Constitution of the United States, . . . Act of Congress, . . . these rules, or . . . other rules prescribed

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58. A variation of the maxim is *inclusio unius est exclusio alterius*. In one case the translation is "the express mention of one" while in the other case the translation is "the inclusion of one." *See* United States v. Koonce, 991 F.2d 693, 698 (11th Cir. 1993).

59. 2A STATUTES AND STATUTORY CONSTRUCTION § 57.10, at 664 (N. Singer, Sands rev. 4th ed. 1984).

60. *E.g.*, United States v. Koonce, 991 F.2d 693, 698 (11th Cir. 1993); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175 (7th Cir. 1989); United States v. Goldbaum, 879 F.2d 811 (10th Cir. 1989); *In re* Marriage of Fisk, 4 Cal. Rptr. 2d 95, 100 (1992); Del Mar v. Caspe, 272 Cal. Rptr. 446 (1990); Parmett v. Superior Court, 262 Cal. Rptr. 387 (1989); People v. Melton, 253 Cal. Rptr. 661 (1988); *In re* Edwayne V., 242 Cal. Rptr. 748 (1987); Elysian Heights v. City of Los Angeles, 227 Cal. Rtpr. 226, 231 (1986). *See generally* ESKRIDGE & FRICKEY, *supra* note 2, at 641.

61. United States v. Crane, 979 F.2d 687 (9th Cir. 1992).

62. Mundell v. Beverly Enterprises-Indiana, Inc., 778 F. Supp. 459, 462 (S.D. Ind. 1991).

63. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 552 (1960).

64. Foy v. First Nat'l Bank, 868 F.2d 251 (7th Cir. 1989)(a carefully drafted statute); Bryant v. Food Lion, Inc, 774 F. Supp. 1484 (D.S.C. 1991) (careful drafting by Congress).

65. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 660 F. Supp. 29 (D. Kan. 1986).

66. 112 S. Ct. 2503 (1992).

67. *Id.* at 2507.

by the Supreme Court pursuant to statutory authority."[68] However, this list contains no mention of a fifth source, namely, case, common, or decisional law. The inference is that the drafters intended to exclude that fifth source. The maxim thus points to the conclusion that Rule 402 precludes the courts from enforcing uncodified exclusionary rules of evidence; case law or decisional authority is *not* a permissible basis for excluding relevant evidence. The predecessors of Rule 402, the history of its adoption, and several subsequent developments all reinforce that conclusion.

A. The Historical Antecedents of Rule 402

Professor Weissenberger correctly points out that a consideration of the Federal Rules' "predecessors" may be helpful in divining the intent of the Rules.[69] He expressly mentions the Model Code of Evidence, published in 1942, and the Uniform Rules, released in 1953.[70] He gives the Code and the Uniform Rules as examples of statutory schemes protective of the trial judge's discretion.[71] Those schemes are undeniably relevant to fathoming the intent of Rule 402, particularly since the Advisory Committee Note to 402 specifically cites similar schemes such as the Uniform Rules.[72] However, his discussion omits the most relevant parts of those statutory schemes. Both schemes included provisions analogous to Rule 402, and both provisions are at odds with Professor Weissenberger's contention that the Federal Rules should be interpreted to preserve the common law power to create and enforce uncodified exclusionary rules.

The American Law Institute promulgated the Model Code, which included Rule 9, a counterpart to Rule 402. In pertinent part, Rule 9 stated that "[e]xcept as otherwise provided in these Rules, . . . all relevant evidence is admissible."[73] The official comment to the Model Code expressed the drafters' intent: "These Rules . . . abrogate the effect of any prior judicial decision contrary to any part of the Rules, and prevail over inconsistent statutory provisions."[74]

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules, which were adopted in Kansas.[75] Like

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68. FED. R. EVID. 402.

69. Weissenberger, *supra* note 39, at 1327-29.

70. *Id.*; CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 22-23.

71. *Id.*

72. FED. R. EVID. 402, Adv. Comm. Note.

73. 22 CHARLES A. WRIGHT & KENNETH GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5191, at 174-75 n.13 (1978).

74. Comment, MODEL CODE OF EVIDENCE Rule 2, quoted in *Id.* § 5199, at 219 n.1.

75. *Id.* § 5191, at 175.

the Model Code, the Uniform Rules contained a provision strikingly similar to Rule 402. That provision—Uniform Rule 7—announced that "[e]xcept as otherwise provided in these Rules, . . . all relevant evidence is admissible."[76] The Kansas drafting committee which embraced the Uniform Rules stated that Rule 7 "wipes out all existing restrictions . . . on the admissibility of relevant evidence."[77] The Advisory Committee Note to Federal Rule 402 expressly cites both the Uniform Rule and Kansas' version of the Rule as comparable provisions.[78]

The same Note prepared by the authors of Rule 402 mentions California Evidence Code section 351 as one of the drafting models for 402.[79] Section 351 proclaims: "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."[80] The statute was drafted by the California Law Revision Commission which used Uniform Rule 7 as its template.[81] The Commission avowed its intent that section 351 would preclude the possibility that "valid restrictions on the admissibility of evidence in addition to those declared by statute will remain."[82]

Given the citations to other statutory schemes in the Note to Rule 402, Professor Weissenberger is correct in urging the courts to look at the "predecessors" to the Federal Rules. However, given close scrutiny, the "structural scheme" of those predecessors undercuts his position. The thrust of the earlier statutory schemes was to reform and simplify Evidence law, in part through the simple expedient of depriving the courts of the power to further complicate it by judicially prescribing uncodified exclusionary rules.

B. Rule 402 Itself and the History of Its Adoption

The link between Rule 402 and California Evidence Code section 351 is more than philosophic. The California Law Revision Commission studied the codification of evidence during the early 1960's,[83] at roughly the same time, Professor Weissenberger notes, that Chief Justice Warren initiated the study of the feasibility of a federal evidence code.[84] At one point, the Advisory Committee drafting the Federal Rules included one

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76. *Id.* § 5191, at 175 n.14.
77. *Id.* § 5192, at 178 n.9.
78. FED. R. EVID. 402, Adv. Comm. Note.
79. *Id.*
80. CAL. EVID. CODE § 351.
81. WRIGHT & GRAHAM, *supra* note 73, § 5191, at 175.
82. 7 CAL. L. REV'N COMM'N, RECOMMENDATIONS PROPOSED AND EVIDENCE CODE 34 (1965).
83. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 132-33 (1987).
84. Weissenberger, *supra* note 39, at 1319.

of the drafters of the California Evidence Code.[85] As previously stated, the California Law Revision Commission explicitly stated that the Code was intended to impliedly repeal uncodified exclusionary rules; and in their Note, the drafters of Rule 402 cited section 351 of the Code as a model for 402. As we shall now see, the context of Rule 402, its accompanying Note, and its legislative history all support the conclusions that the omission of any reference to case law in Rule 402 was purposeful and that this purpose was to deny the courts the rule-making authority which Professor Weissenberger claims the Rules left intact.

To properly interpret a portion of the text of any document—whether a public statute or private writing—the court should consider the entire context of the document.[86] Thus, other provisions of the Federal Rules can shed light on the meaning of Rule 402. As provisions in the same statutory scheme, Rules 501 and 403 form part of the context of Rule 402. Rule 501 specifically authorizes the courts to continue to evolve privilege doctrine by "common law" process.[87] Professor Weissenberger's position would reduce Rule 501 to a meaningless[88] nullity.[89] Rule 501 would be unnecessary if, as Professor Weissenberger asserts, the courts retain a general common law power to create[90] "evidentiary doctrines";[91] the provision purports to confer on them a power he asserts they already have.

The omission of any reference to "common law" in Rule 402 becomes even more significant in the context of 403. Like Rule 402, Rule 403 contains a list of probative dangers that can justify the exclusion of logically relevant evidence:

> Although [logically] relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[92]

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85. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 222 n.16.

86. Amendola v. Secretary, Dept. of H.H.S., 989 F.2d 1180, 1182 (Fed. Cir. 1993) ("out of context"); DAE Corp. v. Engeleiter, 958 F.2d 436, 439 (D.C. Cir. 1992) ("the meaning of . . . language . . . depends on context"); Animal Legal Defense Fund v. Secretary of Agriculture, 813 F. Supp. 882, 887 n.7 (D.D.C. 1993) ("the language and design of the statute as a whole"); Lilienthal & Fowler v. Superior Court, 16 Cal. Rptr. 2d 458 (1993) (the whole act rather than isolated words); People v. Jiminez, 10 Cal. Rptr. 2d 281, 283 (1992) ("in context, with reference to the entire statutory scheme of which it is a part"); Squaw Valley Ski Corp. v. Superior Court, 3 Cal. Rtpr. 2d 897, 902 (1992) ("in context").

87. FED. R. EVID. 501.

88. Galli v. Metz, 973 F.2d 145 (2d Cir. 1992).

89. People v. Falconer, 11 Cal. Rptr. 2d 788 (1992).

90. Weissenberger, *supra* note 39, at 1311.

91. *Id.* at 1331.

92. FED. R. EVID. 403.

Before the adoption of the Federal Rules, the common law in some jurisdictions recognized another probative danger warranting the exclusion of relevant evidence: unfair surprise.[93] The text of Rule 403 fails to list surprise as an exclusionary ground. What is the effect of that failure? The third and fourth paragraphs of the accompanying Advisory Committee Note explain that since the text does not list surprise, the courts may no longer bar evidence on that basis.[94] In effect, the Note invokes the *expressio unius* maxim; in the Note, the drafters indicate that they carefully chose the words inserted in text and that the omission signals the demise of surprise as a recognized probative danger. By parity of reasoning, the omission of "common law" in Rule 402 signals the demise of the common-law power to enunciate evidentiary doctrine.

The Note accompanying Rule 402 buttresses the contextual argument and makes it untenable to argue that the omission in the text of 402 was an oversight. The second paragraph of the Note reiterates the permissible bases for an exclusionary rule of evidence, and like the text of Rule 402, the paragraph excludes the common law.[95] However, in virtually the next breath—the fifth paragraph discussing another issue—the same Note expressly refers to "common-law rules."[96] Rule 501 proves that the drafters knew how to refer to the common law when they wanted to, and the Note to Rule 402 compels the conclusion that the failure to mention common law in 402 was deliberate rather than inadvertent.

Finally, like the Advisory Committee Note, the extrinsic legislative history is also consistent with this conclusion. In general, the history documents a lengthy, careful consideration of the Rules. The process spanned years. The very length and care of the consideration strengthen the inference that the words ultimately approved were carefully chosen. The Federal Rules were not adopted hastily; quite to the contrary, as Professor Weissenberger notes, Congress' deliberation over the Rules was the tail end of an already prolonged process.[97] Congress had considered the proposed Rules for well over a year.[98] Even more to the point, the tenor of the testimony before the various Congressional committees "rather strongly suggests that Congress assumed that, except where [as in Rule 501] the Evidence Rules otherwise provide, there would be no decisional law of evidence."[99] One witness testified directly that

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93. CHARLES MCCORMICK, EVIDENCE § 185 (4th ed. 1992).
94. FED. R. EVID. 403, Adv. Comm. Note.
95. FED. R. EVID. 402, Adv. Comm. Note.
96. *Id.*
97. Weissenberger, *supra* note 39, at 1319.
98. *Id.* at 1319 n.63, 1320.
99. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 222.

after Congress' enactment of the Rules, the judicial creation of evidentiary rules "will in all probability be prevented."[100] The broader "political context" lends further support:[101]

> In the aftermath of its Watergate battle with the Executive branch, Congress was jealous and assertive of its powers. Congress intervened to prevent the Supreme Court from promulgating the rules under the Court's own authority.[102]

Congress' battle with President Nixon in the courts also was fresh in its mind. As the culmination of that battle, in 1974, the Supreme Court handed down its decision in *United States v. Nixon*,[103] the same year Congress began its consideration of the Rules. The "political atmosphere in Washington" at the time of the Rules' passage makes it difficult to believe that Congress approved a statutory scheme "which would preserve the courts' common-law hegemony over evidence law."[104]

C. Subsequent Developments

Since the passage of the Federal Rules, there have been several developments which strengthen the case that the Rules impliedly abolish uncodified exclusionary rules of evidence. In 1978, the Reporter for the Federal Rules, the late Professor Edward Cleary, wrote a now-famous article about the proper interpretation of the Rules.[105] Professor Weissenberger cites the article,[106] quoting part of one sentence from the article: "[i]n reality . . . the body of common law knowledge [of evidence] continues to exist, though in the somewhat altered form of a source of guidance . . . ."[107] Unfortunately, he deletes critical language from both the beginning and the end of the passage. The full passage reads:

> In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . . ." [Fed.R.Evid. 402. See United States v. Grajeda, 570 F.2d 872 (9th Cir. 1978).] In reality, of course, the body of common law knowledge continues to exist, though in the

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100. *Id.* § 5199, at 222 n.17.
101. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 47.
102. *Id.*
103. 418 U.S. 683 (1974).
104. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 47.
105. Edward Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).
106. Weissenberger, *supra* note 39, at 1331.
107. *Id.*

somewhat altered form of a source of guidance in the exercise of delegated powers.[108]

Several noteworthy aspects exist in the deleted language. The language deleted at the end of the passage indicates that the courts may look to case law precedents in deciding how to exercise powers "delegated" to them by the Rules but not to exercise an independent, common-law power to create evidentiary doctrine on their own motion. Furthermore, the first sentence deleted from the quotation flatly contradicts the assumption that the Rules leave intact the courts' earlier common-law power to develop evidentiary doctrine. The first sentence flatly declares that "no common law of evidence remains." Moreover, Professor Cleary's reference to Rule 402 makes it clear that, in his judgment, it is Rule 402 that abrogates that common-law power. Professor Cleary's citation to the *Grajeda* case further defines his interpretation. In that case the Court of Appeals for the Ninth Circuit declared, citing Rule 402, that the courts are no longer "free" to establish evidentiary rules independent of the Federal Rules.[109]

The relevant developments are not limited to federal practice. Later developments in the states reflect an even broader consensus that Rule 402 abolishes the courts' common-law powers to "create"[110] evidentiary rules and "superimpose" additional restrictions on the face of the statutory language.[111] The drafters of the Vermont Rules subscribed to the consensus view and explicitly stated in their Note to that state's Rule 402 that the rule eliminated prior common-law rules.[112] In other jurisdictions, when the drafters did not want to foreclose the courts' evolution of common-law evidentiary doctrines, they said so in no uncertain terms. In its order promulgating the Minnesota Rules, that state supreme court explicitly reserved the common-law power to revise evidentiary doctrine.[113] The drafters of an early version of the proposed New York code added language to their version of Rule 402 which would have partially preserved the courts' common-law authority.[114] The West Virginia drafters added a reference to decisional law in the text of their Rule 402.[115] Similarly, the Oregon drafting committee included the expression "decisional law" in their adaptation of Rule 402.[116]

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108. Cleary, *supra* note 105, at 915.

109. United States v. Grajeda, 570 F.2d 872, 874 (9th Cir. 1978), *withdrawn*, 587 F.2d 1017 (9th Cir. 1978).

110. Weissenberger, *supra* note 39, at 1311.

111. *Id.* at 1318.

112. VT. R. EVID. 402 Reporter's Note.

113. P. THOMSON, MINNESOTA PRACTICE: EVIDENCE 5 (1979).

114. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 218 n.9.

115. W. VA. R. EVID. 402.

116. 1 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 402[06], at 402-26 (1992).

It would, of course, be a mistake to overstate the extent to which the Federal Rules operate as a self-contained evidence code. As Professor Cleary indicated, the courts may certainly turn to common-law precedents to help them resolve ambiguities in the text of the individual rules. In addition, the Rules contain some partial or complete windows to the common law. As previously stated, in the area of privileges, Rule 501 expressly tasks the courts to continue refining privilege doctrine by "common law" methodology.[117] In this doctrinal area, by the express terms of Rule 501, the courts may still exercise full common-law power. In addition, as we shall see at greater length in Part II, Rule 403 empowers the trial judge to exclude otherwise admissible evidence when, in the judge's mind, the attendant probative dangers substantially outweigh the probative value of the evidence.[118] However, power does not equate with the common-law power to create general exclusionary rules of evidence.[119] As Professor Weissenberger points out, Rule 403 is modeled after Model Rule 303.[120] He acknowledges that Model Rule 303 gave the trial bench limited "case specific" authority to exclude logically relevant evidence when the particular probative dangers incident to the admission of the evidence outstripped its probative worth.[121] Rule 403 does not confer true, common-law discretion to fashion evidentiary rules.[122] Instead, Rule 403 permits trial judges to exclude particular relevant testimony only on the basis of the factors specified in the text of the Rule.

II. The Role of Rule 402 in Rationalizing the Supreme Court's Decisions and in Protecting Trial Court Discretion

Part I explained the central flaw in Professor Weissenberger's general position: complete disregard of Rule 402, the most essential provision to understanding the design of the Federal Rules. This Part describes some of the more specific arguments which Professor Weissenberger advances to support his position. He not only critiques individual Supreme Court decisions construing the Federal Rules of Evidence; he also develops the policy argument that the Court's textualist approach to interpreting the Rules imperils the discretion which the trial bench needs to administer

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117. Fed. R. Evid. 501.

118. Fed. R. Evid. 403.

119. *See generally* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 Vand. L. Rev. 879 (1988).

120. Weissenberger, *supra* note 39, at 1335.

121. *Id.*

122. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. Cal. L. Rev. 937, 980-82 (1990).

the Rules. As we shall see, though, these specific lines of argument are predictably flawed because they also overlook the role of Rule 402.

A. Rationalizing the Supreme Court Decisions Construing the Federal Rules of Evidence

To support his attack on the Supreme Court's approach to interpreting the Federal Rules, Professor Weissenberger faults several of the individual Supreme Court decisions construing the Rules. In some cases, the thrust of his critique is that the end result of the decision is overturning an uncodified exclusionary rule. He regards this as unsound.[123] In those cases, Rule 402 itself is the best answer to the critique. Properly construed, Rule 402 abolishes uncodified exclusionary rules of evidence. Thus, even if the exclusionary rule in question is a hoary, well-respected one, the decision overturning the rule is supportable under the Rules.

However, in the case of some other Supreme Court decisions construing the Rules, Professor Weissenberger launches slightly different attacks. The attacks on the decisions in *United States v. Abel*[124] and *Huddleston v. United States*[125] are particularly interesting.

The question presented in *Abel* in 1984 was whether proof of bias is a permissible method of impeachment under the Federal Rules. At trial, the prosecutor attempted to impeach a defense witness on the basis that both he and the accused were members of a gang sworn to commit perjury on each other's behalf. Proof of bias was[126] and is[127] a well-settled impeachment technique at common law. Article VI of the Federal Rules generally governs the impeachment and rehabilitation of witnesses. The problem is that there is no mention of "bias" or "partiality" in Article VI.[128] In *Abel*, the defense argued that since the Rules do not explicitly authorize bias impeachment, that impeachment technique is no longer permitted in federal practice. The *Abel* Court ultimately concluded that bias impeachment is still a viable technique.

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123. *E.g.*, Weissenberger, *supra* note 39, at 1318 (his criticism of the result in Bourjaily v. United States, 483 U.S. 171 (1987)).

124. 469 U.S. 45 (1984).

125. 485 U.S. 681 (1988).

126. CHARLES MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 40 (1954).

127. CHARLES MCCORMICK, EVIDENCE § 39 (4th ed. 1992).

128. In truth, the Federal Rules do mention bias impeachment. Rule 411 reads:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411. Surprisingly, during the *Abel* litigation, this fact seems to have escaped both the litigants and the Court!

Professor Weissenberger treats the result in *Abel* as proof that, as a practical matter, the Court must resort to uncodified common-law doctrines to render the Federal Rules workable. He states that to justify its conclusion, the Court "relied on several pre-Rules [common-law] cases . . . ."[129] He adds that if "the Court [had] followed its usual [textualist] line of reasoning, it would have eliminated impeachment by bias . . . ."[130] After all, he writes, bias impeachment is "a pre-Rule doctrine which was not expressly preserved in the plain language of text of the Rules . . . ."[131] In Professor Weissenberger's mind, *Abel* is the case in point, showing in concrete terms that the Court's "customary statutory construction analysis"[132] is unworkable. Not once during this discussion does Professor Weissenberger allude to Rule 402.

In truth, Rule 402 explains the *Abel* decision. Chief Justice Rehnquist authored the Court's unanimous opinion. There are two key passages—both of which highlight Rule 402.

In the initial passage, the Chief Justice addresses the narrow question of the permissibility of bias impeachment under the Federal Rules:

> [Federal Evidence] Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of the witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.[133]

No one could deny that a witness' credibility is a fact in issue in a trial under the Federal Rules; if it were not, most of the provisions of Article VI would have to be deleted. The very existence of those provisions attests that a witness' credibility is "a fact . . . of consequence"[134] within the intent of that expression in Rule 401. Likewise, no one could dispute the proposition that a person's bias is a relevant factor in assessing his or her credibility.[135] The Chief Justice's reasoning was straightforward:

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129. Weissenberger, *supra* note 39, at 1311.
130. *Id.*
131. *Id.* at 1332.
132. *Id.*
133. United States v. Abel, 469 U.S. 45, 50-51 (1984).
134. *Id.*
135. *Id.* at 52.

Because proof of bias is relevant under 401 and no recognized basis for excluding the evidence existed under 402, the evidence was admissible.

It is true that the Chief Justice referred in passing to earlier common-law decisions permitting bias impeachment.[136] However, those references were makeweights; the premise of the decision is Rule 402. In *Abel*, there was no need to resort to any common-law precedent; even if there had not been a single prior common-law precedent permitting bias impeachment, the Chief Justice's Rule 402 analysis would still be valid. Once the logical relevance of a witness' impeachment is acknowledged, Rule 402 alone suffices to rationalize the outcome in *Abel*. By the terms of Rule 402, logically "relevant evidence is admissible, except"[137] in specified instances; the proffered bias evidence was indisputably relevant, and none of the specified exceptions came into play in *Abel*.

In the other key passage, the Chief Justice quotes Professor Cleary's article on the interpretation of the Rules.[138] However, he begins the quotation with the language deleted by Professor Weissenberger: "In principle, under the Federal Rules of Evidence no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided . . . .'"[139] The unanimous Court was not content to invoke 402 to resolve the technical question presented in *Abel*; the Court went out of its way to spotlight the central role Rule 402 has in the structure of the Federal Rules' scheme. The Supreme Court forcefully affirmed its position in June 1993 in *Daubert v. Merrell Dow Pharmaceuticals*.[140] There the Court unanimously held that the Rules overturn the common-law *Frye* rule, restricting expert testimony to generally accepted scientific theories. The Court cited *Abel* and again quoted the entire relevant passage from Professor Cleary's article. Indeed, the *Daubert* Court went further; the Court described Rule 402 as "the baseline"[141] of the Federal Rules and declared that "the Rules occupy the field."[142]

Just as he attacked the Court's reasoning in *Abel*, Professor Weissenberger targets the Supreme Court's 1988 decision in *Huddleston v. United States*.[143] Although the supposed point of the attack on *Abel* is to prove that the Federal Rules will not work without the benefit of judicially-created evidentiary doctrines, the gravamen of the complaint against *Huddleston* seems to be that the Court's reasoning proves too much.

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136. *Id.* at 51.
137. FED. R. EVID. 402.
138. *Abel*, 469 U.S. at 51-52.
139. *Id.* at 51.
140. 113 S. Ct. 2786 (1993).
141. *Id.* at 2793.
142. *Id.* at 2794.
143. 485 U.S. 681 (1988).

Both at common law[144] and under the Federal Rules,[145] a prosecutor may sometimes introduce evidence of an accused's uncharged crimes. Suppose, for example, that the accused is charged with an armed robbery committed on July 1, 1993. The robbery victim testifies that when the robber fled, he dropped his pistol at the crime scene. The investigating police officer testifies that he found a pistol with a certain serial number at the robbery scene. The prosecution has testimony that on June 1, 1993, the accused stole the pistol in question from a local gun store. The gun store clerk is prepared to identify the accused as the thief and to testify that the serial number of the stolen weapon matches that of the pistol found at the robbery scene. Although the prosecutor may not introduce the testimony about the June 1 theft to show the accused's general bad character,[146] she could offer the testimony to establish the accused's identity as the perpetrator of the charged crime.[147] The prosecutor is not relying on forbidden bad character reasoning prohibited by Federal Rules 404-05.[148] Rather, the evidence has legitimate, noncharacter relevance under Federal Rule of Evidence 404(b); her theory of logical relevance is that with its serial number, the pistol is a one-of-a-kind item and the testimony about the uncharged, June 1 theft places the accused in possession of the very weapon used to commit the charged July 1st robbery. Rule 404(b) countenances the admission of uncharged misconduct evidence on a noncharacter theory to prove "identity."[149]

Of course, a key part of the foundation for admitting testimony about the June 1 theft is the clerk's willingness to identify the accused as the thief. Whenever a prosecutor offers such uncharged misconduct evidence, proof of the accused's identity as the perpetrator of the uncharged act is an essential part of the foundation or predicate.[150] At common law, a split of authority existed as to the quantum of evidence needed to link the accused to the uncharged act.[151] Most courts assume that this type of testimony is highly prejudicial.[152] Consequently, prior to the adoption of the Federal Rules of Evidence, the prevailing view in the United States was that before admitting uncharged misconduct

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144. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18 (1984).
145. FED. R. EVID. 404(b).
146. IMWINKELRIED, *supra* note 144, § 2:18.
147. *Id.* § 3:28.
148. *Id.* § 2:18.
149. FED. R. EVID. 404(b).
150. IMWINKELRIED, *supra* note 144, § 2:05.
151. *Id.* § 2:08.
152. *Id.* §§ 1:02-:03.

evidence, the trial judge must find clear and convincing evidence that the accused committed the uncharged act.[153]

In *Huddleston*, the prosecution offered evidence of the accused's uncharged misconduct to establish the accused's mens rea. The accused was charged with possessing and selling stolen videocassette tapes. The charged offenses required proof of the mens rea element that the accused knew the tapes were stolen. At trial, the prosecution presented testimony about the accused's involvement in other similar transactions with stolen goods. The accused's uncharged transactions reduced the objective plausibility of his claim that he did not know the tapes were stolen.[154] Concededly, an innocent person can become enmeshed in suspicious circumstances; but the more frequently a person is involved in such incidents, the more improbable is his claim of an innocent state of mind.[155]

In *Huddleston*, all parties agreed that, as at common law, proof of the accused's identity as the perpetrator of the uncharged act is a requisite part of the foundation under the Federal Rules. However, the Rules did not expressly prescribe the measure of proof of the accused's identity. The defense urged the Court to hold that the majority, common-law rule of clear and convincing evidence is still in effect under the Federal Rules. Instead, the Court ruled that Federal Rule of Evidence 104(b) controlled. Rules 104(a)-(b) set out the procedures for determining the existence of foundational or predicate facts.[156] Rule 104(b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.[157]

Once again writing for a unanimous Court, Chief Justice Rehnquist declared that uncharged misconduct evidence is admissible under Rule 404(b) so long as the judge believes that a hypothetical rational juror "can reasonably conclude that the act occurred and the defendant was the actor."[158]

According to Professor Weissenberger, *Huddleston* is a dangerously broad decision requiring the "rejection of virtually any evidentiary doc-

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153. *Id.*

154. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 593-95 (1990).

155. *Id.*

156. FED. R. EVID. 104. *See generally* Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, in 45 AM. J. TRIALS 1 (1992).

157. FED. R. EVID. 104(b).

158. Huddleston v. United States, 485 U.S. 681, 689 (1988).

trine that is not found on the face of the literal text" of the Federal Rules.[159] He reads *Huddleston* as announcing that "[i]f the plain language of the Rules does not provide for a doctrine of [either] admissibility or inadmissibility, the doctrine" must be abandoned.[160] If *Huddleston* said that, Professor Weissenberger's criticism would be well-founded. If there must be an explicit statutory basis for recognizing even "a doctrine of admissibility,"[161] *Huddleston* would be at odds with *Abel*. As previously stated, Article VI of the Federal Rules does not explicitly authorize bias impeachment.

However, this criticism misses the mark because *Huddleston* does not say that. Again, Professor Weissenberger misreads the case because he fails to focus on the passages in the opinion devoted to Rule 402. The Court made it abundantly clear that it was holding only that there must be a statutory basis for an exclusionary rule which would have the effect of barring the admission of evidence that is logically relevant and satisfies all the explicit requirements of the Rules:

> Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence—evidence which makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The text contains no intimation . . . that any [other] showing is necessary before such evidence may be introduced for a proper [noncharacter] purpose [under Rule 404(b)]. If offered for a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.[162]

Interestingly enough, in the 1978 article by Professor Cleary which Professor Weissenberger cites,[163] Professor Cleary anticipated the result in *Huddleston*.[164] He noted an early post-Rules case applying the clear and convincing evidence standard under Rule 404(b). Professor Cleary condemned the case as unjustifiably "engrafting a further requirement"

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159. Weissenberger, *supra* note 39, at 1316.
160. *Id.*
161. *Id.*
162. *Huddleston*, 485 U.S. at 687-88.
163. Weissenberger, *supra* note 39, at 1331.
164. Cleary, *supra* note 105, at 917.

onto the text of the statute.[165] Professor Cleary singled out and repudiated the court's claim that "[a]s a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation [such as the clear and convincing evidence standard] unless the intention is clearly manifest."[166] Professor Cleary obviously believed that no further manifestation of intention was necessary to overthrow an uncodified "doctrine of . . . inadmissibility"[167] such as the clear and convincing evidence standard. His belief is correct; as Part I demonstrated, Rule 402, standing alone, has ample force to abolish such exclusionary rules.

However, "doctrine[s] of . . . inadmissibility" are distinguishable from "doctrine[s] of admissibility" under Rule 402.[168] Contrary to Professor Weissenberg's suggestion, nothing in *Huddleston* states or implies that "a doctrine of admissibility"[169] in the sense of a theory of logical relevance must have an express statutory basis other than Rule 402 before the court may admit evidence on that theory. *Abel* is illustrative. Evidence of the witness' bias was logically relevant to a fact in dispute. Logically relevant evidence is presumed admissible under Rules 401-02. If there is no statutory exclusionary rule barring the evidence and the evidence successfully runs the gauntlet of Rule 403, the evidence is admissible. The Court described that sequence of analysis in *Abel*[170] and reiterated it near the end of the *Huddleston* opinion.[171] When an item of evidence passes the muster of that sequence of analysis, Rules 401-02 are ample statutory authorization for the admission of the evidence. A "doctrine of admissibility"[172] does not need any statutory sanction other than Rules 401 and 402.

B. Safeguarding the Discretion of the Trial Judiciary in Administering The Rules of Evidence

In addition to faulting individual Supreme Court decisions construing the Federal Rules, Professor Weissenberger argues that the cumulative effect of the decisions is to erode the necessary discretion of the trial judiciary in administering the Federal Rules.[173]

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165. *Id.*
166. *Id.*
167. Weissenberger, *supra* note 39, at 1316.
168. *Id.*
169. *Id.*
170. *Abel*, 469 U.S. at 51-54 (1984).
171. *Huddleston*, 485 U.S. at 691-92.
172. Weissenberger, *supra* note 39, at 1316.
173. *Id.* at 1325, 1329-30, 1332-39.

In one respect, Professor Weissenberger is eminently correct: It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the Rules. No matter how hard they try, the drafters of any evidence code can never anticipate all the variations of the record that a trial judge will encounter. The presiding judge needs a modicum of discretionary authority to flexibly[174] adapt the evidentiary rules to the case as it unfolds in her courtroom. That discretion is widely viewed as "an indispensable tool of the law of evidence."[175] The drafters of the Federal Rules appreciated the desirability of granting such discretionary power to the trial judge. Rule 403 is the most obvious conferral of discretionary authority,[176] but it is by no means the only one:

> There are many other situations in which the language of the Federal Rules confers upon the trial judge the authority . . . to exercise judgment in the application of the rules to particular cases. . . . [A]lthough the words "discretion" and "discretionary" appear only six times, other terms such as "may," "in fairness," "would be unfair," "in the interests of justice," "helpful," and "assist" are also used to confer discretion on the trial court. . . . The term "may" is used thirty-seven times in the Federal Rules.[177]

Having conceded the trial bench's need for discretionary authority, however, it is quite another matter to leap to the conclusion that, in turn, that need requires the empowerment of appellate courts to continue to "create"[178] full-fledged "evidentiary doctrines"[179] in the nature of exclusionary rules. That argument is not only *non sequitur*; worse still, it flies in the face of the American historical experience that unfettered appellate power to fashion evidentiary rules is the worst enemy of trial court discretion. In some passages of his article, Professor Weissenberger makes it clear that he is discussing the discretion of the trial bench.[180] In other passages, though, he refers generically to the discretion of the judiciary[181] without distinguishing between the trial bench and the appellate courts. That distinction is vital.

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174. *Id.* at 1326.
175. People v. Castro, 696 P.2d 111, 115 (1985).
176. Leonard, *supra* note 122, at 964-66.
177. *Id.* at 966 n.134.
178. Weissenberger, *supra* note 39, at 1311.
179. *Id.* at 1331.
180. *Id.* at 1325, 1328-30, 1332-39.
181. *Id.* at 1307, 1310, 1311, 1326, 1334.

For the most part, legislative intervention to prescribe evidentiary rules has been far less frequent than the enunciation of exclusionary rules by appellate courts. More importantly, many of the proposed interventions have redounded to the benefit of the trial bench. One of the primary criticisms of the proposed Model Code was that it expanded trial court discretion at the expense of the appellate courts.[182] The Code's opponents charged that it conferred excessive discretion upon the trial judge.[183] Similarly, in drafting the California Evidence Code, the California Law Revision Commission intended to expand the trial judge's discretion, particularly over such matters as the form of the question.[184]

In adopting the Federal Rules of Evidence, Congress followed in the footsteps of the drafters of the Model Code and the California Evidence Code. In particular, the trial bench is the repository of the discretion granted by Federal Rule 403.[185] That discretion is not a discretion on the part of appellate courts to create general, categorical evidentiary doctrines. (To construe Rule 403 in that fashion would put it in direct conflict with Rule 402,[186] resurrecting the common-law power which Rule 402 abolishes.[187]) Rather, Rule 403 is designed to permit trial judges to balance the probative value of a particular item of evidence against the incidental probative dangers in an ad hoc, case-specific manner.[188] The intended impact of the adoption of Rule 403 was to shift power from the appellate courts to the trial bench.[189] The appellate court may review the trial judge's Rule 403 decision to determine whether the judge is guilty of an abuse of discretion,[190] but the court may not treat Rule 403 as an independent source of authority for evidentiary rule-making. In short, many of the statutory evidence codes have at-

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182. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 22; WRIGHT & GRAHAM, *supra* note 73, § 5005, at 88.

183. *Id.*

184. Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. L.A. L. REV. 279, 280-86 (1971).

185. Leonard, *supra* note 122, at 966-67.

186. Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 615 (1984).

187. Imwinkelried, *supra* note 119, at 879.

188. *Id. See also* Weissenberger, *supra* note 39, at 1335 (noting that Model Rule 303 is the forerunner of Federal Rule 403 and that "[t]he comment to Rule 303 stated that its application was case specific . . . .").

189. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 415, 457-58 (1989).

190. Leonard, *supra* note 122, at 977-84; Jon R. Waltz, *Judicial Discretion in the Admission of Evidence under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1102 (1985).

tempted to protect trial court discretion from erosion by the appellate courts.

Although the rare legislative interventions in evidence law have been largely designed to ensure trial court discretion, interventions by the appellate courts are not only more frequent, but are primarily responsible for the proliferation of exclusionary rules in American evidence law. American appellate courts have had a "fascination with exclusionary rules."[191] Due largely to judicially-created exclusionary rules, the United States legal system has "the most complex, restrictive set of evidentiary rules in the world."[192]

Even when a legislature has acted to confer discretion on the trial bench, appellate courts have often misconstrued the legislation to retake *de facto* rule-making power. The California experience is instructive. The California Evidence Code contains an analogue to Federal Rule 403, namely, Evidence Code section 352.[193] The Advisory Committee Note to Rule 403 indicates that the drafters used section 352 as one of the models for Rule 403, and the language of the two statutes is strikingly similar.[194] Like Rule 403, section 352 is intended to guarantee the trial judge discretionary authority to balance the probative worth of an item of evidence against the attendant probative risks in a case-specific context. However, over the years, the California appellate courts began treating section 352 as a basis for formulating exclusionary rules of general applicability.[195] Under the aegis of section 352, the courts announced "rigid limitations on the discretion of the trial court"—hard-and-fast exclusionary rules requiring the trial court to exercise its discretion in certain, specified ways.[196] The appellate courts were especially inclined to do so in cases involving the use of convictions for impeachment purposes.[197] This line of appellate cases generated so much political opposition that, in 1982 the California electorate passed an initiative measure, Proposition 8, designed to repeal the line of authority.[198] In

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191. Graham, *supra* note 184, at 306.

192. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 1028.

193. CAL. EVID. CODE § 352.

194. CAL. EVID. CODE § 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

195. Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1024-25 (1992).

196. People v. Castro, 696 P.2d 111, 115 (Cal. 1985).

197. *Id.* at 114-16.

198. *Id.* at 115-20.

a 1985 decision, the California Supreme Court itself was forced to acknowledge that "[t]he intention of the drafters of the initiative was to restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion which [the appellate courts] had grafted onto the code . . . ."[199]

In California, the appellate courts did not prove to be the guardians of trial court discretion. Quite to the contrary, in violation of the statutory mandate, they strove to circumscribe that discretion and arrogate some of the trial bench's authority to themselves. The exercise of ersatz "discretion" by the appellate courts proved to be the greatest threat to the preservation of the legitimate discretion of trial judges. The end of preserving trial court discretion is a laudable one, but empowering the appellate courts to formulate general exclusionary evidentiary rules is anything but a proven means to that end. The interpretation of Rule 402 adopted by the Supreme Court is far more likely to contribute to the realization of that end.

III. Conclusion

In closing, it is important to once again define the question presented. The issue is not whether the specific results reached in the individual Supreme Court decisions interpreting the Federal Rules are debatable as a matter of evidentiary policy. For example, without challenging the Supreme Court's general approach to interpreting the Rules, some commentators,[200] bar organizations,[201] and state courts[202] have questioned the result in *Huddleston*. For that matter, the issue is not even whether the Court has properly interpreted all the individual Federal Rules provisions involved in the cases. Again, without challenging the Supreme Court's general approach to construing the Rules, one might question the outcome in *Huddleston*.[203] The question presented here is the broader issue of

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199. *Id.* 117.

200. Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L.J. 135 (1989); Paul Rothstein, *Needed: A Rewrite—Where the Federal Rules of Evidence Should Be Clarified*, 4 Crim. Just. at 20 (1989).

201. The American Bar Association's Criminal Justice Section has urged the use of the clear and convincing proof standard. *Id.* The A.B.A. House of Delegates endorsed the Section's position. 57 L.W. (BNA) 2480, 44 Crim.L. (BNA) 2376.

202. State v. Garner, 806 P.2d 366 (Colo. 1991); Phillips v. State, 591 So.2d 987 (Fla. Dist. Ct. App. 1991); Minn. R. Evid. 404.

203. The textual approach adopted by the Supreme Court permits the judge construing a Rules provision to consider the accompanying Advisory Committee Note as a matter of course. *See* note 25, *supra*, and accompanying text. The Note to Rule 104 extensively cites writings by Professor Morgan. Fed. R. Evid. 104, Adv. Comm. Note.

the soundness of the Court's basic approach to interpreting the Rules.

Professor Weissenberger has made his view clear that the outcomes in several of the Supreme Court cases construing the Rules are "untoward."[204] Assuming *arguendo* that he is correct, the solution is not revising the Court's interpretive approach. Rather, given Rule 402, the solution must be to seek to amend the Federal Rules. The price of having a truly codified body of Evidence law is the necessity of resorting to the amendment process to overturn specific, untoward outcomes.[205]

That price is minimal. The amendment process is not unduly burdensome. In most instances, an amendment proposed by the Supreme Court does not even require the affirmative approval of Congress; the amendment takes effect so long as Congress does not act affirmatively to block the amendment.[206] Although the Rules are a relatively young statutory scheme, they have already been amended on several occasions. At this very moment, further amendments are pending.[207] In the future, the amendment process may be even easier to reconnoiter, since the Chief Justice recently reconstituted the Judicial Conference Advisory Committee on the Rules of Evidence.[208]

Professor Morgan was one of the architects of modern preliminary fact-finding procedures. Edward J. Imwinkelried, *supra* note 186, at 587-88. The late John Kaplan's article, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987 (1978), is one of the most lucid expositions of those procedures. In the article, Professor Kaplan argues that the dividing line between Rules 104(a)(competence) and 104(b)(conditional relevance) should be the test of whether we can trust the jury to administer the evidentiary rule in question. There is consensus that 104(b) applies to the issues of a lay witness' firsthand knowledge and a document's authenticity. According to Professor Kaplan, conditional relevance procedures apply to those issues because the jury can be trusted to administer those rules. Even if the jury decides that the witness lacked personal knowledge or that the document is inauthentic, there is little risk that the jury's exposure to the foundational testimony will distort the jury's deliberations; common sense should lead the jury to completely disregard the testimony if they conclude that the witness lacks knowledge or that the document is a forgery. However, using this test, it can be argued that the accused's identity as the perpetrator of an uncharged act should be classified as a competence issue under Rule 104(a). The old bromide teaches that "where there's smoke, there's fire." Suppose that at a conscious level a lay juror finds insufficient proof that the accused committed the uncharged act. Nevertheless, at a subconscious level the juror may suspect the accused's guilt. That danger is particularly acute when the judge permits the prosecution to introduce evidence of multiple uncharged acts. If one read the Advisory Committee Note as incorporating Morgan's procedure, as explained by Kaplan, one could reach a different outcome in *Huddleston*.

204. Weissenberger, *supra* note 39, at 1311-18.

205. Robert Aronson, *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington*, 54 WASH. L. REV. 31, 37-42 (1978).

206. 28 U.S.C. § 2076.

207. For example, there is a pending amendment to FED. R. EVID. 705.

208. *Judicial Conference Advisory Committee on the Rules of Evidence Starts Work*, AMERICAN ASSOCIATION OF LAW SCHOOLS SECTION ON EVIDENCE NEWSLETTER at 1 (May 1993).

The price is certainly modest when one considers the benefits flowing from the Supreme Court's approach to interpreting the Federal Rules. In the short term, the benefits are protecting trial court discretion from appellate erosion and effectuating the liberal structural design of the Rules.

The potential long-term benefit is even more important. Although the Model Code and the Uniform Rules were well-intentioned in their efforts to liberalize and simplify American evidence law, those statutory schemes enjoyed little success. No jurisdiction adopted the Model Code,[209] and the Uniform Rules won acceptance in only three states.[210] The Federal Rules are the first reformist evidence code to gain widespread acceptance in the United States.[211] The United States still has the most complicated, restrictive set of evidentiary exclusionary rules in the world.[212] However, the Federal Rules, especially Rule 402, represent a critical, initial step toward the rational simplification of American evidentiary doctrine. Better still, contemporary empirical research may be taking us to the brink of another major step in the same direction; some of the most recent research calls into question the behavioral assumptions underlying many of the exclusionary rules developed by the common law courts.[213] At this promising juncture, it would be tragic to take a step backward; that is precisely what we would be doing by giving the appellate courts carte blanche to enforce exclusionary rules which neither the Advisory Committee, nor the Supreme Court, nor Congress saw fit to codify.

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209. CARLSON, IMWINKELRIED & KIONKA, *supra* note 73, at 22.

210. *Id.* at 23 (Kansas, New Jersey, and Utah).

211. *Id.* at 26-27; GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987) (4 vols.).

212. CARLSON, IMWINKELRIED & KIONKA, *supra* note 73, at 22.

213. *E.g.*, Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992); Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCH. REV. 65 (1991); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992); Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 892 (1982); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Note, *Are Children Competent Witnesses? A Psychological Perspective*, 63 WASH. U. L.Q. 815 (1985).