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TO CODIFY OR NOT TO CODIFY—THAT IS THE QUESTION: A STUDY OF NEW YORK'S EFFORTS TO ENACT AN EVIDENCE CODE

*Barbara C. Salken**

INTRODUCTION

New York State's law of evidence continues to be governed largely by cases, despite codification efforts dating back almost 150 years. Complete codes of evidence have been proposed on six different occasions. The failure of New York, once the leader in codification of the common law,¹ to enact an evidence code is particularly surprising in light of the momentum toward codification that began with the enactment of the Federal Rules of Evidence in 1975 and resulted in the codification of evidence law

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¹ See *infra* notes 46-73 and accompanying text.

in all but six sister states.²

In 1992, the New York legislature again considered an evidence code. Drafted in 1990, and repeatedly modified to meet political opposition, the current proposal was designed merely to codify current New York common law.³ Yet, even this conservative approach failed.

Why has it been so difficult for the New York legislature to enact a code of evidence? This Article attempts to answer that question and examines the arguments advanced on both sides of the issue. Part I traces the long history of the codification movement. Part II examines the current debate. In general, supporters of codification argue that New York's common law of evidence is difficult to discover and hard to understand. They assert that it is applied differently in different courtrooms, is antiquated and is ripe for reform. Opponents argue that the present system is working well and should not be disturbed. They fear that codification will freeze the development of the law or, worse, subject it to the political process. Identification of the supporters of codification and its opponents discloses a surprising alliance of adversaries. Regardless of their specialty, those members of the bar generally having the burden of proof, both civil and criminal, enthusiastically support codification while the defense bar aggressively, and so far successfully, opposes it.

Part II also discusses the merits of each side's arguments. The result of this examination suggests that the real conflict is between those who would benefit from the modern trend to lib-

² Besides New York, Connecticut, Illinois, Indiana, Maryland, Massachusetts and Virginia are the only remaining states without evidence codes. Connecticut is now considering codification of its law of evidence. State Senator Anthony V. Avallone, Co-chair of the Connecticut General Assembly's Judiciary Committee, has ordered the Connecticut Law Revision Commission to study the feasibility of enacting a state evidence code. Joseph Calve, *Evidentiary Circumstance*, CONN. L. TRIB., Dec. 2, 1991, at 13.

Thirty-four states have codified their law of evidence modeled on the Federal Rules of Evidence. See *infra* note 124. Four states have codes that pre-date the Federal Rules: ALA. CODE §§ 12-21-1 to -285 (1986 & Supp. 1992); CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1992); KAN. STAT. ANN. §§ 60-401 to -470 (1985 & Supp. 1992); N.J. STAT. ANN. §§ 2A:84A-1 to -49 (West 1976 & Supp. 1992). Five states have modern codes that are not based on the federal model: GA. CODE ANN. §§ 24-1-1 to -154 (Michie 1982 & Supp. 1992); KY. REV. STAT. ANN. §§ 422.010-990. (Michie/Bobbs-Merrill 1992); MO. REV. STAT. §§ 490.010-710 (1986 & Supp. 1992); PA. STAT. ANN. tit. 42, § 6101 (1982 & Supp. 1992); and S.C. CODE ANN. §§ 19-1-10 to -70 (Law. Co-op. 1985 & Supp. 1991).

³ NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK XVIII (1991) [hereinafter 1991 *Proposed N.Y.C.E.*].

eralize the admission of evidence, and those who not only oppose that trend, but fear placing decision-making power in the legislature. New York has been unable to codify its law of evidence because the defense bar, particularly the criminal defense bar, does not believe that the legislature will protect its interests. As with so much else in our society, the question of whether to codify the law of evidence has become a question of power and trust. This Article concludes that codification can make the law more accessible, clarify ambiguities and permit reform and modernization. But since codification requires legislative action, with its possible political consequences, it cannot be strikingly innovative. Codification will not prevent change but will shift the forum for change. The courts' role in developing law will be more limited and the legislature's role will be more important. There is little evidence to support opponents' fears that codification will make the law of evidence a political football. In the end, the quality of New York's evidence law will be improved with codification.

I. HISTORICAL ROOTS OF CODIFICATION

Codification is the process by which the whole of a body of law, be it case law or statutory law, is converted into systematic form by legislative or executive act.⁴ The current effort to codify New York's law of evidence is merely the latest in a long history of attempts to consolidate and simplify complex bodies of law. The arguments in this debate have their roots in the ancient controversy over whether law should be made by judges or legislators.

A. *The European Beginnings*

Codification began in France in the early 1800s. France's successful and popular codification movement grew out of the chaotic state of its law and became a model for reform.⁵ The need for uniformity and simplicity could not have been greater: at the time of the French Revolution, there were at least 360 local codes of civil law. In addition, there were two distinct sys-

⁴ CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 513 (William S. Hein & Co. 1980) (1911). See also COURTENAY ILBERT, *THE MECHANICS OF LAW MAKING* 150 (1914).

⁵ ILBERT, *supra* note 4, at 153.

tems of law in the country; the written law, based on the Roman law, and a substantial body of customary law.⁶ Each had its own distinctive features. The written law, which predominated in the North, was authoritative and individualistic while the customary law, which predominated in the South, was more humane and flexible.⁷ Making matters worse, both of these systems were supplemented, modified or contradicted by three other general systems: feudal law, canon law and royal ordinances.⁸ Finally, all of these laws were modified by local usage.⁹ The pressure to unify the law was intense. The constitution of September, 1791, ordered such unification and by 1804, with Napoleon's support, it had happened.¹⁰ The Napoleonic Code, as it has come to be known, was so well received that Belgium, Holland, Italy, Spain, Portugal, Mexico, Chile and Japan quickly followed suit. Then Germany enacted its code in 1896, and Switzerland did so in 1907.¹¹ As in France, codification in these countries arose from a need for unification of diverse and often multiple legal systems.¹²

Perhaps the absence of any such pressing need explains the hostility with which the English common law system has greeted codification. For many centuries England has had one body of general law while other European countries required codification to achieve such unification.¹³ By the thirteenth century the common law had already been formed from customary precedents and was a single system of law for the whole realm.¹⁴ In common law England, the legislature was essentially supplementary; the unwritten law was added to or modified when times suggested the need for modernization, but it was not systematically reformed or reshaped.¹⁵ Nonetheless, the idea of reducing the English common law to a code goes back as far as the reign of Henry VII.¹⁶ In 1592, Francis Bacon proposed to the House of

⁶ *Id.* at 156.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 158-61.

¹¹ *Id.* at 153.

¹² *Id.* at 165.

¹³ *Id.* at 172.

¹⁴ M. E. LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 11 (1924).

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 28.

Commons a plan to amend and consolidate the whole body of English law.¹⁷ In 1653, Sir Matthew Hale chaired a commission, which included Cromwell, that drew up a plan for law reform.¹⁸ It was not until the close of the eighteenth century and the contribution of Jeremy Bentham, however, that the codification movement became an important force in England.¹⁹

Bentham gave his life to the codification movement. In fact, he coined the words "codify" and "codification."²⁰ Bentham's work had an enormous influence: "His bold and insistent attacks on the absurdities and injustice of the Common Law of evidence and of the English system of criminal law were the fountainhead of all the law reform of the Nineteenth Century."²¹ Bentham wanted to simplify the law, to make it available to everyone and to eliminate (or at least reduce) the ordinary man's dependence on lawyers.²² Bentham and others were offended by their perception that the law was inaccessible and uncertain.²³ The root of this evil, they believed, was judge-made law which was created by individual cases confined to their facts and reported in numerous volumes stored in libraries and law offices. Bentham thought that the solution lay in writing law in simple language and covering an entire field, thereby leaving little or nothing for judges or commentators to interpret.²⁴

Bentham's views sparked efforts to codify English common law. In 1833, William IV appointed a commission to examine whether to codify criminal law.²⁵ After twenty years of revision, the judges of England did not think that the law was uncertain or that codification was needed, unanimously rejecting the proposed codification.²⁶ In fact, they concluded that codification would create the very uncertainty that Bentham sought to eliminate. As a result, the government chose not to proceed with the

¹⁷ WARREN, *supra* note 4, at 513.

¹⁸ *Id.* at 513-14.

¹⁹ LANG, *supra* note 14, at 30-31.

²⁰ WARREN, *supra* note 4, at 513.

²¹ *Id.* at 515.

²² JEREMY BENTHAM, *THEORY OF LEGISLATION* 92-95 (Richard Hildreth trans., Oceana Pub., Inc. 1975) (1914).

²³ See II JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 620-81 (1911); SHELDON AMOS, *THE SCIENCE OF LAW* (New York, D. Appleton & Co. 1874).

²⁴ BENTHAM, *supra* note 22, at 92.

²⁵ LANG, *supra* note 14, at 42.

²⁶ *Id.* at 42-48.

efforts to codify criminal law, which had been seen as a precursor to codifying the entire law of England.²⁷ The plan was abandoned in 1854, resurrected in 1864, and abandoned again in 1867.

Interestingly, one of the first successful common law codifications was of evidence law. In 1872, Sir James Fitz Stephen's Indian Evidence Act was completed. Stephen was a high court judge and criminal law scholar, and the impact of his code was enormous. His work is generally regarded as the first successful effort to codify the law of evidence and is the direct antecedent of modern codes.²⁸ England's Attorney General Coleridge quickly requested that Stephen's become a code of evidence for England.²⁹ Yet Parliament rejected the Stephen code, as it had all of its predecessors.³⁰ Unlike the rest of Europe, there was no general support for the idea of codification in England. The judges did not want it, the profession was skeptical, and the people knew nothing about it. Although there have been repeated efforts to codify various bodies of English law, the common law has stubbornly survived.

B. *The Transatlantic Adventure*

Bentham's work found a far more receptive environment across the Atlantic. Here, the codification movement was a response to the dissatisfaction of lawyers. In addition, the general public thought the law inaccessible and uncertain, and many urged substantive reform.

Immediately after the revolution, the United States found itself in need of a legal system. Post-revolutionary America found that discovering and maintaining existing law was not easy. Statutory law was published in pamphlet form, but the pamphlets were difficult to find and there were few complete sets.³¹ Moreover, these pamphlets were virtually impossible to use since they were organized chronologically, not by subject,

²⁷ *Id.* at 53-54.

²⁸ Josiah H. Blackmore II, *The Ohio Evidence Rules: 105 Years of Heritage and Dilemma*, 6 CAP. U. L. REV. 533, 533-35 (1977).

²⁹ JAMES F. STEPHEN, *A DIGEST OF THE LAW OF EVIDENCE* iii-iv (3d ed. London, Macmillan 1877).

³⁰ LANG, *supra* note 14, at 54-58.

³¹ CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* 6 (1981).

and lacked indexes. Statutes were frequently amended in later pamphlets and private laws were interspersed with public laws, frequently on the same page. This lack of organization made the statutes effectively unavailable for any practical use.³²

The common law was equally inaccessible. Decisions were announced in open court and were unpublished,³³ leaving the common law to the memory of the bar. The situation was exacerbated because many of the best lawyers and judges had been Tories who had returned to England, taking their knowledge of the law with them.³⁴

While lawyers complained of inaccessibility, laymen complained in much the same way that the American public complains today. The public felt that the intricacies and complexities of the law caused substantial injustice. As one critic said, "those absurd rules of evidence [and] pleadings [were] little better than 'gamblings' or 'hazards' that 'changed simple justice into a professional mystery' and 'contributed to oppression and plunder rather than happiness and security of the people'."³⁵

Post-revolutionary Americans also resented the expense and time involved in litigation. A lawsuit was described in a Philadelphia newspaper as a "contest of wealth."³⁶ The same newspaper complained that "the evasions [in the law] are so numerous, and by technical forms so established, that the plainest and most incontestable questions stand for years on the records of our courts."³⁷ The lay critic of yesterday, like today, claimed that the complexities and uncertainties in law were the design of the lawyer who conspired to keep law as complicated as possible in his own self-interest.³⁸

The role of English common law was another complication in creating an American legal system. Continuing English law as precedent after the revolution was necessary for stability. Yet much of it was neither appropriate nor welcome in the new

³² *Id.* at 6-7.

³³ *Id.* at 8-9.

³⁴ *Id.* at 9.

³⁵ *Id.* at 13 (quoting JESSE HIGGINS, *SAMPSON AGAINST THE PHILISTINES* 15-16 (1807)).

³⁶ *Id.* (quoting *AURORA* (Phila.), Nov. 9, 1804).

³⁷ *Id.*

³⁸ *Id.* at 14. See also *Luke* 11:52 ("Woe unto you, lawyers! For ye have taken away the key of knowledge: Ye entered not in yourselves, and ye hindered them who were entering in ye.").

country. While most state governments expressly accepted English statutory and common law as their law at the time of independence,³⁹ the new governments deemed many portions incompatible, excluding them by some general statutory provision.⁴⁰ Thus, it was difficult to determine which precedents endured and which perished.⁴¹ By 1820, American law had matured to the point where statutory law was more available and judge-made law was reported by private and, eventually, public reporters. However, courts continued to use some (but not all) English law and the general dissatisfaction with the law and lawyers continued.⁴²

This strong discontent made the United States receptive to the reform movement already underway in Europe. Since the most important goal of American law reform was to simplify the law to make it more available to the people,⁴³ codification was the most vigorously promoted reform. Reformers sought to substitute a general code for the whole of common and statute law.⁴⁴ Former colonists saw codification as a tool to resolve conflicts and doubts by restating the law in useful, understandable, modern and clearer terms.⁴⁵ New York was at the forefront of this movement.

C. *New York and the Codification Movement*

By the early 1800s, many of the former colonies were engaged in efforts to revise their statutes. New York, however, produced the first codification in any common law jurisdiction. New York's revision was different—even revolutionary because it collected acts that were dispersed throughout the law but related to a common subject, consolidated them into a single act, reworded laws to make them simpler and more comprehensible and in

³⁹ Cook, *supra* note 31, at 10. New York's first constitution declared that "such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the colony at the breaking out of the Revolution in 1775, constituted the law of the State, subject to alteration by the Legislature." N.Y. CONST., adopted April 20, 1777, *quoted in* WILLIAM A. BUTLER, *THE REVISION AND THE REVISERS* 4-5 (New York, Banks & Bros. 1889).

⁴⁰ Cook, *supra* note 31, at 10-11.

⁴¹ *Id.*

⁴² *Id.* at 24-31.

⁴³ *Id.* at 65.

⁴⁴ *Id.* at 70.

⁴⁵ *Id.* at 84.

many instances, modified the substance of the law. Additionally, New York created entirely new laws to cover previously excluded areas.⁴⁶ Many rules found only in common law were reduced to statute form. In some areas, such as property law, important reforms were achieved and the law transformed.⁴⁷ The revisions, which were completed in 1828,⁴⁸ reorganized major portions of the law in a systematic way and reformed significant substantive areas of the law. The main body of the common law, however, was left undisturbed.

Several factors made New York preeminent in the codification movement. New York's rapid growth as a commercial and agricultural center contributed to a huge increase in both its statutory and decisional law. The enormous quantity of New York law impeded accessibility and certainty, making codification more attractive.⁴⁹ In addition, David Dudley Field, the spearhead of the codification movement in America, was a New Yorker.⁵⁰ For forty years he worked as a law reformer, directing his energies primarily to codifying the law in his state.

As a result of Field's efforts, the New York Constitutional Convention of 1846 created two commissions: one to codify New York's substantive law and the second to codify its procedural law.⁵¹ Although not an original member of either commission, Field was quickly appointed to fill a vacancy in the commission on procedural law. In five short months the commission produced the initial draft of a procedural code designed as the first installment of an entire code of remedial law. This partial code, which came to be called the Field Code, was enacted by the legislature in April, 1848.⁵² One historian described it as

tightly worded and skeletal; there was no trace of the elaborate redundancy, the voluptuous heaping on of synonyms so characteristic of Anglo-American statutes. It was, in short, a code in the French sense, not a statute. It was a lattice of reasoned principles, scientifically arranged, not a thick thumb stuck into the dikes of the common law.⁵³

⁴⁶ *Id.* at 146-47.

⁴⁷ *Id.* at 150-51.

⁴⁸ BUTLER, *supra* note 39, at 45.

⁴⁹ COOK, *supra* note 31, at 131-34.

⁵⁰ *Id.* at 186.

⁵¹ *Id.* at 189-91.

⁵² This code was formally titled "An Act to Simplify and Abridge the Practice and Pleadings and Proceedings of the Courts of the State." *Id.* at 191.

⁵³ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 340-41 (2d. ed. 1985).

The Field Code was more than a reorganization or revision of existing law. It entirely redesigned the law of procedure, abolishing the distinction between law and equity, eliminating all the ancient forms of action at common law and abandoning special forms of pleadings. The new code provided for only one form of action and one method of commencing it.⁵⁴ The commission continued its work and by 1850, had drafted codes that covered the entire law of procedure, both civil and criminal.⁵⁵ Yet, the new proposals met serious opposition in the legislature.⁵⁶ These codes, which included a codification of the law of evidence,⁵⁷ were never passed.

Undeterred, Field continued to draft codes, both procedural and substantive.⁵⁸ On February 13, 1865, codifications of the entire civil and criminal substantive law were presented to the legislature. The work was contained in three codes: a political code, a penal code and a civil code.⁵⁹ Although the legislature twice passed the civil code, the Governor refused to sign it.⁶⁰ After several attempts, the penal law was finally enacted on July 26, 1881. Although there were further attempts to enact the political and civil code they all failed largely because of the ardent opposition of the powerful Bar Association of the City of New York.⁶¹

If Field was the hero of the codification movement, James C. Carter was its villain.⁶² Writing at the behest of the Bar Asso-

⁵⁴ COOK, *supra* note 31, at 192.

⁵⁵ LANG, *supra* note 14, at 127.

⁵⁶ By the time the new installments were presented, enthusiasm for the codification project had waned considerably. The first installment had not pleased everyone. Many at the bar were opposed to its experimental nature. Additionally, the original installment had its flaws. Between its passage in 1848 and its repeal 30 years later, amendments and modifications enlarged its size nearly ten times over. This effort at revision may have done more harm than good, since it significantly increased the complexity of the original project. Some of the difficulty with the Field Code can be attributed to the legislature's desire to finish it quickly. Completed in little over a year and a half, there was inadequate time to consider the many innovations that ultimately were included. COOK, *supra* note 31, at 192-94.

⁵⁷ NEW YORK STATE COMMISSIONERS ON PRACTICE AND PLEADING, *THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK* 692-789 (1850).

⁵⁸ Despite the lack of enthusiasm for the codification effort, Field persisted. In 1857, he convinced the legislature to reestablish the Commission on the Code and to include himself as one of the Commissioners. COOK, *supra* note 31, at 195-96.

⁵⁹ LANG, *supra* note 14, at 139-40.

⁶⁰ *Id.* at 145-46.

⁶¹ *Id.* at 146-47.

⁶² COOK, *supra* note 31, at 188.

ciation of the City of New York, Carter argued against codification, making many of the same points made today. First, Carter argued that courts are the superior forum for development of the law because they decide matters in the context of discrete and certain facts and seek to "do justice."⁶³ As such, courts must have the discretion to decide cases as justice requires, rather than in conformity with rules created by a legislature that lacks necessary expertise.⁶⁴ Second, Carter asserted that codification would prevent the natural development of the law.⁶⁵ Third, he reasoned that codification would not produce the predicted certainty but would have the opposite effect, creating new issues for interpretation and new problems for practitioners. Fourth, Carter argued that the real advocates of codification were the law professors, who felt the need for structured text, rather than lawyers and judges, who were involved in the practical administration of the law.⁶⁶ Fifth, Carter argued that the problem was not with the law, but rather with lack of clarity in the treatises.⁶⁷ Finally, he argued against tinkering with a system that worked reasonably well.⁶⁸

Notwithstanding the legal community's conservatism, codification efforts were succeeding across the country. Before the turn of the century the Field Code had become the basis of codifications in thirty states and territories.⁶⁹ One noted historian has said of the Field code that it "more than any other statute on the subject, acted as a catalytic agent of procedural reform in the United States."⁷⁰ Further support for codification

⁶³ JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* 26 (1894).

⁶⁴ *Id.* at 9. The legislature was also viewed as untrustworthy and too interested in the short-run political effects of their actions. FRIEDMAN, *supra* note 53, at 404.

⁶⁵ CARTER, *supra* note 63, at 30-36.

⁶⁶ *Id.* at 72.

⁶⁷ *Id.* at 73.

⁶⁸ *Id.* at 71.

⁶⁹ Missouri (1849), California (1850), Kentucky (1851), Iowa (1851), Minnesota (1851), Indiana (1852), Ohio (1853), Oregon (1854), Washington (1854), Nebraska (1855), Wisconsin (1856), Kansas (1859), Georgia (1860), Nevada (1861), Dakota (1862), Idaho (1864), Arizona (1864), Montana (1864), North Carolina (1868), Arkansas (1868), Wyoming (1869), South Carolina (1870), Florida (1870) (repealed 1873), Utah (1870), Colorado (1877), Connecticut (1879), North Dakota (1889), South Dakota (1889), Oklahoma (1890) and New Mexico (1897). LANG, *supra* note 14, at 131. The Civil Code was also accepted in the Dakota Territory, Idaho, Montana and California. They also adopted the penal and political codes. FRIEDMAN, *supra* note 53, at 405.

⁷⁰ FRIEDMAN, *supra* note 53, at 391.

came as the country became more and more industrial. As commerce flourished the need for a more uniform commercial law grew. By 1900, the Negotiable Instruments Law had been adopted by many states and the movement for other uniform laws was well underway.⁷¹ The American Law Institute began drafting uniform laws in the early 1900s. In the years since many uniform codes have been drafted and enacted.⁷² Although Field's vision of complete codification of the common law was never realized, codification on a smaller scale has now become widespread.⁷³ Throughout this process the law of evidence has been a prime target for codification. Ironically, the codification of evidence law has not occurred in New York, despite New York's position as the early leader in the United States codification movement.

D. *The Law of Evidence*

Historically, the rules of evidence played an important role in the general codification debate.⁷⁴ Since trials were local events, often attended for amusement, the public became familiar with the rules of evidence. The public viewed the rules of evidence as archaic and irrational and yet another visible example of the hypertechnical way lawyers kept the law.⁷⁵ Accordingly, the rules of evidence attracted Bentham's interest.⁷⁶

⁷¹ *Id.*

⁷² *Id.* at 674. See, e.g., UNIF. PARTNERSHIP ACT, 6 U.L.A. 1 (1985) (promulgated in 1914 and adopted in 41 states); UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. 561 (1985) (promulgated in 1916 and adopted in 44 states); UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427 (1985) (promulgated in 1918 and adopted in 25 states); UNIF. SIMULTANEOUS DEATH ACT, 8A U.L.A. 557 (1985) (promulgated in 1940 and adopted in 47 states); UNIF. COMM. CODE, 1 U.L.A. 1 (1985) (promulgated in 1952 and adopted in all 50 states); UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 15 (1985) (promulgated in 1968 and adopted in all 50 states) (amended in 1987); UNIF. PROBATE CODE, 8 U.L.A. 1 (1985) (promulgated in 1969 and adopted in 15 states) (amended in 1992); UNIF. CONTROLLED SUBSTANCES ACT, 9 Part II U.L.A. 1 (1985) (promulgated in 1970 and adopted in all 50 states) (amended in 1992); UNIF. CONSUMER CREDIT CODE, 7A U.L.A. 1 (1985) (promulgated in 1974 and adopted in four states) (amended in 1992).

⁷³ Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 351 (1969).

⁷⁴ 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5005, at 63 (1977).

⁷⁵ *Id.*

⁷⁶ See JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827).

1. The Early Days

Bentham's early works on codifying evidence were used by Edward Livingston. In 1830, Livingston wrote the first systematic code of evidence for Louisiana.⁷⁷ Livingston sought to control judicial discretion by making the law simpler and clearer and to reform the substance of the law. It was a formidable task. Livingston's code was an early example of the extent to which some codifiers favored a legislative monopoly over lawmaking. Livingston sought to limit judicial power by prohibiting judges from making rules of evidence and requiring judges to stop the trial and send a report to the legislature if a new rule was required.⁷⁸ Not surprisingly, his code was never adopted, but it sparked interest both in Massachusetts and New York.⁷⁹

By the turn of the century, New York had tried to enact an evidence code four times. As noted, David Field was responsible for the first effort to codify the law of evidence in New York. On December 31, 1849, a bill was submitted to the New York legislature entitled "An Act to Establish a Code of Evidence."⁸⁰ This was the fourth part of Field's code of Civil Procedure and it was rejected by the legislature.⁸¹ Thirty-seven years later, the same bill, with a few minor amendments, was resubmitted. This time the bill passed the legislature but met its demise at the hands of Governor Hill.⁸² In 1887, the legislature again authorized a committee to draft a code of evidence. Field prepared a code based on the India Evidence Act.⁸³ Again the legislature passed the bill and again the governor refused to sign it.⁸⁴ In 1900, the legislature rejected a code of evidence prepared and submitted by the Statutory Revision Commission, which had been appointed to consolidate and revise the general statutes of the state.⁸⁵ This ended the early attempts to codify New York's evidence law.

⁷⁷ *Id.* at 65.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ J. BLEECKER MILLER, AN ARGUMENT IN OPPOSITION TO THE PROPOSED CODE OF EVIDENCE 3 (1886).

⁸¹ *Id.* at 6.

⁸² Edith L. Fisch, *The Feasibility of Formulating a Code of Evidence for the State of New York*, 12 REPORT OF JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 182, 190 (1967).

⁸³ *Id.* at 190.

⁸⁴ *Id.* at 190-91.

⁸⁵ *Id.* at 191.

2. Modern Efforts

By the beginning of the twentieth century dissatisfaction with the substance of evidence law had become more common, and reform was more frequently urged. Edmund Morgan observed that the "law of evidence is in at least as bad a condition as was that governing pleading in the day when David Dudley Field began his crusade."⁸⁶ Wigmore noted that "the opening of a new phase in the profession's attitude toward the rules of evidence, viz. a disposition to reconsider the rules' weaknesses, and a willingness—even a determination—to improve that body of law in every possible part."⁸⁷

In 1920, the Commonwealth Fund, one of the first charitable foundations, decided to encourage legal research. One of its first undertakings was to reform the law of evidence. It formed a distinguished committee, chaired by Professor Edmund Morgan and including Dean John H. Wigmore.⁸⁸ After more than five years, the committee issued a report suggesting five changes in the law of evidence.⁸⁹ Although viewed by some as "the first of a long line of failures,"⁹⁰ the report was premised on the notions that a trial is a search for the truth and that the best way to get to the truth was to admit more evidence.⁹¹ This assumption underlies all modern codifications.⁹² The work of the Fund found expression in many federal and state statutes. Indeed, it formed

⁸⁶ *Id.* at 182 (quoting Edmund Morgan, *Codification of Evidence*, FIELD CENTENARY ESSAYS 164 (1949)).

⁸⁷ *Id.* at 192 (quoting 1 JOHN H. WIGMORE, WIGMORE ON EVIDENCE vii (3d ed. 1940)).

⁸⁸ WRIGHT & GRAHAM, *supra* note 74, at 77. Chief Justice William A. Johnston of the Kansas Supreme Court, Judge Charles M. Hough of the United States Court of Appeals for the Second Circuit, Professors Zechariah Chaffee, Jr. of Harvard University, Ralph W. Gifford of Columbia University, Edward W. Hinton of the University of Chicago and Edson R. Sunderland of the University of Michigan, completed the group. *Id.*

⁸⁹ EDMUND M. MORGAN ET AL., THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM (1927). The suggested reforms were: (1) to create a business records exception to the hearsay rule; (2) to repeal of the Dead Man's statute; (3) to create of a new exception to the hearsay rule admitting the statements of an insane or dead person; (4) to restore the power of a judge to comment on the evidence; and (5) to establish a rule that would permit a judge to admit evidence without regard to the rules of evidence in essentially uncontested matters. *Id.* at xix-xx.

⁹⁰ WRIGHT & GRAHAM, *supra* note 74, at 80.

⁹¹ MORGAN ET AL., *supra* note 89, at 39.

⁹² See *infra* notes 316-19; EDMUND M. MORGAN, THE CODE OF EVIDENCE PROPOSED BY THE AMERICAN LAW INSTITUTE 539, 587, 694, 742 (1941); Jon R. Waltz, *The New Federal Rules of Evidence: An Overview*, 1977 TRIAL LAW. GUIDE 225, 230.

the basis for the next step in the evidence reform movement, the Model Code of Evidence.⁹³

In 1942, with Morgan as reporter, the American Law Institute completed its Model Code of Evidence. The Model Code was in many respects a truly revolutionary attempt at reform. First, over the strident objection of Dean Wigmore,⁹⁴ the law of evidence was reduced to a code that was contained, even with lengthy comments, in less than 300 pages.⁹⁵ Second, the Model Code significantly changed the hearsay rule. Under the Model Code, hearsay was admissible as long as the declarant was either present and available for cross-examination or unavailable as a witness.⁹⁶ Third, the Model Code permitted the trial judge substantial discretion,⁹⁷ a reform that is most commonly blamed for the Code's failure.⁹⁸ In any event, the Model Code of Evidence was never adopted in any state.⁹⁹

The next attempt at codifying evidence rules came in 1953, when the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. The Uniform Rules were simple; there were only seventy-two rules contained in a pocket book of fifty-seven pages.¹⁰⁰ Unlike the Model Code, the Uniform Rules did not seek dramatic reform of the law of evidence. Rather, their goal was to provide a uniform law that would be accepted and enacted throughout the country.¹⁰¹ It turned out, however, that uniformity without reform failed to marshal significant interest. As recently as 1953, lawyers rarely practiced across state lines and so there was less need for uniformity in evidence than in other areas, like commercial transactions. In the end, only four states accepted the Uniform Rules: Kansas (1964), California (1965), New Jersey (1967) and Utah (1971).¹⁰² Yet it would be wrong to say that the Uniform

⁹³ Blackmore II, *supra* note 28, at 536.

⁹⁴ See John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23 (1942).

⁹⁵ WRIGHT & GRAHAM, *supra* note 74, at 86.

⁹⁶ MODEL CODE OF EVIDENCE 231-34 (1942).

⁹⁷ WRIGHT & GRAHAM, *supra* note 74, at 88; Spencer A. Gard, *The New Uniform Rules of Evidence*, 2 KAN. L. REV. 333 (1954).

⁹⁸ WRIGHT & GRAHAM, *supra* note 74, at 88.

⁹⁹ *Id.* at 88-89.

¹⁰⁰ *Id.* at 91.

¹⁰¹ *Id.* at 90.

¹⁰² CAL. EVID. CODE §§ 1-1605 (West 1965); KAN. STAT. ANN. §§ 60-401 to -470 (1964);

Rules had no impact; they did become the basis for many of the Federal Rules of Evidence.¹⁰³

3. The Federal Rules of Evidence

By the 1950s, the rules under which evidence was admitted in federal courts were under attack from academic commentators, the judiciary and the bar.¹⁰⁴ There were two principal criticisms. First, there was the problem caused by the source of evidentiary rules. The admissibility of evidence in civil cases was controlled principally by Rule 43(a) of the Federal Rules of Civil Procedure,¹⁰⁵ which allowed evidence in a federal court if it was admissible under federal statute, federal common law or decisions, or under statutes or rules of the state where the district court sat. The result was that evidentiary decisions within a circuit were at the least non-uniform and occasionally unfounded or conflicting.¹⁰⁶ Second, reformers insisted that the time had come to change the substance of evidence law. Since Bentham's time, many judges, commentators and lawyers had sought reform of evidence law.¹⁰⁷ Commentators argued that it needed to

N.J. STAT. ANN. §§ 2A:84A-1 to -32 (West 1967); UTAH RULES OF EVIDENCE (1971). On September 1, 1983, Utah enacted a new set of rules based on the Federal Rules of Evidence. New Jersey is currently considering the same path.

¹⁰³ WRIGHT & GRAHAM, *supra* note 74, at 90.

¹⁰⁴ See, e.g., Thomas F. Green, Jr., *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560, 580 (1952); Hon. Joe E. Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1960); *Report of the Special Committee on Uniform Evidence Rules for Federal Courts*, 44 A.B.A. J. 1113 (1958).

¹⁰⁵ Rule 43(a), the most important rule, covered admissibility and competency of witnesses. Nonetheless, 20 other rules also involved evidentiary questions: Rules 26-37 dealt with depositions and discovery; Rule 41(b) covered involuntary dismissal; Rule 44 controlled proof of official records; Rule 45 regulated subpoena and service; Rule 50 authorized a party to introduce evidence if the party moved for and was denied a directed verdict at the close of the opponent's evidence; Rule 59(a) permitted additional testimony on certain motions for new trial; Rule 60(b) permitted admission of newly discovered evidence; Rule 61 was the harmless error rule; Rule 68 made evidence of an unaccepted offer of judgment inadmissible; and Rule 80(c) permitted proof of prior testimony by a transcript. Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 89 (1962).

¹⁰⁶ See Standards Relating to Court Organization, *Standards of Judicial Administration*, A.B.A. 73 (Handbook, 1961).

¹⁰⁷ Thomas F. Green, Jr., *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 178 (1967).

be clarified¹⁰⁸ and modernized.¹⁰⁹ The time had come to unify and overhaul the law of evidence.¹¹⁰

The real work of developing the Federal Rules of Evidence began in March, 1961, at a special session of the Judicial Conference of the United States¹¹¹ where a Committee recommended that uniform rules of evidence be adopted.¹¹² In 1965, the United States Supreme Court appointed an Advisory Committee on Rules of Evidence.¹¹³ Four years later the first draft was finished and, after revisions, was circulated for comments.¹¹⁴ The rules were revised in March and October, 1971,¹¹⁵ and November, 1972.¹¹⁶ The November draft was approved by the Court and sent to Congress.¹¹⁷ Both houses of Congress then drafted their own rules that, while based on the proposed rules, revised them in several major respects.¹¹⁸ A compromise reached by the

¹⁰⁸ *Id.* at 179. See also Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214 (1942).

¹⁰⁹ Green, Jr., *supra* note 107, at 179. See also Edmund M. Morgan, *Foreword*, MODEL CODE OF EVIDENCE 5-6 (1942).

¹¹⁰ Morgan, *supra* note 109, at 6. See Ladd, *supra* note 108, at 218.

¹¹¹ Morgan, *supra* note 109, at 75. At that time, the Standing Committee on Rules of Practice and Procedure recommended that the Chief Justice appoint a committee to study the advisability and feasibility of formulating uniform rules of evidence for the federal courts. *Id.*

¹¹² *Id.* at 77. The committee was chaired by Professor James Moore of Yale Law School. It filed a preliminary report in February, 1962. *Id.*

¹¹³ 28 U.S.C. § 331 (1970). The Advisory Committee was chaired by Albert E. Jenner, Jr., a noted Chicago trial lawyer, and included eight practitioners, three judges and three law professors. The other members of the committee were: David Berger, Hicks Epton, Robert Erdahl, Judge Joe Ewing Estes, Professor Thomas F. Green, Jr., Egbert L. Hayward, Dean Charles W. Joiner (subsequently appointed to the federal bench), Frank Raichle, Herman F. Selvin, Judge Simon E. Sobeloff, Craig Spangenberg, Judge Robert Van Pelt, Professor Jack B. Weinstein (also subsequently appointed to the federal bench), and Edward Bennett Williams.

¹¹⁴ *Preliminary Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 46 F.R.D. 161 (1969).

¹¹⁵ *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971); Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Proposed Rules of Evidence* (Rev. Draft Oct. 1971).

¹¹⁶ *Rules of Evidence for the United States Courts and Magistrates*, 56 F.R.D. 183 (1972).

¹¹⁷ *Id.* at 184.

¹¹⁸ The proposed rules had a relatively easy time until they reached the Congress. There, however, difficulties developed. First, when the rules sent to Congress were compared with the 1971 revised draft, it was discovered that nine of the 77 proposed rules had been changed by the Judicial Conference at the request of the Kleindienst Justice Department. These changes were made after the deadline had expired for public examination of and comment on revisions. Waltz, *supra* note 92, at 228. Second, Congress was

two houses produced the present Federal Rules of Evidence and they were finally enacted on January 2, 1975.¹¹⁹

The enactment of the Federal Rules of Evidence led to a near revolution in the states. One of the hoped-for by-products of the rules was that states would adopt the final result.¹²⁰ In some states drafting projects were undertaken even before the Court sent the rules to Congress.¹²¹ In 1971, Nevada adopted rules based on the Preliminary Draft. New Mexico and Wisconsin adopted rules based on the 1972 version, even though it was being hotly contested in Congress at the time.¹²² Eleven more states followed suit in the first years after the Federal Rules were enacted.¹²³ Today thirty-four states have adopted the Federal Rules.¹²⁴

annoyed that the Supreme Court had included a date that would have made the rules automatically effective in the absence of congressional approval, even though it was authorized to do so under the Rules Enabling Act. 28 U.S.C. § 2072 (1982). Led by a few influential members, Congress passed a bill that required the affirmative consent of Congress before the rules could be deemed effective. Rules of Evidence, Civil Procedure and Criminal Procedure Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. See also WRIGHT & GRAHAM, *supra* note 74, at 102; H.R. REP. No. 52, 93d Cong., 1st Sess. 3 (1973). Then the battle really began. The Advisory Committee had been successful in rejecting the lobbying of special interest groups, WRIGHT & GRAHAM, *supra* note 74, at 102, for instance, the American Medical Association's objection to the elimination of the doctor-patient privilege. Congress was not. Although a number of special interest groups entered the fray, the principal battle was waged largely between the Justice Department, with its list of law enforcement objectives, and liberal members of Congress. *Id.*

¹¹⁹ Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

¹²⁰ *Rules of Evidence, Hearings Before the Special Subcomm. on Reform of the Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 34 (1973) (statement of Albert E. Jenner).

¹²¹ L. Kivin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1318 (1985).

¹²² *Id.* at 1318-19.

¹²³ *Id.* at 1319-20.

¹²⁴ ALASKA STAT., R. EVID. §§ 101-1103 (1992); ARIZ. REV. STAT. ANN., R. EVID. §§ 101-1103 (1992); ARK. CODE ANN., R. EVID. §§ 101-1102 (Michie 1992); COLO. REV. STAT., R. EVID. §§ 101-1103 (1984 & Supp. 1990); DEL. CODE ANN., R. EVID. §§ 101-1103 (1991); FLA. STAT. ANN. §§ 90.101-958 (West 1979 & Supp. 1992); HAW. REV. STAT., R. EVID. §§ 101-1102 (1985 & Supp. 1991); IDAHO R. EVID. §§ 101-1103 (1992); IOWA CODE, R. EVID. §§ 101-1103 (1984 & Supp. 1992); LA. CODE EVID. ANN. (West Sp. Pamph. 1992); ME. REV. STAT. ANN., R. EVID. (West 1991); MICH. COMP. LAWS, R. EVID. §§ 101-1103 (1992); MINN. STAT. ANN., R. EVID. 50 §§ 101-1101 (West 1980 & Supp. 1992); MISS. CODE ANN. §§ 13-1-1 to -153 (1972 & Supp. 1991); MONT. CODE ANN. §§ 26-10-101 to -1008 (1991); NEB. REV. STAT. §§ 27-101 to -1103 (1988 & Supp. 1992); NEV. REV. STAT. §§ 47.020 - 52.395 (1991); N.H. R. EVID. §§ 100-1103 (1992); N.M. STAT. ANN., R. EVID. §§ 11-101 to -102 (Michie 1986); N.C. GEN. STAT. § 8C-1, RULES 101-1102 (1988); N.D. CENT. CODE, R. EVID. §§ 101-1103 (1990-91); OHIO REV. CODE ANN., R. EVID. §§ 101-1103 (1992); OKLA. STAT. ANN. tit.

4. New York's Response to the Proposed Federal Rules

New York's first efforts at a modern evidence code substantially antedate the Federal Rules. In 1958, the Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts recommended that New York study adoption of the Uniform Rules of Evidence.¹²⁵ In 1966, the State Judicial Conference commissioned such a study.¹²⁶ It concluded that codification should be undertaken as soon as possible and should include a complete substantive revision, not merely a restatement of existing law.¹²⁷ The Judicial Conference wholeheartedly endorsed these recommendations and repeatedly (though unsuccessfully) urged the legislature to fund the proposal.¹²⁸ In 1973, the New York State Bar Association presented to the legislature a proposal for codification of the law of evidence based on its own study and report.¹²⁹

Not until 1976, however, did the legislature commit funds to the codification effort, increasing the allotment of the New York Law Revision Commission¹³⁰ by \$65,000.¹³¹ The Commission appointed a team of consultants to research and draft the code and an advisory panel to screen the product.¹³² The plan was to use

12, §§ 2101-3103 (West 1980 & Supp. 1992); OR. REV. STAT. §§ 40-010 to -585 (1991); R.I. GEN. LAWS, R. EVID. (1991-1992); S.D. CODIFIED LAWS ANN. §§ 19-9-1 to 19-18-8 (1987 & Supp. 1992); TENN. CODE ANN., R. EVID. §§ 101-1102 (1990-1991); TEX. CODE ANN., TEX. CIVIL R. EVID. and TEX. CRIM. CODE EVID. (1990-1991); UTAH CODE ANN., R. EVID. (1992); VT. STAT. ANN., R. EVID. §§ 101-1103 (1983 & Supp. 1991); WASH. REV. CODE ANN. §§ 5.04-5.64 (West 1963 & Supp. 1992); W. VA. CODE, R. EVID. §§ 101-1102 (1992); WIS. STAT. ANN. §§ 901.01-911.02 (West 1975 & Supp. 1991); WYO. STAT., R. EVID. §§ 101-1103 (1979).

¹²⁵ Second Preliminary Report of the Advisory Committee on Practice and Procedure, N.Y. LEGIS. DOC. NO. 13, at 87-88 (1958).

¹²⁶ Stanley H. Fuld, *The History and Progress of the Proposed Federal Rules of Evidence*, 19 N.Y. L.F. 741, 742 (1974).

¹²⁷ Fisch, *supra* note 82, at 194-95.

¹²⁸ Fuld, *supra* note 126, at 743.

¹²⁹ *Id.*

¹³⁰ The Law Revision Commission was created by chapter 597 of the Laws of 1934, article 4-A of the Legislative Law. It is the oldest continuous existing agency in the common law world devoted to law reform through legislation. It consists of five members appointed by the Governor, each for a term of five years, and the chairs of the Judiciary and Codes Committees of the New York State Senate and Assembly, as *ex officio* members.

¹³¹ NEW YORK LAW REVISION COMMISSION, PROCEEDINGS OF THE COMMISSION IN 1976, A CODE OF EVIDENCE FOR NEW YORK, 1977 N.Y. LAW REV. COMM'N REP. 10 [hereinafter 1977 N.Y. LAW REV. COMM'N REP.].

¹³² *Id.* The consultants were: Jerome Prince, Dean Emeritus of Brooklyn Law

the Federal Rules of Evidence as an organizational model, but to look to the Federal Rules, the California Evidence Code and New York common law for substantive guidance.¹³³ The goal was to complete the project by 1979.¹³⁴

In 1978, the Law Revision Commission reported that the project was on schedule.¹³⁵ By 1979, the consultants completed a first draft. By the end of the year they had completed a final draft with commentaries, both approved by the Advisory Panel. West Publishing Company printed and published the Proposed Code of Evidence *pro bono* in the 1980 McKinney's session laws and distributed more than one thousand additional copies to legislators, judges, lawyers and other interested parties.¹³⁶

The draft code was more dependent on the Federal Rules than had originally been contemplated. Not only did the draft code follow the form of the Federal Rules, but it also tracked their language and the commentaries noted and explained any differences between the two. Language was sometimes modified to correct a perceived imperfection in the Federal Rules and occasionally the drafters proposed a rule that was different in substance.¹³⁷

The Senate and Assembly Judiciary and Codes Committees held public hearings throughout the state.¹³⁸ Following the hearings, the Commission and its staff reviewed and revised the draft. During 1981, in an attempt to achieve consensus, the Commission met with "each and every person, or groups of persons, or organizations, who expressed a desire to explore the rea-

School; Professor Harold L. Korn of Columbia; Professor Faust F. Rossi of Cornell; Professor Travis H. D. Lewin of Syracuse; and Professor Michael M. Martin of Fordham. The Advisory Panel was composed of Bernard S. Meyer, Chairman (later Associate Judge of the New York Court of Appeals); Judge Eugene R. Canudo, Court of Claims; Edward H. Cole, Counsel, Senate Codes Committee; Charles F. Crimi; James Dempsey; Judge John M. Keane, Surrogate; John F. Keenan, Special Prosecutor, New York City; William B. Lawless; Douglas McCuen, Associate Counsel to Assembly Majority Leader; Judge Nathan Sobel, Surrogate; and Judge Paul J. Yesawich, Jr.

¹³³ 1977 N.Y. LAW REV. COMM'N REP., *supra* note 131, at 13.

¹³⁴ *Id.* at 14.

¹³⁵ *Id.* at 9.

¹³⁶ NEW YORK LAW REVISION COMMISSION, PROCEEDINGS OF THE COMMISSION IN 1979, A CODE OF EVIDENCE FOR NEW YORK, 1980 N.Y. LAW REV. COMM'N REP. 9.

¹³⁷ Joseph M. McLaughlin, *Trends, Developments, New York Trial Practice: Code of Evidence*, N.Y. L.J., May 9, 1980, at 1.

¹³⁸ *Id.* at 10. Hearings were held in Buffalo, New York City and Syracuse.

soning behind Commission proposals."¹³⁹ The bill was finally offered in the legislature on March 19, 1982,¹⁴⁰ but was referred to the Codes Committees of each house to be considered as study bills.¹⁴¹

On January 5, 1983, the bill was resubmitted to the legislature in almost identical form.¹⁴² West Publishing Company printed, distributed and made available this later edition. Once more the Senate and Assembly Codes and Judiciary Committees held joint hearings.¹⁴³ By then, support for the idea of codification was waning and serious difficulties had developed on the political front. The Senate bill was reported out of the Codes Committee and advanced to a third reading in the Senate, but was then recommitted to the Codes Committee. The Assembly Codes Committee did not report the Assembly bill to the legislature. The Commission worked on revisions through 1984, attempting to meet the objections of all those who had commented on any of its provisions.¹⁴⁴ The resulting draft was no more successful in either house of the legislature. In 1985, the code bill was introduced in both the Senate and Assembly. It remained there, unchanged and without legislative action, until 1988.¹⁴⁵

5. The Current Effort at Codification

In 1988, the Law Revision Commission mounted what may be the last effort to enact a code of evidence. A working group was formed, headed by Robert M. Pitler, a Professor at Brooklyn Law School.¹⁴⁶ With the support of Governor Cuomo, the

¹³⁹ NEW YORK LAW REVISION COMMISSION, PROCEEDINGS OF THE COMMISSION IN 1982, A CODE OF EVIDENCE FOR NEW YORK, 1983 N.Y. LAW REV. COMM'N REP. 8.

¹⁴⁰ S. 3375, A. 11279, N.Y. Leg. 205th Sess. (1982).

¹⁴¹ Michael M. Martin, *Trends, Developments, New York Trial Practice: Code of Evidence*, N.Y. L.J., May 14, 1982, at 1. A study bill is intended for committee consideration and is not offered for enactment.

¹⁴² *Id.* at 8; S. 334, A. 332, N.Y. Leg. 206th Sess. (1983).

¹⁴³ Hearings were held in New York City on February 25, 1983 and in Albany on March 2, 1983. Martin, *supra* note 141, at 8.

¹⁴⁴ NEW YORK LAW REVISION COMMISSION, PROCEEDINGS OF THE COMMISSION IN 1984, A CODE OF EVIDENCE FOR NEW YORK, 1985 N.Y. LAW REV. COMM'N REP. 6.

¹⁴⁵ S. 2132, A. 2893, N.Y. Leg. 208th Sess. (1985).

¹⁴⁶ The working group consists of Evan A. Davis, Counsel to the Governor; Lise Gelernter, Assistant Counsel; Commissioner Carolyn Gentile, Chairwoman; Commissioner Kalman Finkel; Commissioner Albert J. Rosenthal; Commissioner Robert M. Pitler; Gregory V. Serio, Counsel to Senator John R. Dunne; Franklin Breseler, Counsel to Senator Dale M. Volker; Milton Amgott and Michael Garabedian, Counsels to Assem-

working group spent 1989 reviewing the previous drafts and developing a new version of an evidence code that sought primarily to codify existing law rather than introduce changes.¹⁴⁷ The new proposed draft was submitted to the legislature as part of the Governor's Program Bill in 1990.¹⁴⁸ Public hearings were held in New York City on July 24, 1990. Based on comments and submissions at that hearing, the working group redrafted the proposal and resubmitted the new proposal to the Governor on March 21, 1991.¹⁴⁹ Governor Cuomo offered that draft to the 1991-1992 session of the legislature where, despite a more receptive environment, it died again in the Assembly Codes Committee.¹⁵⁰

Notwithstanding the apparent intransigence of the legislature, New York is closer than it has ever been to adopting an evidence code.

II. THE CURRENT DEBATE

Since 1976, when it first committed funds to the codification effort, the New York legislature has conducted three sets of public hearings on three different versions of a code.¹⁵¹ Interestingly, support and opposition to these proposals has remained unchanged, notwithstanding significant differences in the various drafts. The principal supporters of codification have been trial lawyers associations¹⁵² bar associations,¹⁵³ and, with some reser-

blyman Oliver Koppell; Frederick Jacobs, Counsel to Assemblyman Sheldon Silver; James Yates, Legislative Counsel to the Speaker of the Assembly; Alyse Gray, Esq. and Harry Dunsker, Interim Speaker's staff; James Cantwell, Assistant Counsel to the Senate Majority Leader; and M. Dawn Herkenham, Counsel, Criminal Justice Services. NEW YORK LAW REVISION COMMISSION, PROCEEDINGS OF THE COMMISSION IN 1988-89, A CODE OF EVIDENCE FOR NEW YORK, 1989 N.Y. LAW REV. COMM'N REP. 282.

¹⁴⁷ 1991 *Proposed N.Y.C.E.*, *supra* note 3, at xix.

¹⁴⁸ *Id.* at xviii.

¹⁴⁹ *Id.*

¹⁵⁰ Telephone Interview with James Yates, Counsel to the Assembly (July 6, 1991).

¹⁵¹ Joint public hearings were held by the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes. The first set of hearings were held on November 12, 1980 in Buffalo, November 19, 1980 in New York City and December 10, 1980 in Syracuse. The first proposed draft was reconsidered in light of these and other comments and a new draft was proposed in late 1982. A second round of hearings were held, the first in New York City on February 25, 1983 and a second in Albany on March 2, 1983. The most recent draft was commented on at a public hearing held in New York City on July 24, 1990.

¹⁵² See, e.g., Memorandum from the New York State Trial Lawyers Association on S. 7694 & A. 10557 1 (1990) (on file with author).

vations, district attorneys.¹⁵⁴ Although there are exceptions, these proponents are members of the bar who represent parties that most frequently carry the burden of proof. The proposed codification has also found strong support within the academic community.¹⁵⁵ The opposition is mainly the criminal defense bar, joined by civil lawyers who generally represent defendants.¹⁵⁶

An analysis of the principal arguments offered by each side of the debate reveals that codification will neither produce all the benefits predicted by its proponents nor realize all the fears envisioned by its opponents.

¹⁵³ See, e.g., Resolution of the House of Delegates of the New York State Bar Association (Apr. 27, 1984) (on file with the author); *Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes* 264 (Feb. 25, 1983) [hereinafter *Hearings*, Feb. 25, 1983] (testimony of Richard H. Uviller, on behalf of the Bar Association of the City of New York).

¹⁵⁴ The position of some District Attorneys has been lukewarm at best. See, e.g., *Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes* 102-71 (July 24, 1990) [hereinafter *Hearings*, July 24, 1990] (testimony of Mark Dwyer on behalf of the New York State District Attorneys' Association). The District Attorneys have supported the concept of codification but have had reservations about particular draft codes. See *id.* at 112.

¹⁵⁵ See, e.g., *Hearings*, Feb. 25, 1983, *supra* note 153, at 128 (testimony of Professor Stephen Gillers, New York University School of Law); *id.* at 162 (testimony of Professor Richard Uviller, Columbia Law School); *Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes* 4-5 (Mar. 2, 1983) [hereinafter *Hearings*, Mar. 2, 1983] (testimony of Professor Roderick Surratt, Syracuse Law School); *Hearings*, Feb. 25, 1983, *supra* note 153, at 36-37 (testimony of Dean Jerome Prince). But see *Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes* 562 (Nov. 19, 1980) [hereinafter *Hearings*, Nov. 19, 1980] (testimony of Bennett Gershman, Pace University School of Law, speaking in support of the common law system).

¹⁵⁶ See, e.g., *Hearings*, July 24, 1990, *supra* note 154, at 36 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Lawyers); James M. Furey, Position Paper on the Proposed Code of Evidence by the Tort Reparations Committee of the New York State Bar Association (1982); Letter from David Siegel, Albany Law School to Edward J. Hart, Chair of the New York State Tort Reparations Committee (Feb. 11, 1984) (on file with the author).

A. *The Arguments in Favor of Codification*

All codification movements have begun with the same three premises: the common law is inaccessible; when discoverable, the law is unclear and not uniformly applied; and, even when the law is found and understood, it often needs substantive reform. The efforts to codify New York's law of evidence are no exception. Every argument that has been offered to support codification of the law of evidence fits into one of these three categories.

1. Inaccessibility

Proponents of codification argue that New York law is difficult to use because it is difficult to find. Since the law of evidence is only partially judge-made, it is scattered throughout cases and statutes. Legislative enactments, in turn, are interspersed throughout statutory law. Indeed, it has been observed that over nine thousand provisions concern evidentiary rules.¹⁵⁷ In addition, some rules of evidence are found in both decisional and statutory law. For example, the hearsay rule and many of its exceptions, such as admissions or declarations against interest, are decisional.¹⁵⁸ Other hearsay exceptions, such as that relating to business records, are statutory.¹⁵⁹ Privileges are statutory¹⁶⁰ but most of the exceptions to privileges are decisional.¹⁶¹ The principal advantage of any codification is that it puts all the law, whether originally judge-made or legislative, in one place, easily available to all.¹⁶²

Code proponents argue that improved access will improve

¹⁵⁷ Eugene R. Canudo & Harold Korn, *Proposal for Codification of the New York Law of Evidence*, 1973 N.Y. St. B.J. 527, 528.

¹⁵⁸ See *Hayes v. Claessens*, 234 N.Y. 230, 137 N.E. 313 (1922) (admissions are an exception to the hearsay rule); *Smith v. St. Lawrence County Nat'l Bank*, 18 A.D.2d 1042, 238 N.Y.S.2d 585 (3d Dep't 1963) (admissions exception to hearsay rule); *People v. Maerling*, 46 N.Y.2d 289, 385 N.E.2d 1245, 413 N.Y.S.2d 316 (1978) (declarations against interest exception to hearsay rule); *People v. Thomas*, 68 N.Y.2d 194, 500 N.E.2d 293, 507 N.Y.S.2d 973 (1986) (declaration against interest exception), *cert. denied*, 480 U.S. 948 (1987).

¹⁵⁹ N.Y. CIV. PRAC. L. & R. 4518 (McKinney 1992).

¹⁶⁰ See, e.g., N.Y. CIV. PRAC. L. & R. 4502(b) (McKinney 1992) (marital privilege).

¹⁶¹ See, e.g., *Poppe v. Poppe*, 3 N.Y.2d 312, 144 N.E.2d 72, 165 N.Y.S.2d 99 (1957) (marital privilege does not apply to statements aimed at destroying the marital relationship).

¹⁶² *Hearings*, Feb. 25, 1983, *supra* note 153, at 227 (testimony of Robert Pitler, on behalf of the New York County District Attorney's Office).

the quality of evidentiary arguments and decisions.¹⁶³ According to them, there is no area of law where the need for ascertaining accurate information in a short time is as great as in the presentation of evidence. When an objection to evidence is made, the trial judge must make an immediate ruling. While some evidence questions can be anticipated, most cannot. Thus, argue proponents, consolidation of all evidence rules in handbook form will benefit all participants and will result in fewer trial errors, reversals and costly retrials.¹⁶⁴

Opponents respond that New York's law of evidence already is available in a single volume, citing *Richardson on Evidence* and *Fisch on New York Evidence*.¹⁶⁵ There are two problems with this response. First, of course, these treatises are not the law, but the authors' distillation of the law. Even conceding that treatise writers are correct in their summaries, the common law basis for the treatises does not offer a prospective litigant the same information as codification will provide. Courts decide cases based on the facts before them; their goal is not to prescribe the law for the future. A trial court considering an evidence dispute in a common law system must look at the case offered as precedent. The facts of the current case will not be identical to those the earlier court had before it and the applicability of the prior ruling will depend on many subtle variables.¹⁶⁶ Codified law, on the other hand, is prospective; it is designed solely for future use. The question for courts deciding an evidence question under a code is the meaning of particular words in the statute. Codification brings the rule of law itself into the courtroom rather than the holding of various cases. Second,

¹⁶³ "The proposed code will, if adopted, prove of great service to both the student who must master the Law of Evidence, and to the judge and trial practitioner who must apply it on a daily basis." *Hearings*, Nov. 19, 1980, *supra* note 155, at 460-61 (testimony of Richard Rifkin, Deputy First Assistant Attorney General, representing the New York State Department of Law); see also *Hearings*, July 24, 1990, *supra* note 154, at 33 (testimony of Judge William Donnino, on behalf of the Chief Administrator's Advisory Committee on Criminal Law and Procedure).

¹⁶⁴ *Hearings*, Feb. 25, 1983, *supra* note 153, at 10-12 (testimony of Carolyn Gentile).

¹⁶⁵ JEROME PRINCE, *RICHARDSON ON EVIDENCE* (10th ed. 1973) [hereinafter *RICHARDSON*]; EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE* (2d ed. 1977).

¹⁶⁶ Such as, how close are the facts of the prior case to the facts of the current case? What was the precedent-setting court trying to accomplish? Were there equitable considerations that were instrumental in the prior court's ruling? How important was the particular piece of evidence to the party seeking or objecting to its admission?

though of lesser concern, is the difficulty of keeping treatises updated. The current edition of Fisch was published in 1977 and requires yearly supplements.¹⁶⁷ Richardson is even older; the latest edition was published in 1972 and has not been updated since 1985.¹⁶⁸

Yet proponent's argument that a code will provide concrete evidence law is also faulty. The proposed rules are not a codification as that term is generally understood. The New York rules will consist of approximately 100 relatively brief rules compared to the 401 sections of the Uniform Commercial Code, the 575 sections of the Internal Revenue Code, or even the 287 sections of the California Evidence Code. It is apparent that these New York rules do not constitute a code in the usual meaning of the term. Instead, these provisions sometimes lay down a black-letter rule,¹⁶⁹ sometimes merely set forth a principle,¹⁷⁰ and sometimes relegate a matter to discretion or another source of authority.¹⁷¹ Since evidence, like torts, is subject to an infinite variety of situations, anything more than guidelines would quickly become unworkable.

At the same time, it is hard to deny that codification will put the law of evidence in everyone's pocket or purse. The Federal Rules of Evidence are available in a 4" by 6" pamphlet of fifty-five pages.¹⁷² The New York rules, though slightly longer, will also be available in compact form. They will not be exhaustive, but will permit all parties to begin a discussion about the admissibility of some piece of evidence from the same reference point. If the issue is the admissibility of a medical record, for instance, all participants will have to decide whether the particular document meets the requirements of the hearsay exceptions in proposed rule 803(c)(2) (then-existing mental, emotional, or physical condition), proposed rule 803(c)(3) (statements for purposes of medical diagnosis or treatment), or proposed rule 803(c)(5) (business records). On balance, it seems indisputable

¹⁶⁷ FISCH, *supra* note 165.

¹⁶⁸ RICHARDSON, *supra* note 165.

¹⁶⁹ See, e.g., 1991 Proposed N.Y.C.E., *supra* note 3, § 605 (prohibiting a judge from testifying at a trial, proceeding, or hearing at which the judge is presiding).

¹⁷⁰ See, e.g., *id.* § 402 (all relevant evidence is admissible).

¹⁷¹ See, e.g., *id.* § 403 (permitting exclusion of relevant evidence when its prejudicial effect outweighs its probativeness).

¹⁷² FED. R. EVID. (National Institute for Trial Advocacy 1991).

that codification will make evidence rules more accessible.

Further, it is critical that trial lawyers have a solid understanding of the principles underlying evidence law since evidentiary issues must be recognized immediately, responded to without delay and decided promptly. Yet, anyone who has ever sat in a courtroom has observed that evidence problems are handled by the trial bar and bench unevenly at best. Codification can raise the level of that performance by making it easier to learn basic evidence concepts. The Code will be a convenient, easily transportable focus of study for lawyers and law students. As with the Federal Rules, there will be annotated editions collecting the cases and, as with the current proposal, extensive commentary. Enactment of the Federal Rules in other states has stimulated much evidence scholarship, including excellent treatises which provide useful materials for educating future lawyers and practicing lawyers and judges.¹⁷³

Additionally, it is not by chance that evidence professors all over the country teach evidence through the Federal Rules.¹⁷⁴ It is not simply a desire to prepare students for practice in federal court or to avoid the stigma of localism. The common law principles of evidence could be the basis of a very challenging and useful evidence course. It is not usually done because it makes learning evidence harder than it needs to be and harder than it is under the code. Students, like lawyers, work better with rules than with judicial holdings because the rules allow them to go directly to the evidence principle at issue. Learning evidence from common law cases requires that a student identify the principle in the holding which is frequently hidden among facts and *dicta*. The principle must first be extracted before it can be examined and its application in new situations considered. Evidence taught from the Federal Rules, however, gives the student a clearer starting point. The student must still consider the

¹⁷³ See, e.g., Kenneth Graham, *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 312 n.87 (1990), citing 1 M. UDALL & J. LIVERMORE, *ARIZONA PRACTICE: LAW OF EVIDENCE* (2d ed. 1982); C. EHRHARDT, *FLORIDA EVIDENCE* (2d ed. 1984); P. THOMPSON, *MINNESOTA PRACTICE: EVIDENCE* (1979); L. KIRKPATRICK, *OREGON EVIDENCE* (1982); S. GOODE ET AL., *GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL* (1988); K. TEGLAND, *WASHINGTON PRACTICE: EVIDENCE* (2d ed. 1982). For a discussion of why inclusion in these treatises is important, see *infra* notes 195-97 and accompanying text.

¹⁷⁴ Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 257 (1984).

rule's application to new facts, but the student can begin with the rule itself. Obviously, the better one learns evidence in the classroom the better one will later practice it in the courtroom. Codifying the law of evidence will enhance this process.¹⁷⁵

2. Clarification and Unification

The desire to unify the law has been a powerful and important influence in all codification efforts. In fact, codification has been most successful when uniformity was the primary concern of reforms.¹⁷⁶ The law of evidence is no exception. The desire for uniformity within the federal system and between federal and state courts has been a principal purpose in the movement to codify the law of evidence in this country.¹⁷⁷ The Federal Rules themselves were erected from the skeletal efforts originally designed to provide uniform state laws.¹⁷⁸ In New York, proponents of codification desire uniformity on two different fronts.¹⁷⁹ One is uniformity within the state. The second is conformity within between the Federal Rules of Evidence and New York's law of evidence.

As to statewide uniformity, proponents urge that evidence questions are decided at the trial level in an idiosyncratic fashion.¹⁸⁰ As a result of inaccessibility or ambiguity in the law, indi-

¹⁷⁵ I am not suggesting that New York evidence teachers will begin to teach evidence courses based exclusively on the codified New York Rules of Evidence. Rather, once New York law adopts the language and format of the Federal Rules, both the differences and similarities will be accessible to teachers and students of evidence law.

¹⁷⁶ See *supra* notes 5-12 and accompanying text.

¹⁷⁷ Wroth, *supra* note 121, at 1321. See also Graham, *supra* note 173, at 298. In fact, the desire for uniformity has strong roots in American legal history. Uniformity in the law was one of the stated goals of the American Bar Association when it was organized in 1878 and when the National Conference of Commissioners on Uniform State Laws held its first meeting back in 1892. WRIGHT & GRAHAM, *supra* note 74, at 76. New York itself had an early interest in uniform state laws. The New York legislature created commissioners to promote uniform state laws before the turn of the century. *Id.*

¹⁷⁸ Wroth, *supra* note 121, at 1317. The Federal Rules were influenced considerably by the American Law Institute's Model Code of Evidence and the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, both of which "had been developed primarily to provide model legislation for state adoption." *Id.*

¹⁷⁹ *Hearings*, Nov. 19, 1980, *supra* note 155, at 460 (testimony of Richard Rifkin, Deputy First Assistant Attorney General, representing the New York State Department of Law). See also *Hearings*, Feb. 25, 1983, *supra* note 153, at 31-32 (testimony of Dean Jerome Prince, Senior Consultant to the Law Revision Commission).

¹⁸⁰ See, e.g., *Hearings*, Mar. 2, 1983, *supra* note 155, at 21 (testimony of Melvin

vidual trial judges have developed their own rules of evidence. The consultants and advisory panelists who drafted the 1982 proposed code discovered many instances of such "local rules" of evidence.¹⁸¹ Code supporters insist that codification will eliminate these inconsistencies.¹⁸² It is their view that simplifying the law of evidence and reducing it to a few easily understood rules will mean that everyone will see the law of evidence through the same eyes.¹⁸³ To some extent, they may be correct. Codification can clarify the law, make it more available and eliminate some of the ambiguities that have developed in cases. Therefore, codification may help some judges apply the law more uniformly. But it is too much to expect that an evidence code will turn the law of evidence into hard and fast rules or will turn everyone into evidence scholars.

Proponents second concern with uniformity, however, is that conformity between New York and the Federal Rules needs to be given greater consideration. Having a code modeled on the Federal Rules would enable lawyers to work more efficiently in both state and federal court and in the vast majority of states that have adopted codes based on the federal model.¹⁸⁴ Using a code based on the Federal Rules also would permit New York's law of evidence to benefit from the larger laboratory of federal courts and states that have already adopted a code following on

Freidel, on behalf of the Trial Lawyers Section of the State Bar Association).

¹⁸¹ Report of the Special Committee to Review the Proposed Code of Evidence for the State of New York, New York State Bar Association 7 (1984) (on file with the author) [hereinafter NYSEA]; *Hearings*, Feb. 25, 1983, *supra* note 153, at 264 (testimony of Professor Richard Uviller of Columbia Law School, on behalf of the Association of the Bar of the City of New York).

¹⁸² See, e.g., *Hearings*, Nov. 19, 1980, *supra* note 155, at 229 (testimony of Peter Grishman, Administrative Assistant District Attorney on behalf of Mario Merola, District Attorney of Bronx County) ("I think that a Code would provide us with a greater degree of uniformity among the trial bench . . . a Code of Evidence is necessary for us to get uniformity among the trial bench."); *Hearings*, Feb. 25, 1983, *supra* note 153, at 264 (testimony of Professor Richard Uviller, on behalf of the Bar Association of the City of New York) ("In our opinion the codification of our Rules of Evidence will greatly enhance the consistency and the intelligibility of our Common Law of Evidence. A number of rules, which have in their Common Law form remained regrettably obscure are frequently misunderstood, and variously applied by the court.").

¹⁸³ See *Hearings*, Mar. 2, 1983, *supra* note 155, at 5 (testimony of Professor Roderick Surratt, Syracuse Law School).

¹⁸⁴ See, e.g., *Hearings*, Feb. 25, 1983, *supra* note 153, at 28 (testimony of Dean Jerome Prince); NYSEA, *supra* note 183, at 8; Letter from Judge Jack B. Weinstein to Judge Thomas M. Stark, reprinted in *Hearings*, Nov. 19, 1980, *supra* note 155, at 493.

that model.¹⁸⁵

The attraction of uniformity, or at least similarity, between federal and state rules is attested to by the thirty-four states that have modeled their own laws on the Federal Rules of Evidence. No state, however, has adopted every provision of the Federal Rules. New York's reliance on its own common law as the substantive foundation for most of its rules is not unique.¹⁸⁶ A study of state codifications in 1985 showed that two-thirds of the Federal Rules provisions had been modified when enacted in various states; only one state had fewer than ten substantial changes in its version of the seventy-seven rules that make up the Federal Rules. Most states had many more.¹⁸⁷

Yet substantial similarity does exist. All the codes use a common language, format, organization and numbering system. All agree on which subjects should be included or excluded from the code.¹⁸⁸ Even with its express declaration of independence from the Federal Rules model,¹⁸⁹ the proposed code for New York conforms in these important aspects of uniformity. Such

¹⁸⁵ *Id.*; see also *Hearings*, Nov. 19, 1980, *supra* note 155, at 515 (testimony of Professor Arthur Best, New York Law School).

¹⁸⁶ See *supra* note 2.

¹⁸⁷ Wroth, *supra* note 121, at 1322. Five types of variations were found. *Id.* at 1322-24. Interestingly, examples of each of these variations can also be found in the Proposed New York Code. First, some of the variations were only technical. For instance, state counterparts had to be used rather than references to federal laws and court structures. Compare ME. R. EVID. 402 with FED. R. EVID. 402. For an example of this accommodation in the proposed New York Code, compare 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 402 with FED. R. EVID. 402. Second, many states have retained what they perceived as traditional state practice. Compare, e.g., N.H. R. EVID. 611 (b) with FED. R. EVID. 611(b). For an example in the proposed New York Code, compare 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 803(b)(3) with FED. R. EVID. 801(d)(2)(D) (admissions by a party's agent or employee). Third, some states preferred the losing position regarding a matter hotly disputed in the Congress. Compare, e.g., ME. R. EVID. 201 (g) with FED. R. EVID. 201(g). For an example in the proposed New York Code, compare 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 302 (which adopted the Edmund Morgan-Charles McCormick view on presumptions originally approved by the Supreme Court) with FED. R. EVID. 301. (Congress eventually adopted the more conservative view of presumptions associated with Professor James Thayer.). Fourth, states sometimes rejected all of the positions that had been taken in the Congress in favor of their own solution to a controversial issue. Compare, e.g., Vt. R. EVID. 301 with FED. R. EVID. 301. For an example in the proposed New York Code, compare 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 806 with FED. R. EVID. 803(24) and 804(5). And, lastly, some states included provisions that address issues ignored by the Federal Rules. See DEL. UNIF. R. EVID. 304. For an example in the proposed New York Code, see 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 202 (determination of law).

¹⁸⁸ Wroth, *supra* note 121, at 1348.

¹⁸⁹ 1991 *Proposed N.Y.C.E.*, *supra* note 3, at xxi.

uniformity, superficial though it may seem, offers two principal advantages: "(1) it allows lawyers who practice in both state and federal court, or who have clients in more than one state, to master only one basic set of rules, and (2) it provides practitioners and scholars alike ready access to a single nationwide body of authority and commentary."¹⁹⁰

Another benefit of uniformity merits serious consideration.¹⁹¹ Uniformity can provide economies of scale.¹⁹² Modeling a code, even to the extent of using the same numbering system, after one currently in use in three dozen jurisdictions provides the user with a rich resource. The greater the number of judges, lawyers and legal scholars who apply the same rule, the more likely one is to be able to find authority on that point. The body of law will be richer as well.¹⁹³

Must New York actually codify to benefit from this national experience? Clearly yes. By modeling its format on the Federal Rules, the proposed code provides a common vocabulary and a common approach. It allows New York to join the national legal community by placing it in the national treatises. If a lawyer in

¹⁹⁰ Wroth, *supra* note 121, at 1322.

¹⁹¹ I find it difficult to worry too much about the ease with which lawyers practice in different forums. In my experience, most lawyers do not practice in different forums. Even conceding the obvious, that unifying the law would be helpful to those that do cross jurisdictional lines, the potential benefit for that group seems too small to impact meaningfully on the codification debate. See also Graham, *supra* note 173, at 296. Professor Kenneth Graham has noted a number of other advantages to uniformity. First, it promotes fairness. It seems unfair that a communication privileged in one jurisdiction would have to be disclosed merely because the plaintiff files suit across the border in a neighboring state that does not recognize the privilege. Second, uniformity promotes predictability. Uniformity of evidence law may make outcome determinations more predictable for insurance companies or manufacturers. Finally, it will reduce the costs of legal services in states with insufficient legal representation by permitting lawyers from other states to fill the supply-demand gap. Professor Graham has even noted that the appeal of uniformity may be psychological rather than rational:

There seems to be something in human nature that makes us more comfortable going wrong in a crowd, that makes us uneasy when we discover that others take delight in pleasure we find bizarre or offensive, and that makes the familiar seem safer, if less interesting, than the exotic. Even law professors who make fun of this foible can probably be found pulling in under the Golden Arches when travelling rather than taking a chance on Ptomaine Tillie's Truck Stop. Similarly, the Federal Rules may provide an aura of reliability, rather like "genuine GM parts," that one does not get from local job shops.

Id. at 300-01.

¹⁹² *Id.* at 299.

¹⁹³ *Id.* at 300.

Minnesota wants to understand an intricacy in Minnesota's law on dying declarations, the lawyer can look in Thompson's *Minnesota Practice*.¹⁹⁴ But the lawyer has other options. The lawyer can look in *Weinstein's Evidence*¹⁹⁵ or in Wright and Graham's treatise.¹⁹⁶ There the lawyer can learn what Minnesota's law is on that point and also have the laws of sister states to compare, since these national treatises include the law of all those states speaking the language of the Federal Rules. But the lawyer cannot learn what New York's law is on that point. Similarly, the New York lawyer cannot turn to these national treatises to benefit from the well-spring of knowledge that has developed around the Federal Rules because New York's law is not there and does not fit within this framework. Codification can permit New York to take advantage of those benefits even if it retains the substance of its law. But it must at least accept the vocabulary of the Federal Rules, even if New York speaks its own particular dialect.

3. Reform of Substantive Law

The desire to reform the law has helped to drive most codification movements.¹⁹⁷ New York's earlier efforts to codify its law of evidence were no exception.¹⁹⁸ According to proponents, codification provides the best opportunity for revision of outdated or otherwise unsound rules.¹⁹⁹ The adversary system places a limit on the extent to which a court can remedy the deficiencies in present law.²⁰⁰ First, it depends on the court's sensibilities. Sometimes the court will not act even when it thinks the rule is outdated and indefensible.²⁰¹ Second, common-law development can only occur piecemeal since the court can

¹⁹⁴ P. THOMPSON, MINNESOTA PRACTICE: EVIDENCE (1979).

¹⁹⁵ JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE (1990).

¹⁹⁶ WRIGHT & GRAHAM, *supra* note 74.

¹⁹⁷ See, e.g., LANG, *supra* note 14, at 74 (codification of Indian Law was motivated, in part, to improve the substance of that law); ILBERT, *supra* note 4, at 158-59 (need for amendment and reform of French law).

¹⁹⁸ See, e.g., FISCH, *supra* note 165, at 185-87; Canudo & Korn, *supra* note 157; Stanley H. Fuld, *Foreword*, 19 N.Y. L.F. 741 (1974).

¹⁹⁹ See *Hearings*, Feb. 25, 1983, *supra* note 153, at 14 (testimony of Carolyn Gentile).

²⁰⁰ *Id.* at 36 (testimony of Dean Jerome Prince).

²⁰¹ See *Loschiavo v. Port Auth.*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983) (agent's admissions).

only address an issue when it is presented in a particular case.²⁰² Systemic changes or revisions of a complicated set of principles is simply not possible.²⁰³ Codification, however, can make the needed reforms.²⁰⁴ Indeed, all recent codes have attempted to make some of the suggested reforms.²⁰⁵

New York's current proposal, however, is an anomaly. Although proponents of the current draft have urged enactment to "modernize . . . clarify . . . assure reliability and fairness . . . and gently push the law along its path"²⁰⁶ political pressure has greatly limited the ability of the drafters to make changes in the substance of the rules.

The current draft is a concession to the reality that even the most modern, just and well-drafted code will do New York no good if the legislature will not pass it. The 1980 draft which included many of the modernizations and reforms enacted in the Federal Rules, such as inclusion of the present sense impression²⁰⁷ and learned treatise²⁰⁸ exceptions to the hearsay rule, and

²⁰² *Id.*

²⁰³ *Hearings*, Feb. 25, 1983, *supra* note 153, at 38; see also *Michelson v. United States*, 335 U.S. 469, 485 (1948).

²⁰⁴ *Hearings*, Feb. 25, 1983, *supra* note 153, at 45 (testimony of Dean Jerome Prince). The Association of the Bar of the City of New York argued that codification would necessarily focus the attention of the bar on areas where the common law of evidence offends common sense and saw some rewriting as a good thing. *Hearings*, Feb. 25, 1983, *supra* note 153, at 265 (testimony of Professor Richard Uviller); *Hearings*, July 24, 1990, *supra* note 154, at 96-97 (testimony of Alton Abromowitz, on behalf of the Committee on State Legislation of the Association of the Bar of the City of New York). The New York State Bar Association also supports codification because of its potential for reforming antiquated or unjust rules of evidence. It has argued that the codification process gives the legislature the opportunity for reviewing, revising, organizing and bringing up to date this whole area. NYSBA, *supra* note 183, at 809. There seems to be general consensus that reform would be beneficial but no consensus on what that reform should be.

²⁰⁵ See Proposed Code of Evidence for the State of New York under consideration by The New York State Law Revision Commission, Rule 801(d)(1)(A) (Sp. Pamph., West 1980) [hereinafter 1980 *Proposed N.Y.C.E.*] (permitted admission of declarant's prior inconsistent statement for substantive purposes); New York Law Revision Commission, A Code of Evidence For The State of New York, Submitted to the 1982 Session of The Legislature, Commentary to Rule 601, (Sp. Pamph., West 1982) [hereinafter 1982 *Proposed N.Y.C.E.*] (eliminated dead man's statute); 1991 *Proposed N.Y.C.E.*, *supra* note 3, Rule 1003 (duplicates admissible as originals).

²⁰⁶ 1991 *Proposed N.Y.C.E.*, *supra* note 3, at xix.

²⁰⁷ "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." 1980 *Proposed N.Y.C.E.*, *supra* note 206, § 803(1).

²⁰⁸ To the extent called to the attention of an expert witness upon cross-exami-

the restriction of prior bad acts used to impeach a witness to those bearing on truthfulness,²⁰⁹ was unable to win legislative approval. The 1991-1992 draft is based on the assumption that it will not change current law unless there is good reason for change.²¹⁰ As a consequence, it is the most conservative of the draft proposals and has been less objectionable to those traditionally opposing codification.²¹¹ Nonetheless, as this bill is considered by the legislative committees and examined by the bar, the pressure to maintain the status quo and resist change continues. The drafters have been forced even to retreat from some of the 1990 limited reforms proposed in the original version of this bill, such as elimination of the often-criticized Dead Man's Statute.²¹² This resistance to change is unfortunate. If the legislature eventually enacts this code New York will not reap the benefits of many of the lessons that have been learned elsewhere.

Nonetheless, the New York rules make important and useful reforms. Although some of them are technical and minor, many are not. For instance, section 1003 modernizes the best evidence rule by permitting the introduction of reproductions in lieu of originals unless there is a genuine issue as to the authenticity of the original.²¹³ Modern methods of reproduction have

nation or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Id. § 803(18).

²⁰⁹ *Id.* § 608(b).

²¹⁰ 1991 *Proposed N.Y.C.E.*, *supra* note 3, at xviii.

²¹¹ See *Hearings*, July 24, 1990, *supra* note 154, at 63 (testimony of Susan Lindenauer).

²¹² The Dead Man's statute is a common law principle, currently codified at N.Y. Civ. PRAC. L. & R. 4519 (McKinney 1990), which makes a person or party interested in an event incompetent to testify to a personal communication or transaction with a deceased in an action against the estate of the deceased. It has been the object of almost universal criticism for many years. See, e.g., JOHN WIGMORE, EVIDENCE §§ 578, 578a (3d ed. 1940); MORGAN ET AL., *supra* note 89, at 23-35. It was omitted from the Model Code of Evidence, the Uniform Rules of Evidence and almost every modern codification. Also, see the proposed amendment to the declaration against interest exception to the hearsay rule to include matters that would "make the declarant an object of hatred, ridicule, or disgrace. . . ." 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 804(b)(4); S. 7694, A. 10557, N.Y. Leg. 213th Sess. 1 (1990).

²¹³ See 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 1003.

eliminated much of the need for strict application of the traditional rule that requires the original unless it has been lost or destroyed. This is a significant improvement that will be welcomed by New York's courts.²¹⁴

The proposal makes some interesting changes in the law of privilege as well. For instance, section 501(c) changes New York law by providing that privileged conversations overheard by a third party without the privilege-holder's knowledge are not necessarily waived.²¹⁵ This makes good sense when the disclosure would defeat the policies underlying the particular privilege and when the holder of the privilege took reasonable precautions against the unauthorized disclosure. The proposed code also expands the applicability of professional privileges to include those circumstances when the privilege-holder reasonably believes he or she is speaking to such a professional but is actually speaking to someone unlicensed or otherwise not qualified.²¹⁶

Additionally, the proposed code clarifies some areas of the law. For instance, the operation of presumptions has been particularly difficult and confusing. Like most jurisdictions, New York has many kinds of presumptions that operate in a variety of ways.²¹⁷ Proposed section 302 would apply one rule to all presumptions in civil cases.²¹⁸ Adoption of a single method of operation for all presumptions in civil cases has been favored by most evidence scholars²¹⁹ although which rule ought to control has been hotly debated.²²⁰ The drafters of the code resolved the

²¹⁴ See *R.D.D. Enter. v. Eaton Allen Int'l, Ltd.*, N.Y. L.J., Apr. 14, 1992, at 21, 28 (noting and welcoming the modernized version of the rule in the proposed code).

²¹⁵ See 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 501(c).

²¹⁶ 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 504 (attorney-client privilege), § 506 (doctor-clergy privilege), § 507 (doctor-patient privilege).

²¹⁷ *Fisch*, *supra* note 165, § 1193.

²¹⁸ See 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 302. A uniform rule that would include criminal cases may be impossible given the constitutional restrictions imposed by the United States Supreme Court. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

²¹⁹ See EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF* 76-81 (1956); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 *STAN. L. REV.* 5 (1959).

²²⁰ Cleary, *supra* note 220, at 5; see also EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 31-44 (1962); Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 *HARV. L. REV.* 59, 82-83 (1933); JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* 337 (1898).

debate by adopting "the so-called 'Morgan view,' giving presumptions the effect of shifting the burden of proof, rather than just the burden of going forward, from the beneficiary of the presumption to his opponent."²²¹ The drafters adopted this rule both because they agreed with it and because it more closely reflected the current operation of presumptions under existing New York practice.²²² The position actually adopted is of less significance than the fact that a single rule has been selected, finally offering a glimmer of hope for consistent and understandable application in the future.

A number of other reforms are introduced in the code. Section 405 permits proof of character through opinion evidence in addition to evidence as to reputation.²²³ Section 408 excludes statements in civil settlement discussions even if the statements are not hypothetical²²⁴ and section 410(d) excludes statements made during criminal plea discussions.²²⁵ Section 607(b) eliminates the ancient "voucher rule" and permits a party to impeach his or her own witness.²²⁶ Section 804(b)(2) permits the admission of dying declarations in wrongful death actions as well as homicide prosecutions.²²⁷ These are all changes that move the law forward and appear to have survived opposition by the most strident evidence conservatives.

In some areas the code benefits from experience under the Federal Rules by addressing an overlooked issue, clarifying an ambiguity or creating an ingenious solution to a problem. For instance, proposed code section 404(2) expressly permits the use of character evidence in certain quasi-criminal civil cases, a growing practice in some federal circuits,²²⁸ notwithstanding the

²²¹ 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 302 cmt., at 33. This is in contrast to the Federal Rules's solution to the problem which adopted the more conservative or traditional view espoused by James Thayer which merely shifts to the party against whom a presumption is directed the burden of going forward with evidence to meet or rebut it. 120 CONG. REC. 11,929-30 (1974).

²²² 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 302 cmt., at 35.

²²³ *Id.* § 405.

²²⁴ *Id.* § 408.

²²⁵ *Id.* § 410(d).

²²⁶ *Id.* § 607(b).

²²⁷ *Id.* § 804(b)(2).

²²⁸ See, e.g., *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 826 (10th Cir. 1986) (holding it an error to exclude evidence that plaintiff was not a rube); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1092 (5th Cir. 1980) (expert testified that civil defendant's driver was safe which then justified testimony regarding prior accidents by pilot), *cert.*

absence of authority for such evidence in the Federal Rules. The practice has developed because creating an exception to the general prohibition on character evidence for these civil cases, analogous to that expressly provided for in criminal cases, makes sense.

Generally the law does not permit evidence concerning a person's character to prove he or she acted in a particular way since its probative value is slight while its prejudicial effect can be great. While it may be true that people's conduct frequently conforms to their character traits, human experience tells us that is not necessarily true in a particular instance. Character evidence tends to divert attention from what actually happened on a particular occasion, introducing the possibility that the factfinder will reward a good person or punish a bad person despite the evidence in the case. However, Federal Rule 404(a)(2) includes a specific exception for the defendant in a criminal case.²²⁹ This is based on the common law rule that the probative-prejudice balance is different in a criminal case. Although knowledge of the defendant's good character may prejudice a jury in the defendant's favor, the social cost of convicting an innocent person argues for the admissibility of all relevant evidence so the factfinder ought to be able to consider whether a person of past good character is likely to have committed the charged offense.²³⁰ Like reasoning applies in certain civil cases, such as fraud, since the quasi-criminal nature of these offenses has the same potential for destroying a person's reputation and economic status. The proposed New York code, therefore, permits character evidence in a civil case when the underlying cause of action is predicated on intentional conduct that violates the penal law.

The proposed code also clarifies a major ambiguity under the Federal Rules. Rule 803(3) permits a statement of present state of mind or emotional or physical condition to be admissible even though it may be hearsay.²³¹ The theory behind this

denied, 450 U.S. 981 (1981); *Gray v. Sherril*, 542 F.2d 952, 954 (5th Cir. 1976) (court found no error in admission of testimony concerning appellant's character trait of having emotional outbursts and of being argumentative).

²²⁹ FED. R. EVID. 404(a)(2).

²³⁰ CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* § 186 (John William Stray ed., 4th ed. 1992).

²³¹ FED. R. EVID. 803(3).

exception to the hearsay rule is that the spontaneity and contemporaneity of the statement and the state of mind or condition of the declarant assures its reliability.²³² The common law antecedent of this rule arose in the famous case of *Mutual Life Insurance Co. v. Hillmon*.²³³

The issue in *Hillmon* was whether a body recovered on March 17, 1879, in Crooked Creek, Kansas, was John W. Hillmon or Frederick Adolph Walters. A letter written by Walters stating his intention to go to Crooked Creek with John Hillmon was offered to prove that Walters actually went there. The Supreme Court held that the statement in Walters's letter, that he intended to go to Crooked Creek, made it more likely that he actually did go than if there had been no such statement.²³⁴ The primary difficulty that has arisen under this provision is whether the declarant's statement of intent may be admitted to show what someone other than the declarant did, *i.e.*, would Walters's statement be admissible to show what Hillmon did?²³⁵ The legislative history on the issue is unclear.²³⁶ The majority of courts have admitted such statements to prove the conduct of other parties despite uniform disapproval by commentators.²³⁷ The proposed New York code recognizes the danger in

²³² FED R. EVID. 803(3) advisory committee's note including reference to 803(1).

²³³ 145 U.S. 285 (1892).

²³⁴ *Id.* at 295-96.

²³⁵ The language used by the Court supports use of such statements to prove the conduct of another although whether Hillmon went to Crooked Creek was not really at issue in the case. The court stated:

The letters in question were competent . . . as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.

Id. (emphasis added).

²³⁶ See FED R. EVID. 803(3) advisory committee's note (the rule of *Hillmon* is left undisturbed); H.R. REP. NO. 650, 93d Cong., 1st Sess. 13-14 (1973), reprinted in 1974 U.S.C.A.N. 7051 (House made clear that statement was not admissible as to actions of non-declarant).

²³⁷ See *United States v. Pheaster*, 544 F.2d 353, 379-80 (9th Cir. 1976) (victim intended to meet defendant in parking lot from which he disappeared), *cert. denied*, 429 U.S. 1099 (1977); *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975) (deceased intended to discuss ending business dealings with defendant), *cert. denied*, 424 U.S. 911 (1976); *State v. Abernathy*, 577 S.W.2d 591 (Ark. 1979) (victim intended to meet defendant); *State v. Cugliata*, 372 A.2d 1019 (Me.) (victim intended to travel with defendant), *cert. denied*, 434 U.S. 836 (1977), *overruled by State v. Brewer*, 505 A.2d 774 (Me. 1985); *contra, e.g.*, *Clark v. United States*, 412 A.2d 21 (D.C. 1980) (victim intended to meet

the general admissibility of these statements by setting limits on their use. A declaration of intent to engage in conduct with another to prove the conduct of another person is admissible only if: the declarant is unavailable and there are other circumstances that suggest that the statement of intent was serious; it is likely that someone other than the declarant would engage in the conduct; and there is corroboration that the second person actually engaged in the conduct.²³⁸ The proposed New York rule, therefore, improves on the federal rule both by explicitly addressing an ambiguity and by creating conditions that enhance the reliability of the admitted evidence.

Probably the most interesting innovation in the current New York proposal is its solution to the problem of developing future hearsay exceptions. The Federal Rules addressed this problem by creating two identical exceptions to the hearsay rule, commonly called the residual exceptions or catch-alls, which permit, with notice to the adverse party, admission of hearsay statements not covered by other exceptions if they have other guarantees of trustworthiness and if the court determines that

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.²³⁹

The residual exceptions have been criticized for allowing the admission of "almost any relevant out-of-court statement that passes muster under Rule 403."²⁴⁰ The residual exceptions have been used to admit such arguably unreliable hearsay as: the grand jury testimony of accomplices;²⁴¹ telexes from governmen-

defendant at location where she was killed not admissible). Compare, e.g., Douglas D. McFarland, *Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon*, 30 VILL. L. REV. 1, 18-27 (1985); John M. Maguire, *The Hillmon Case—Thirty-three Years After*, 38 HARV. L. REV. 709, 715 (1925).

²³⁸ 1991 Proposed N.Y.C.E., *supra* note 3, § 804(b)(5).

²³⁹ FED. R. EVID. 803(24) & 804(5). The only difference between the two provisions is that the availability of the declarant is immaterial to the former and required by the latter.

²⁴⁰ Jeffery Cole, *Residual Exceptions to the Hearsay Rule*, 16 LITIG. 26, 27 (1989); see also Faust Rossi, *The Silent Revolution*, 9 LITIG. 13, 17 (1983).

²⁴¹ See, e.g., *United States v. Curro*, 847 F.2d 325 (6th Cir.), *cert. denied*, 488 U.S. 843 (1988).

tal agencies prepared for use in litigation even though the information was contradicted by other evidence;²⁴² statements from defendant's estranged wife to the FBI that she told her husband of an outstanding arrest warrant;²⁴³ an accomplice's unsworn statements implicating others even though there was evidence that the declarant had previously lied to the authorities;²⁴⁴ and statements that almost, but not quite, qualify under one of the enumerated exceptions.²⁴⁵

The proposed New York rule is much more restrictive. In an effort to provide for further development of the law but protect against the admission of unreliable evidence, New York's proposed residual exception only permits hearsay that is "within a definable category of statements" and that is separate and distinct from the categories set forth elsewhere.²⁴⁶ The rule recognizes that the enumerated exceptions do not encompass every situation that might present reliable hearsay. However, the drafters did not want to give trial judges broad discretion to admit any type of hearsay that might appear reliable in a particular case. The drafters thought that

vesting trial judges with virtually unlimited and unreviewable discretion to admit so-called reliable hearsay will lead to the admissibility of unreliable evidence, a lack of uniform application, and most importantly, an absence of meaningful review by the Court of Appeals which has limited power to review discretionary determinations, mixed questions of fact and law, and virtually no power to review factual determinations.²⁴⁷

The code envisions the development of future hearsay exceptions such as an exception for learned treatises, but expressly precludes admission of a statement that almost, but not completely, meets the requirements of an enumerated exception.²⁴⁸

²⁴² See, e.g., *United States v. Doe*, 860 F.2d 488 (1st Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989).

²⁴³ See, e.g., *United States v. Marshall*, 856 F.2d 896 (7th Cir. 1988).

²⁴⁴ See, e.g., *United States v. Roberts*, 844 F.2d 537 (8th Cir.), *cert. denied*, 488 U.S. 867 (1988).

²⁴⁵ See, e.g., *Moffett v. McCauley*, 724 F.2d 581 (7th Cir. 1984); *United States v. McPartlin*, 595 F.2d 1321, 1350-51 (7th Cir.) (calendars admitted "as statements 'by a conspirator of a party during the course and in furtherance of the conspiracy'"), *cert. denied*, 444 U.S. 833 (1979).

²⁴⁶ 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 806.

²⁴⁷ 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 806 cmt., at 233-34.

²⁴⁸ *Id.* at 234.

The proposed New York code expressly provides that these determinations are questions of law, thereby assuring review by the New York Court of Appeals, and limits applicability of the residual exception in criminal cases to statements of an unavailable witness, being mindful of constitutional confrontation concerns.²⁴⁹ All in all, it is an ingenious solution to a difficult problem.

B. *The Arguments Against Codification*

Defense lawyers consistently oppose codification. Although the criminal bar has been the most conspicuous, it has not been alone.²⁵⁰ The civil defense bar, when identifiable as such, has also opposed codification.²⁵¹ Just as modern supporters of codification renew historical arguments, opponents' arguments mirror those raised by their intellectual and political predecessors.

Opponents make four principal arguments against codification. First, there is no need for a code because the present system is working and is superior to anything that can be achieved by codification. Second, codification will freeze the development of the law. Third, any given proposal vests too much discretion in the trial judge. Fourth, codification will politicize the law of evidence.

1. No Need for a Code

Opponents argue that New York has a long and proud tradition of common law development of rules of evidence, and that the proponents of codification have not established a need for abandoning the current system.²⁵² Unlike the federal system

²⁴⁹ *Id.*

²⁵⁰ See, e.g., *Hearings*, Nov. 19, 1980, *supra* note 155, at 290-96 (testimony of Archibald Murray, on behalf of the Legal Aid Society); *Hearings*, Feb. 25, 1983, *supra* note 153, at 287-310 (testimony of Eric Seiff, on behalf of the New York Criminal Bar Association); *Hearings*, July 24, 1990, *supra* note 154, at 130-34 (testimony of Peter McShane, on behalf of the New York State Defenders' Association).

²⁵¹ See, e.g., *Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes and Assembly Standing Committee on Codes*, 84-93 (Nov. 12, 1980) [hereinafter *Hearings*, Nov. 12, 1980] (testimony of R. William Larson); *id.* at 94-117 (testimony of Frank Raichle); *id.* at 118-27 (testimony of Alexander Cordes); *Hearings*, Feb. 25, 1983, *supra* note 153, at 51-71 (testimony of Jim Furey).

²⁵² *Hearings*, Feb. 25, 1983, *supra* note 153, at 56 (testimony of Jim Furey, on behalf

before the Federal Rules were enacted, traditionally New York has not been troubled by inter-circuit and inter-district conflicts. The New York Court of Appeals has been a leader in developing the law²⁵³ and opponents of codification find nothing unclear²⁵⁴ or inaccessible²⁵⁵ about New York's common law of evidence. They also maintain that a code with commentary will be no smaller than *Richardson on Evidence*²⁵⁶ or *Fisch on Evidence*.²⁵⁷ Moreover, every practicing attorney knows where to find the law of evidence.²⁵⁸ As Judge Phylis Bamberger has argued, codification may be an extreme remedy for a minor ill:

Finding statutes and relevant cases governing evidentiary principles is a task no different from finding the statutes and other authorities relevant to any other legal subject. The same tools are available. It is generally presumed that law school has at least taught the method for researching the law. If education is the intent of the proposal, it would be accomplished by simply distributing the proposal without its enactment by the legislature.²⁵⁹

Opponents also fear codification will result in extensive and expensive appellate litigation.²⁶⁰ The reasoning is as follows: the law is now well defined and once the legislature enacts a code, even one that merely codifies current law, courts will have to review each rule to decide whether the legislature intended it to

of the Tort Reparations Committee of the New York State Bar Association); *see id.* at 245 (testimony of Archibald Murray).

²⁵³ *See, e.g., Hearings*, July 24, 1990, *supra* note 154, at 5 (statement of Sheldon Silver, Chairman, Assembly Codes Committee); *Hearings*, Feb. 25, 1983, *supra* note 153, at 246 (testimony of Archibald Murray); *Hearings*, Nov. 12, 1980, *supra* note 252, at 58 (testimony of Edward Nowak, on behalf of the Public Defender of Monroe County).

²⁵⁴ *Hearings*, Nov. 12, 1980, *supra* note 252, at 163 (testimony of Joseph McCarthy); *Hearings*, July 24, 1990, *supra* note 154, at 131 (testimony of Peter McShane, on behalf of New York State Defenders' Association).

²⁵⁵ *See Hearings*, July 24, 1990, *supra* note 154, at 39-40, 45 (testimony of Gerald Lefcourt).

²⁵⁶ RICHARDSON, *supra* note 165.

²⁵⁷ FISCH, *supra* note 165.

²⁵⁸ *Hearings*, July 24, 1990, *supra* note 154, at 39-40 (testimony of Gerald Lefcourt); *Hearings*, Feb. 25, 1983, *supra* note 153, at 184 (testimony of Edward J. Hart); *Hearings*, Nov. 12, 1980, *supra* note 252, at 163 (testimony of Joseph McCarthy).

²⁵⁹ Phylis Skoot Bamberger, *Let's Think Before We Leap: Why Should the Law of Evidence Be Codified?*, N.Y. L.J., May 13, 1992, at 1, 7.

²⁶⁰ *See, e.g., Hearings*, July 24, 1990, *supra* note 154, at 64 (testimony of Susan Lindenhauer, on behalf of the Legal Aid Society.); *id.* at 131 (testimony of Peter McShane, on behalf of the New York State Defenders' Association); *Hearings*, Feb. 25, 1983, *supra* note 153, at 197-200 (testimony of Edward J. Hart).

be the same or whether the rule has been changed in some way. Thus it will be years before the law of evidence is settled again.²⁶¹ Additional drawbacks envisioned by opponents are the expense involved in codification and the time and effort required to learn the new code. One lawyer has calculated that learning the new code will consume forty-five years of judges' time and fifty million dollars' worth of attorney time.²⁶²

Opponents assert that proponents have not demonstrated that trial judges and trial lawyers have difficulty learning and using the law of evidence²⁶³ or that the law needs to be simplified, modernized or clarified.²⁶⁴ They insist that codification will actually create many of the problems that its supporters seek to avoid.²⁶⁵ In some ways they are right. Proponents of any change have the burden of providing a reasonable basis for adopting the suggested reform. But to maintain that the law of evidence in New York is beyond improvement or that it is a subject that is easily learned and used is clearly wrong.

Codification is not a panacea. Learning the new code will take time and have its costs. Working with the new code will raise questions as well as provide answers. No law of evidence can be specific enough to provide easy, automatic solutions to all evidence issues. The law of evidence must be flexible enough to accommodate the enormous variety of situations that real life presents. Nor will there necessarily be fewer appeals. No new (or old) body of law can avoid appellate litigation. Courts must interpret the words and reveal the policies behind the rules. Opponents to codification are correct that the code's text will not be all there is to the law but that, of course, is true of all statutory law. Courts will continue to have a role and judicial opinions will continue to shape the rules.

Ultimately, opponents have overstated the problem. The current proposal does not create an entirely new body of law

²⁶¹ See *Hearings*, Feb. 25, 1983, *supra* note 153, at 185 (testimony of Edward J. Hart, Chairman of the Tort Reparations Committee of the New York State Bar Association). Interestingly, the Law Revision Commission has argued that it would be financially beneficial to enact a code. The cost of retrials as a result of evidentiary errors that could be eliminated by a code will reduce the waste of time currently in the system. *Id.* at 11-12 (testimony of Carolyn Gentile).

²⁶² *Id.* at 57-58 (testimony of Jim Furey, Corporate Defense Fund).

²⁶³ See *supra* notes 163-64 and accompanying text.

²⁶⁴ See *supra* notes 182-84 and accompanying text.

²⁶⁵ See part IIA.

that must be learned and defined. Rather, it codifies the current common law unless there is an "express and unequivocal indication of legislative intent to do" otherwise.²⁶⁶ The cost of learning the new law is well worth the benefits achieved through codification. The question is not whether codification will make the law of evidence perfect, only whether it will make it better. On this proponents have met their burden of proof.

2. Codification Freezes the Law of Evidence

Opponents fear that codification will stop further development of evidence law since after codification courts will no longer be the vehicle for growth and change.²⁶⁷ New privileges, hearsay exceptions and doctrines not yet dreamed of will no longer arise from that thoughtful process of slow, case-by-case consideration by trial and then appellate courts.

Opponents concede that courts will continue to interpret the law, but point out that judicial consideration of statutory law is very different from the development of common law. Common law courts apply judicially-created rules to known facts and conditions with the hope that justice will be served in the individual case. Judicial opinions deciding individual cases are generated by adversarial litigation. Opponents argue that law that arises from a real dispute between known litigants is more likely to produce justice. Moreover, common law courts are virtually unlimited in their power to fashion remedies or create rules.²⁶⁸

Once the law of evidence is codified, however, different rules will apply. Courts will not create but only interpret the law. Such statutory interpretation is limited to a few well-defined principles. If the words of the statute are unambiguous, a court must enforce the provision.²⁶⁹ If the words of the statute are ambiguous, a court must seek the intent of the legislature.²⁷⁰ Opponents argue that it will no longer be possible for a court to create

²⁶⁶ 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 102.

²⁶⁷ *See, e.g., Hearings*, July 24, 1990, *supra* note 154, at 36 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Attorneys).

²⁶⁸ Bamberger, *supra* note 260, at 1.

²⁶⁹ N.Y. STAT. LAW § 76 (McKinney 1991).

²⁷⁰ N.Y. STAT. LAW § 92 (McKinney 1991).

new doctrines or abandon outmoded ones.²⁷¹ If the legislature had wanted to change the law in certain areas, so the argument goes, it would have done so. Since it did not, courts will be more hesitant to make future needed changes. As a result, the law of evidence will be the poorer.

Further, opponents argue that the law of evidence should be made by courts and not legislators because "it is largely a matter of logic and experience. It is based on determining facts by drawing reasoned inferences from information relevant to the fact determined."²⁷² This, of course, is what courts do.

Archibald Murray of the Legal Aid Society, a leading opponent of codification, agrees that the law of evidence ought to be developed by courts, reasoning it is *sui generis*, neither substantive nor procedural. Murray concedes that substantive law, because it must reflect policy considerations, and procedural law, because it should be clear and uniform, are the job of the legislature.²⁷³ The law of evidence, however, does not implicate public policy concerns, according to Murray. While general guidelines are important, Murray argues that the law "must remain flexible enough to adapt to the unique factual circumstances of each case."²⁷⁴ Murray sees the judiciary as experts in the trial process and feels that the legislature should intervene only when public policy or uniformity are important.²⁷⁵

Finally, other opponents argue that codification of the law of evidence will further overburden an already stretched legislature²⁷⁶ that has neither the time nor expertise to monitor properly the proposed code to guarantee that justice is done.²⁷⁷ Opponents' fear that codification will restrain the development of the law has merit. After all, the role of the judiciary in interpret-

²⁷¹ Bamberger, *supra* note 260, at 1.

²⁷² *Id.* (citing JAMES THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 265, 275 (1898)).

²⁷³ *Hearings*, Feb. 25, 1983, *supra* note 153, at 246-48 (testimony of Archibald Murray). *See also Hearings*, July 24, 1990, *supra* note 154, at 36 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Attorneys); *but see id.* at 131 (testimony of Peter McShane, on behalf of the New York State Defenders' Association).

²⁷⁴ *Hearings*, Feb. 25, 1983, *supra* note 153, at 247 (testimony of Archibald Murray).

²⁷⁵ *Id.*

²⁷⁶ *See, e.g., Hearings*, July 24, 1990, *supra* note 154, at 36 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Attorneys).

²⁷⁷ *Id.* at 131.

ing a statute is more limited than when it is deciding a case on common law principles.²⁷⁸ However, the argument is based on two premises. First, common law development is healthy and permits the law to mature and grow. Second, once the legislature prescribes the law of evidence, the case-by-case evolution of the law will cease, stifling growth and change. Both premises are questionable.

Common law development of the law of evidence has left much to be desired.²⁷⁹ New York's common law system provides a classic example of the slow pace of judicial reform.²⁸⁰ For instance, New York is one of seventeen states that continue the antiquated voucher rule which prohibits a party from impeaching a witness it has called.²⁸¹ Courts are bound by precedent and their natural conservatism. Opponents are looking to the wrong forum if development of the law is their goal.

Of course, codification will prevent common law development in some areas. The drafters made choices that will require legislative action to reverse. For instance, proposed rule 608(b) permits impeachment with prior specific instances of misconduct that bear on a witness's credibility.²⁸² This language is broader than that adopted in Federal Rule 608(b) which limits

²⁷⁸ Bamberger, *supra* note 260, at 1.

²⁷⁹ We end, as we began, with the observation that the law regulating the offering and testing of character testimony may merit many criticisms. England and some states have overhauled the practice by statute. But the task of modernizing the long-standing rules on the subject is one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake.

Michelson v. United States, 335 U.S. 469, 485-86 (1948).

²⁸⁰ ALA. CODE § 12-21-163 (1986 & Supp. 1991); ARIZ. R. EVID. 601 (1992); COLO. R. EVID. 601 (1984 & Supp. 1990); FLA. STAT. ANN. § 90.601 (West 1992); IDAHO R. EVID. 601(b) (1992); ILL. REV. STAT. ch. 110, para. 8-201 (1992); IND. CODE § 34-1-14-6 (1992); KY. REV. STAT. ANN. § 421-210(2) (Baldwin 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (1985); 42 PA. CONS. STAT. § 5-930 (1991); S.C. CODE ANN. § 19-11-20 (Law. Co-op. 1991); TENN. CODE ANN. § 24-1-203 (1992); TEX. R. CIV. EVID. 601(b) (1990-1991); VT. R. EVID. 601 (1983 & Supp. 1991); WASH. R. EVID. 601 (1963 & Supp. 1991); W. VA. R. EVID. 601 (1992); WIS. STAT. ANN. § 906.01 (West 1975 & Supp. 1991).

²⁸¹ FLA. STAT. ANN. § 90.608(2) (West 1979 & Supp. 1992); IDAHO R. EVID. § 607 (1992); IND. CODE ANN. § 34-1-14 (Burns 1977); LA. REV. STAT. ANN. § 15.487 (West 1967); MASS. GEN. LAWS ANN. ch. 233 § 23 (West 1959); MICH. R. EVID. 607 (1992); N.J. R. EVID. 20 (1976 & Supp. 1992); OHIO R. EVID. 607 (1992); VA. CODE ANN. § 8.01-403 (Michie 1992); *Castillow v. Browning Ferris Indus.*, 591 So. 2d 43 (Ala. 1991); *State v. Smith*, 82 A.2d 816 (Conn. 1951); *Poole v. State*, 428 A.2d 434 (Md. 1981); *Hall v. State*, 165 So. 2d 345 (Miss. 1964); *Commonwealth v. Brady*, 507 A.2d 66 (Pa. 1986); *State v. Gomes*, 604 A.2d 1249 (R.I. 1992); *State v. Anderson*, 406 S.E.2d 152 (S.C. 1991).

²⁸² 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 608(b).

such inquiry to prior specific instances of misconduct that bear on the truthfulness of the testimony.²⁸³ The code has been criticized for adopting what is a minority position.²⁸⁴ It is correct that the choice to retain New York's common law rule forecloses any hope of the New York Court of Appeals reversing its long-held position in this area.²⁸⁵ The price of codification is that in some circumstances courts will not be the vehicle for change. This does not mean that the law can never change. But in these areas, it will have to be the legislature that acts.

Despite these substantive choices and the shift to the legislature as the final decisionmaker, the code will not stop the development of the law. There will still be judicial opinions that move the policy or operation of a provision forward incrementally. Inevitably there also will be decisions that consider novel questions. As new evidentiary questions arise, courts will decide them. Codification will not stop this process.

Since the Federal Rules were adopted, courts have continued to develop the law of evidence in all of these ways. For example, in *Beech Aircraft Corp. v. Rainey*²⁸⁶ the Court made new law based on policy considerations. There, the Court considered for the first time whether the exception to the hearsay rule for public investigatory reports (803(8)(C)) includes conclusions or opinions contained in the reports.²⁸⁷ After determining that neither the language of the rule²⁸⁸ nor the legislative history²⁸⁹ was dispositive, the Court considered the policy behind the Rule's "general approach of relaxing the traditional barriers to 'opinion' testimony"²⁹⁰ coupled with the practical difficulty of

²⁸³ FED. R. EVID. 608(b)(1).

²⁸⁴ Professor Bennett L. Gershman, Address at the New York State Bar Association Criminal Justice Section Annual Meeting (Jan. 30, 1992).

²⁸⁵ See *People v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950). However, there is no reason to think that the court of appeals was likely to make this change. In *People v. Betts*, 70 N.Y.2d 289, 514 N.E.2d 865, 520 N.Y.S.2d 370 (1987), the defendant sought to have the court reconsider its rule. The court responded: "Our holding today neither retreats from that precise holding [in *Sorge*] nor casts the slightest doubt on the correctness of the more general evidentiary principle it confirms." *Id.* at 293-94, 514 N.E.2d at 869-70, 520 N.Y.S.2d at 374-75.

²⁸⁶ 488 U.S. 153 (1988).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 163-64.

²⁸⁹ *Id.* at 164-65.

²⁹⁰ *Id.* at 169.

drawing a clear line between fact and opinion,²⁹¹ and admitted the opinion.

Common law courts sometimes make law when they consider how a rule ought to operate, such as establishing the appropriate burden of proof for admitting a contested evidentiary fact.²⁹² Courts will do the same kind of law-making after codification. *Huddleston v. United States*²⁹³ is an example of judicial resolution of such a procedural rule. Like the common law, Federal Rule 404 generally prohibits the admission of character evidence suggesting that a person will or did act in a certain way because the person acted that way in the past.²⁹⁴ As does the common law, the Federal Rules recognize that such evidence might be admissible for some purposes.²⁹⁵ The rule does not specify what degree of proof of prior acts is required or whether the court or the jury is to decide the point. In *Huddleston* the Supreme Court held that the trial court need not decide whether "the government has proved the act by a preponderance of the evidence" but need only consider "whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."²⁹⁶ This contrasted with the overwhelming majority of circuit courts which had held that the substantive question was for the court and the burden of proof was by clear and convincing evidence.²⁹⁷ Although *Huddleston* has been criticized²⁹⁸ and

²⁹¹ *Id.* at 168.

²⁹² See, e.g., *People v. Robinson*, 68 N.Y.2d 541, 503 N.E.2d 485, 510 N.Y.S.2d 837 (1986) (defendant's commission of an uncharged crime must be proven by clear and convincing evidence before it can be offered on the issue of identity in a prosecution for an unrelated offense).

²⁹³ 485 U.S. 681 (1988).

²⁹⁴ Professor Jonakait has argued that *Huddleston* is an example of the limitation codification places on judicial law-making. Randolph N. Jonakait, *Plain Meaning and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 752-55 (1990). He argues that the Court in *Huddleston* felt constrained by the plain meaning of the statute and the intent of the drafters to reject a rule that would better serve federal evidence policy. *Id.* at 755. Without disagreeing with Professor Jonakait on the merits of the rule actually adopted, I think he argues from wishful thinking. There is nothing in *Huddleston* that suggests that the Court was not completely satisfied with the rule articulated or would have adopted some other rule if left to its own devices. Although the Court does evaluate the issues using traditional statutory construction criteria, the Court clarified a procedural rule and *made law* by concluding that the adopted standard conformed to the policy structure behind the Federal Rules.

²⁹⁵ FED. R. EVID. 404(b).

²⁹⁶ 485 U.S. at 689-90.

²⁹⁷ See *Manning v. Rose*, 507 F.2d 889 (6th Cir. 1974); *United States v. O'Brien*, 618

was rejected by the drafters of the proposed New York code, it illustrates a court developing law under a code.

The greatest need for growth of the law arises when developments in society present new legal problems. For example, the use of hypnotism to refresh a witness's testimony only has become an issue since the enactment of the Federal Rules. There is no provision in the Federal Rules that explicitly addresses the admissibility of such testimony. Rule 601 provides that "[e]very person is competent to be a witness"²⁹⁹ Since hypnotically refreshed testimony simply was not an issue when the Federal Rules were being considered, neither the plain meaning of the rule nor its legislative history suggest a basis for excluding this type of testimony. Yet codification has not prevented courts from creating new rules to deal with new problems. The majority of federal courts apply a balancing approach, permitting the witness to testify if the in-court testimony of a previously hypnotized witness has a basis that is independent of hypnotic influence.³⁰⁰ Regardless of whether one agrees with the particular rule courts have created, it is clear that codification has not stunted the law's growth or the court's ability to deal with this new situation.

Even conceding that courts will be unable to act in certain ways once the law is codified, there is no reason to think that the law of evidence cannot be changed or amended by the legislature. Legislatures are far more responsive in the first place to the need for change than are courts. Judicial change requires a case with the right issue, a party who recognizes it and a court that is willing to risk an unprecedented ruling. Additionally, the dispute must be important enough or, in civil cases, the parties rich enough to appeal. Even if those conditions are satisfied, there is no assurance that the litigation will produce the desired

F.2d 1234 (7th Cir. 1980); *United States v. Fredrickson*, 601 F.2d 1353 (8th Cir. 1979); *United States v. Herrera-Medina*, 609 F.2d 376 (9th Cir. 1977).

²⁹⁸ See, e.g., Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 498-505 (1990); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b) 608(b) and 609(a)*, 38 EMORY L. J. 135 (1989).

²⁹⁹ FED. R. EVID. 601.

³⁰⁰ Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 915 (1972). See, e.g., *United States v. Kimberlin*, 805 F.2d 210, 219 (7th Cir. 1986), cert. denied, 483 U.S. 1023 (1987); *Harker v. Maryland*, 800 F.2d 437, 441 (4th Cir. 1986); *Wicker v. McCotter*, 783 F.2d 487, 492 (5th Cir.), cert. denied, 478 U.S. 1010 (1986).

change.

By contrast, genuine problems in the law can be taken to the legislature and dealt with directly. In 1978, Congress responded to just such a problem. Rule 412, frequently called the rape-shield law, was added to the Federal Rules, precluding the routine admissibility of a rape victim's prior sexual conduct in prosecutions for sex offenses.³⁰¹ The rule was enacted to encourage reform of existing rape laws.³⁰² During the discussion in the House of Representatives, Representative Mann argued:

Mr. Speaker, for many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life. The evidentiary rules that permit such inquiry have in recent years come under question; and the States have taken the lead to change and modernize their evidentiary rules The bill before us similarly seeks to modernize the Federal evidentiary rules.³⁰³

Similar provisions have been adopted in most states, including New York.³⁰⁴ No state developed this doctrine by case law.

Codification will not prohibit the law from developing. Courts will continue moving in their traditional incremental fashion, permitting the law to grow and change. When the common law process is inadequate, the legislature can act again.

3. Codification Permits Excessive Judicial Discretion

One of the more paradoxical objections to codification is the fear of judicial discretion, since such an objection directly contradicts the claim that evidence law should be made by judges with their special expertise. All of the modern codifications adapted from the Federal Rules of Evidence give a significant amount of discretion to trial judges. The drafters of the Federal Rules included broad discretionary rules to allow for continued development in the law. They feared that non-discretionary evidence rules would preclude further growth and prevent on-the-

³⁰¹ Pub. L. No. 95-540, § 2(2), Oct. 28, 1978.

³⁰² TRIAL EVIDENCE COMMITTEE, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 71 (2d ed. 1991).

³⁰³ 124 CONG. REC. 34,912 (1978).

³⁰⁴ See, e.g., N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992); see also IDAHO R. EVID. 412 (1991); ME. RULES OF COURT § 412 (West 1992); MISS. R. EVID. 13-1-412 (1992).

spot flexible decisionmaking that the trial process requires.³⁰⁵ In fact, the argument has been made that the Federal Rules are misnamed and that "[t]he drafters of the Federal Rules did not consider them as rigid rules to be mechanically applied, but rather as flexible principles for both trial and appellate courts."³⁰⁶

Opponents of the current New York proposal have not expressed the same level of concern about judicial discretion as they have about previous drafts,³⁰⁷ which frequently were criticized for removing predictability and guidance by giving too much discretion to trial courts.³⁰⁸ Critics perceived the trial bench as so poor as to require explicit rules to prevent errors.³⁰⁹ Further, such errors would be very difficult to correct since appellate courts, which rarely write evidence opinions in the first place, would feel even more constrained if the standard of review were abuse of discretion rather than the higher *de novo* standard applicable to statutory interpretation.³¹⁰

Articulated objections about the scope of judicial discretion in the proposed code seem to mask a deeper concern about the result of that discretion's exercise. For instance, the Legal Aid Society has most recently argued that

[t]o the extent that the draft considers the problem of judicial discretion, in our view it oscillates between forbidding any judicial development . . . [and] granting an ill-defined and overbroad latitude through the use of a catchall provision in the hearsay article. Beyond this, at least three provisions of the proposed code appear to increase the like-

³⁰⁵ See Margaret A. Berger, *An Introduction to the Federal Rules of Evidence*, 2 LITIG. 8 (1975); see generally Craig Spangenberg, *The Federal Rules of Evidence-Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061 (1969).

³⁰⁶ Thomas Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 415 (1989).

³⁰⁷ The current movement away from this objection is probably the result of the current code's having been redrafted to reflect existing New York law, which does not permit the admission of as much evidence and a recognition of the somewhat schizophrenic nature of the argument.

³⁰⁸ See, e.g., *Hearings*, Nov. 12, 1980, *supra* note 252, at 96, 102 (testimony of Frank Raichle); *Hearings*, Nov. 19, 1980, *supra* note 155, at 528 (testimony of Eric Seiff, on behalf of the New York Criminal Bar Association); *Hearings*, Feb. 25, 1983, *supra* note 153, at 60 (testimony of Jim Furey); *Hearings*, March 2, 1983, *supra* note 155, at 63 (testimony of Jim Hartman).

³⁰⁹ *Hearings*, Feb. 25, 1983, *supra* note 153, at 296 (testimony of Eric Seiff); *Hearings*, Nov. 12, 1980, *supra* note 252, at 97, 102 (testimony of Frank Raichle).

³¹⁰ *Hearings*, Feb. 25, 1983, *supra* note 153, at 297-98 (testimony of Eric Seiff); cf. *Hearings*, Mar. 2, 1983, *supra* note 155, at 64 (testimony of Jim Hartman).

lihood of judicial involvement in the presentation of evidence at trial. . . . These various provisions encourage judicial intervention in the evidentiary process without providing adequate recognition of the dangers of that intrusion, the weakening of the adversary system, the displacement of the jury as the finder of fact and the loss of appearance of judicial impartiality.³¹¹

This concern was expressed in the context of a much larger and more general theme that runs throughout the Legal Aid position, *i.e.*, that "the drafters have opted for admissibility over reliability."³¹² For opponents of codification who, as defendants' attorneys, are often trying to keep evidence from being admitted, the increase in admissibility associated with increased judicial discretion is a serious problem. The preference for common law development reflects a belief that without a code the modern trend toward admitting more evidence can at least be contained.

This same concern was one of the objections expressed when the Federal Rules were enacted and was repeated as states adopted codes based on the federal model.³¹³ Grants of discretion have been equated with increased admissibility. As one commentator described it:

Three words describe the direction in which the Federal Rules of Evidence have taken us: discretion, creativity, and admissibility. The codes give abundant discretionary power to the trial courts. The judges add a sizable measure of interpretive creativity. Greater admissibility has resulted.³¹⁴

That codification along the federal model has broadened admissibility is not seriously debated.³¹⁵ But at the same time, the

³¹¹ *Hearings*, July 24, 1991, *supra* note 154, at 70. The provisions are sections 201, 611(a) and 614(a) & (b).

³¹² *Id.* at 69 (testimony of Susan Lindenauer).

³¹³ *See, e.g.*, Paul F. Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 *FED. B. J.* 21, 29-30 (1974); Richard S. Walinski & Howard Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 *CASE W. RES. L. REV.* 344, 367-86 (1978).

³¹⁴ *See* Rossi, *supra* note 241, at 13.

³¹⁵ *See, e.g.*, Rothstein, *supra* note 314, at 21 (perhaps the predominant theme is a "bias in favor of admissibility"); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 *Nw. U. L. REV.* 1097, 1118 (1985) ("[M]ore evidentiary material is being turned over to the factfinder under the Federal Rules of Evidence than would have been in cases tried at common law."); *but see* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 *IOWA L. REV.* 413, 413 (1989) ("Given a decent amount of flexibility, a trial judge may exclude—as easily as admit—evidence.").

modern trend in evidence well before the Federal Rules has been toward greater admissibility.³¹⁶ The historical exclusionary rules reflected the nineteenth century distrust of the jury and were established to keep unreliable and misleading evidence from the jury's consideration.³¹⁷ As respect for the jury's ability to evaluate evidence has increased, the desire to protect jurors from potentially unreliable evidence has declined.³¹⁸

The criminal defense bar opposes codification because it thinks that increased admissibility will work against its clients. As one commentator has noted, this is probably true in two respects:

- (1) It makes it more difficult for the defense to rely on the prosecution's inability to meet its burden. Greater admissibility means it is easier to put in evidence to meet the burden.
- (2) A cutting down of exclusionary principles hurts the defense because some judges administer exclusionary rules in a way favorable to the defense. These judges exclude prosecution evidence but not defense evidence because only exclusion of defense evidence or admission of prosecution evidence carries any risk of reversal, owing to the fact that no appeal lies by the prosecution.³¹⁹

The defense bar's concern is understandable, particularly in light of the dramatic increase in the power of the American prosecutor in recent years³²⁰ which has enlarged the role of the trial as the final bulwark against government overzealousness. Now, more than ever, the reliability of admitted evidence must be guaranteed.

Although the argument has merit, other considerations make it less persuasive. The combination of a trend in the law of evidence away from protecting the accused and the movement toward greater admissibility of evidence, even without codification, suggests that the criminal defense bar cannot protect itself

³¹⁶ Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 580-81 (1938); Edmund M. Morgan, *Some Observations Concerning a Model Code of Evidence*, 89 U. PA. L. REV. 145, 155, 161 (1940); Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 923, 931 (1940); Mason Ladd, *Modern Thinking Upon Evidence—A Model Code*, 17 TENN. L. REV. 10, 12, 20 (1941).

³¹⁷ Ladd, *supra* note 317, at 216.

³¹⁸ Jack Weinstein, *The Ohio and Federal Rules of Evidence*, 6 CAP. U. L. REV. 517, 522-23 (1977); 1 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* iii (1990).

³¹⁹ Rothstein, *supra* note 314, at 26.

³²⁰ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992).

by defeating codification alone. The judicial trend against the criminal defendant is obvious. Rising public concern about crime has manifested itself in a growing victim's rights movement that has reduced judicial protection of the accused.³²¹ This trend was apparent in the Supreme Court even before enactment of the Federal Rules³²² and continues with increased momentum today.³²³ Lower courts are even more sensitive to public pressure: there is little that is more disconcerting to a trial judge than to find his or her name on the front page of the local paper because of a pro-defendant decision.

Public concern with crime is not the only influence on the law of evidence. New York's common law system already has been greatly affected by the Federal Rules, even without codification.³²⁴ The trend toward admissibility reflected in the Federal Rules is very much a part of New York's common law.³²⁵ New York courts frequently cite the Federal Rules when deciding evi-

³²¹ See, e.g., Eleanor Swift, *Does it Matter Who is in Charge of Evidence Law?*, 25 LOY. L.A. L. REV. 649, 658 (1992) (discussing the effect the victim's rights movement has had on criminal defendants in California).

³²² See, e.g., *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel at line-ups required only after indictment); *Lego v. Twomey*, 404 U.S. 477 (1972) (government must prove confession was voluntary only by a preponderance of the evidence rather than beyond a reasonable doubt); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (approving non-unanimous verdicts.)

³²³ See, e.g., *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (involuntary confession can be harmless error); *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception to the Fourth Amendment exclusionary rule); *New York v. Quarles*, 467 U.S. 649 (1984) (public safety exception to *Miranda*). New York courts have been more protective of defendant's interests. See, e.g., *People v. Griminger*, 71 N.Y.2d 635, 524 N.E.2d 409, 529 N.Y.S.2d 55 (1988) (refusing to adopt the Supreme Court standard for probable cause); *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 680 (1985) (rejecting good faith exception); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (New York provides greater protection to defendant's right to counsel than the federal Constitution).

³²⁴ See, e.g., *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497, 498 (3d Dep't 1983) (Yesawich, J., concurring) ("By permitting reliable but otherwise inadmissible data to serve as a basis for an expert's opinion, the [C]ourt [of Appeals] was harmonizing the New York law of evidence with the Federal rule now found in rule 703 of the Federal Rules of Evidence.").

³²⁵ See, e.g., *People v. Arnold*, 34 N.Y.2d 458, 459, 309 N.E.2d 875, 876, 354 N.Y.S.2d 106, 107 (1974) ("[I]t is observed that this court has in recent years emphasized that the hearsay doctrine has been too restrictively applied to exclude otherwise reliable evidence from the jury."); *People v. Miller*, 39 N.Y.2d 543, 349 N.E.2d 841, 384 N.Y.S.2d 741 (1976) (modifying New York rule to permit admission of specific acts of violence on issue of justification in homicide prosecution).

dence questions.³²⁶ For instance, the Second Department of the Appellate Division recently decided that a lay witness who had not been an eyewitness to the crime could express his opinion that an individual depicted in a photograph was the defendant. The court stated:

Although no New York cases directly stand for the proposition that non-eyewitnesses may be called on the People's direct case to identify the defendant from a photograph of the crime scene, in a number of Federal and State jurisdictions such testimony has been allowed, albeit in some instances in reliance upon general statutory provisions which expressly permit lay witnesses to render an opinion with respect to the determination of a fact in issue. Many of the State statutes are modeled after Federal Rules of Evidence rule 701³²⁷

This trend toward admissibility even includes the development of new exceptions to the hearsay rule. The New York Court of Appeals has recently recognized a present sense impression exception to the rule against hearsay, relying on the Federal Rules.³²⁸

Admittedly, the common law of New York is currently less liberal than that under the Federal Rules. Yet whether or not New York codifies its law of evidence, the bias toward admissibility is here to stay. Ironically, if there is a hope for reducing the effect of this liberalization movement, it may be in the process of codification itself. The current draft both retains many of the provisions helpful to the criminal defense bar³²⁹ and offers some improvements over current law.³³⁰ One of the code's more

³²⁶ See, e.g., *People v. Settles*, 46 N.Y.2d 154, 169, 385 N.E.2d 612, 620, 412 N.Y.S.2d 874, 883 (1978); *People v. Watson*, 100 A.D.2d 452, 464, 474 N.Y.S.2d 978, 986 (2d Dep't 1984).

³²⁷ *People v. Russell*, 165 A.D.2d 327, 332, 567 N.Y.S.2d 548, 551 (2d Dep't 1991), *aff'd*, 79 N.Y.2d 1024, 594 N.E.2d 922, 584 N.Y.S.2d 428 (1992).

³²⁸ *People v. Brown*, No. 34, 1993 N.Y. LEXIS 91 (N.Y. Feb. 18, 1993).

³²⁹ See, e.g., 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 104(b)(2)(C) (requiring that before a co-conspirator's statement can be admissible, the prosecution must prove the existence of the conspiracy without the benefit of the statement itself in contrast to the Supreme Court's holding in *Bourjaily v. United States*, 483 U.S. 171 (1987) and section 104(b)(3)(A), which provides for a higher standard of proof before uncharged crime evidence can be offered than is currently required under the Federal Rules.). See *Huddleston v. United States*, 485 U.S. 681 (1988).

³³⁰ See, e.g., 1991 *Proposed N.Y.C.E.*, *supra* note 3, § 404(b)(1) & (b)(2). They require the offering party to give notice of uncharged crimes evidence before it can be admitted; and section 410 prohibits the admission of statements made during plea negotiations.

important innovations is rule 803(c)(iii), which permits a party to argue against admissibility of an otherwise admissible hearsay statement because it is not sufficiently trustworthy. This provision permits courts to exercise discretion in limiting admissibility and thus offers the defense bar the opportunity to use its adversary skills in a broad range of circumstances.³³¹ Additionally, a persuasive argument can be made for a number of innovations or improvements that actually help the criminal defendant. It may be that the drafters would welcome genuine efforts to improve the law if the defense bar were serious about considering a code and engaged in the negotiation process with the view of ultimately supporting codification.³³²

4. Codification Politicizes the Law of Evidence

Finally, there exists the fear that codification will subject the law of evidence to political influences which will almost certainly hurt the criminal defendant. No matter how good an enacted code of evidence, the argument goes, within no time the legislature will riddle it with piecemeal amendments.

The Legislature, whose members must stand for election every two years, would be even more likely than the courts as a result of a strong District Attorney lobby to do what is perceived as politically popular—which generally coincides with the prosecution's point of view—rather than purely what best serves truth-finding and the ends of justice.³³³

In other words, the defense bar fears that prosecutors will lobby Albany annually and will succeed in changing the law of evidence to increase admissibility at the expense of reliability.³³⁴

³³¹ See, e.g., *United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984).

³³² For instance, Professor Robert Pitler, the principal author of the current proposal, has indicated that any future drafts of the proposed code would include an amendment to rule 403. The rule currently provides for exclusion of relevant evidence if "its probative value is substantially outweighed by the danger that its admission would create undue prejudice to a party" Professor Pitler is prepared to delete the word "substantially", reasoning that evidence which would create undue prejudice simply ought not to be admitted whether the prejudice is substantial or not. Professor Pitler has been convinced of the wisdom of this change through discussions with Professor Randolph Jonakait, Professor of Law at New York Law School, a long time opponent of codification. Telephone conversation with Professor Robert Pitler (Sept. 1, 1992).

³³³ *Hearings*, July 24, 1990, *supra* note 154, at 131-32 (testimony of Peter McShane, on behalf of New York State Defenders' Association).

³³⁴ *Id.* at 36-38 (testimony of Gerald Lefcourt).

Worse is the fear that the legislature will respond to every unpopular verdict. The argument was most directly made by attorney Gerald Lefcourt, speaking for the New York State Association of Criminal Defense Lawyers in his prepared statement for the joint public hearings on the proposed code:

Unfortunately, the legislature by its nature and obligations cannot be as immune [as courts] to public opinion. This Association fears that making evidentiary rule-making the business of the legislature will inevitably infect the process with political currents. Legislators re-elected every two years will understandably be influenced by public opinion and the interests of their constituents. Just as every year there are dozens of proposals to enhance sentences and create new crimes in response to public opinion, we see a future of countless annual proposals to change evidentiary rules in response to unpopular cases and judicial rulings. We fear annual lobbying days with pressure placed on legislators to enact rules simply to make convictions easier or circumvent Court of Appeals decisions disfavored by law enforcement or other groups. We see the threat of labeling lawmakers "soft on crime" for opposing these efforts.³³⁵

Lawyers who represent those accused of crime believe they have a better chance in a courtroom before a single judge than they could possibly have before the legislature.³³⁶ After all, criminal defense lawyers do not represent a group that is either powerful or popular. They do not trust the legislature to protect their clients from the growing victims' rights movement they believe is tilting the scales against the criminal defendant as the movement increases the visibility and power of the crime victim.³³⁷

The criminal defense bar's fear that the law of evidence will become hostage to public opinion is the most pervasive and in some ways persuasive argument against codification. Although the argument has an emotional ring to it, it is not irrational. Legislatures do act in response to public pressure. Criminal defendants do not have a lobby in the legislature. In New York, in

³³⁵ *Id.* at 9 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Lawyers)(on file with the author).

³³⁶ *Id.* at 36 (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Lawyers); *id.* at 132 (testimony of Peter McShane, on behalf of the New York State Defenders' Association).

³³⁷ Swift, *supra* note 322, at 657-60. Ironically, these same lawyers believe deeply that judges, too, favor the prosecution. Yet their confidence in their own persuasiveness makes them more comfortable in a forum where they individually have a voice.

particular, crime is a primary political concern.³³⁸ For example, in 1978, the legislature passed the Juvenile Offender Act³³⁹ without public debate in special session³⁴⁰ during an election year in the wake of a sensationally publicized murder committed by a fifteen-year-old boy.³⁴¹ The Act dramatically altered New York's approach to the administration of juvenile justice, making it one of only ten states that vested original jurisdiction over very young teenagers in criminal courts.³⁴²

The New Jersey legislature recently reacted to a horrified public in exactly the way opponents fear. Arthur Seale was charged with the lurid kidnapping murder of Exxon executive Sidney Reso. Seale's wife, Irene, pleaded guilty and agreed to testify against her husband. However, New Jersey retained a restrictive spousal immunity privilege.³⁴³ Although the prosecutor thought he could secure a conviction without Mrs. Seale's testimony, he went to Trenton and introduced a bill to modify the statute.³⁴⁴ A week later the bill passed.³⁴⁵

The Federal Rules have not been immune to this phenomenon. In 1984, after John Hinckley was acquitted, by reason of insanity, of trying to kill President Reagan, Congress amended Federal Rule 704. Rule 704 had abolished the common law rule that prohibited experts from commenting on the ultimate issue

³³⁸ See State of the State Message of Governor Mario Cuomo for 1990 & 1991, reprinted in 1990 N.Y. Laws 2544, 2545, 2559 (McKinney); 1991 N.Y. Laws 2110, 2191 (McKinney).

³³⁹ 1978 N.Y. Laws 869 (McKinney).

³⁴⁰ Mara Thorpe, *A Critical Perspective*, 15 TRIAL 27, 29 (Jan. 1979).

³⁴¹ In July, 1978, Willie Boskett killed two subway passengers and attempted to kill a subway motorman. Prosecuted as a juvenile delinquent, the only alternative at the time, Boskett was sentenced to five years in a Division for Youth Facility. The Boskett case made front page news and the legislature was under a great deal of public and political pressure to enact a tougher New York juvenile crime law. The Juvenile Offender Act was passed a few days after Boskett was sentenced. Harlan A. Levy, *Violent Juveniles: The New York Courts and the Constitution*, 11 COLUM. HUM. RTS. L. REV. 51, 52 (1980). See Richard J. Meislin, Carey, *In Shift, Backs Trial In Adult Court For Some Juveniles*, N.Y. TIMES, June 30, 1978, at A1 (the second headline read: "Discloses Stand Following 5-year Sentence Given to Youth, 15, for 2 Subway Murders").

³⁴² Barbara Salken, *Down the Up Staircase: Due Process and Removal from Criminal Court*, 26 N.Y.L. SCH. L. REV. 643, 670-72 (1981).

³⁴³ N.J. STAT. ANN. § 2A:84-17(2) (Rule 23).

³⁴⁴ Henry Gottlieb, *Murphy's Law: A Nebraska Professor and a Senator Are Helping the Prosecutor in the Reso Case*, 131 N.J. L.J., July 13, 1992, at 1.

³⁴⁵ Henry Gottlieb, *Seale Gets New Lawyer, Again*, 131 N.J. L.J., July 27, 1992, at 8.

in a case.³⁴⁶ Prompted by public reaction to the jury's verdict, Congress resurrected the restriction for experts testifying with respect to the mental state or condition of a defendant in a criminal case.³⁴⁷

It thus is valid to question whether these notorious examples warrant abandoning the codification effort. Yet closer look at the experience in the states suggests not. Ten of the thirty-four states that have codified their law after the Federal Rules have done so by legislative enactment.³⁴⁸ The following discussion is limited to those ten states in which the legislature was responsible for the enactment of, and therefore amendment to, the rules of evidence.³⁴⁹

With the exception of Nevada³⁵⁰ the rules of evidence were amended rarely: Louisiana and North Carolina have amended none of their provisions;³⁵¹ Arkansas and Hawaii have one amendment each;³⁵² Oklahoma has four amendments;³⁵³ Iowa

³⁴⁶ This rule was premised on the notion that opinions on an issue that might be decisive of the outcome of a dispute invaded the province of the jury. The rule proved to be unworkable and was condemned by legal scholars and judges. See WEINSTEIN & BERGER, *supra* note 196, § 704 [01].

³⁴⁷ *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 150-93 (1983), cited in Anne Lawsor Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620 n.1 (1987).

³⁴⁸ Act of Apr. 13, 1987, No. 876, 1987 Ark. Acts 2096; Act of June 23, 1976, 1976 Fla. Laws ch. 76-237, 1976 Fla. Laws ch. 556; Act of 1980, No. 1827-80, 1980 Haw. Sess. Laws 244; Act of Jan. 28, 1983, ch. 219, 1983 Iowa Acts 713; Act of July 8, 1983, No. 515, 1988 La. Acts 1085; Act of May 22, 1975, No. 279, 1975 Neb. Laws 528; Act of Apr. 22, 1971, ch. 402, 1971 Nev. Stat. 775; Act of July 7, 1973, ch. 701, 1973 N.C. Sess. Laws 666; Act of May 10, 1978, ch. 285, 1978 Okla. Sess. Laws 801; Act of Aug. 22, 1981, ch. 892, 1981 Or. Laws 1374. In the remaining twenty-four states, the law of evidence was codified by judicial promulgation. See, e.g., 7B C.R.S. Rules of Evidence 651 (1980 & Supp. 1990); 50 M.S.A., Evid. 3 (1980 & Supp. 1991) and 17A A.R.S. Rules of Evid. 3 (1980 & Supp. 1991). Since there are restraints on the power of the legislatures to amend the rules in at least some of those jurisdictions, analogy to New York is inappropriate. See, e.g., Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990) (striking down KRS 421.355 which had created an exception to the hearsay rule for child witnesses as usurping the power of the judiciary to control procedure.)

³⁴⁹ In addition to these 10 states that legislatively enacted their evidence laws, I have also looked at the evidence codes of Alabama, Arizona, Mississippi, Colorado, Delaware, Kansas, Michigan and Minnesota. I found no better evidence to support the "legislature run amok" theory in those states.

³⁵⁰ See *infra* notes 362-64 and accompanying text.

³⁵¹ See LA. CODE EVID. ANN. (1989); N.C. GEN. STAT. § 8C-1 (1989).

³⁵² ARK. R. EVID. 803(25) (1985 & Supp. 1992) (Arkansas added a new exception for

five;³⁵⁴ Nebraska six;³⁵⁵ Florida³⁵⁶ and Oregon fifteen and four-

child witnesses to its rule against hearsay, rule 803(25)); HAW. R. EVID. 408 (1989 & Supp. 1992) (Hawaii amended rule 408 to include statements made during mediation proceedings as inadmissible evidence); HAW. REV. STAT. § 23G-15(8) (1985) (Hawaii made gender terms neutral when such change would not alter the meaning of the statute).

³⁵³ OKLA. STAT. ANN. tit. 12, § 2103 (1986 amendment corrects a typographical error), § 2503 (1980 amendment alters limitation on doctor-patient privilege where patient relies on medical condition as an element of his claim or defense), § 2615 (1988 amendment prevents exclusion of the victim of crime from courtroom), § 2803.1 (amendment creates an exception to the hearsay rule for statements of child victims of sex crimes) (West 1978 & Supp. 1992).

³⁵⁴ In 1985, Iowa Rules 601, 611 and 803 were amended; in 1987, Iowa Rule 410 was amended and in 1990, Iowa Rule 601 was amended a second time.

³⁵⁵ In 1978, Nebraska amended Rule 407 to include manufacture or sale of a defective product in its definition of negligence [Laws 1978, LB 665, § 7] NEB. REV. STAT. § 27-407 (1985). In 1982, Nebraska amended Rule 705 to delete a provision that provided for interrogatories for expert witnesses in civil matters. [Laws 1982, LB 716, § 2.] NEB. REV. STAT. § 27-705 (1985). In 1984, Nebraska amended Rule 404 to prohibit the use of reputation or opinion evidence of the past sexual behavior of the victim of a sexual assault [Laws 1984, LB 79, § 2] NEB. REV. STAT. § 27-404 (1985); it amended Rule 505, its marital privilege, to permit a spouse to testify against the other spouse in any criminal case where the crime charged is a crime of violence [Laws 1984, LB 696, § 1] NEB. REV. STAT. § 27-505 (1985); and it amended Rule 1101 concerning the courts in which the Rules are applicable [Laws 1984, LB 13, § 46] NEB. REV. STAT. § 27-1101 (1985). In 1988, Nebraska amended Rule 504, its doctor-patient privilege, to make clear that communications between patient and doctor are not privileged as to obtaining controlled substances unlawfully. [Laws 1988, LB 273, § 1 and LB 790, § 1] NEB. REV. STAT. § 27-504 (Supp. 1992).

³⁵⁶ In 1981, Florida amended Rule 509 to protect communications that were privileged when made but were not covered by the code. FLA. STAT. ANN. § 90.509 (West 1979 & Supp. 1992). Rule 606(3) was amended to change the wording but not the substance regarding interpreters for deaf persons. FLA. STAT. ANN. § 90.606 (West 1979 & Supp. 1992). Rule 801 expanded the definition of hearsay. FLA. STAT. ANN. § 90.801 (West 1979 & Supp. 1992). In 1983, Rule 503(5) was added creating a sexual assault-counselor privilege. FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1992). In 1985, there were minor changes to Rule 605 (deleted the term "young" in front of the word child and inserted "or the duty not to lie"). FLA. STAT. ANN. § 90.605 (West 1979 & Supp. 1992). Rule 606 was expanded to provide interpreters to children and mentally or developmentally disabled persons as well as non-English speaking persons. FLA. STAT. ANN. § 90.606 (West 1979 & Supp. 1992). Rule 803(23) was added creating a new hearsay exception for child witnesses. FLA. STAT. ANN. § 90.803 (West 1979 & Supp. 1992). In 1988, Rule 602 was technically modified creating a change in the dead man's statute substituting the term "mentally incompetent" for the formerly used term insane. FLA. STAT. ANN. § 90.602 (West 1979 & Supp. 1992). The remaining seven changes, all adopted in 1990 include: expanding the definition of psychologist in Rule 503 to include employees of certain state facilities, FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1992); amending Rule 404 to allow the accused to offer evidence of pertinent character traits of the victim, FLA. STAT. ANN. § 90.404 (West 1979 & Supp. 1992); rewording Rule 606(8) to allow reasonable interpretation—but was not substantively changed, FLA. STAT. ANN. § 90.606 (West 1979 & Supp. 1992); changing Rule 608 to expand the ability to impeach, FLA. STAT. ANN. § 90.608 (West 1979 & Supp. 1992); changing Rule 616 to provide for the removal of a witness from the courtroom to prevent overhearing other testimony, FLA. STAT. ANN.

teen respectively.³⁵⁷ A code's age has something to do with the number of amendments, but that is not the whole story. Although both of the states with no amendments recently adopted their codes and Nevada, the state with the most amendments, has the oldest codification,³⁵⁸ the state with the second oldest code, Arkansas, which adopted its code immediately after the Federal Rules were adopted in 1976, has only amended one of its code's provisions.³⁵⁹ Oklahoma and Nebraska, the states with the next most senior codes, show only four and six amendments respectively.³⁶⁰

Even the experience in Nevada, which has amended provisions of its law at least 106 times,³⁶¹ provides no support for opponents' fear of politicization. The amendments to the Nevada Evidence Code suggest not that Nevada has a runaway or reactionary legislature, but rather that Nevada has an inefficient legislature. Indeed, most of these changes have been minor and do

§ 90.616 (West 1979 & Supp. 1992); amending Rule 803(19) to modernize the language replacing the term "legitimacy" with "parentage", FLA. STAT. ANN. § 90.803 (West 1979 & Supp. 1992); and changing Rule 804(c) to remove the ban previously imposed on the use of a co-defendants statement to inculcate, FLA. STAT. ANN. § 90.804 (West 1979 & Supp. 1992).

³⁵⁷ Oregon amended Rule 511 to limit the counselor-client privilege by allowing the client or the one responsible for him to waive the privilege, OR. REV. STAT. § 40.280 (1991); Rule 503 (lawyer-client privilege) was amended by altering the definition of a representative of the client, OR. REV. STAT. § 40.225 (1991); Rule 504 was amended to limit application of the psychotherapist-patient privilege; Rule 504(1) made the same adjustment to the physician-patient privilege; Rule 504(4) was amended to further restrict a prior limitation on the social-worker-client privilege, OR. REV. STAT. § 40.230 (1991); Rule 505 was amended to abolish the husband-wife privilege where the husband and wife are adverse parties in a civil proceeding, OR. REV. STAT. § 40.255 (1991); Rule 604 was amended to change the word handicapped to disabled, OR. REV. STAT. § 40.320 (1991); Rule 606(1), which was entitled competency of Attorney as Witness, was repealed, OR. LAWS 1987, ch. 352 § 1 (June 22, 1987); Rule 609 was amended by the Crime Victim's Bill of Rights, OR. REV. STAT. § 40.335 (1991); Rule 613 was amended to correct a double negative in the provision, OR. REV. STAT. § 40.380 (1991); Rule 615 was amended by the Crime Victim's Bill of Rights, OR. REV. STAT. § 40.485 (1991); Rule 801 was amended to add a statement made at a deposition to the list of non-hearsay statements, OR. REV. STAT. § 40.450 (1991); Rule 803 was amended to add a hearsay exception for a child victim of sexual assault, OR. REV. STAT. § 40.480 (1991); Rule 1005 was amended to expand the circumstances under which a public record satisfied the best evidence rule, OR. REV. STAT. § 40.570 (1991).

³⁵⁸ Nevada was so anxious to codify that it based its code on the Preliminary Draft of the Federal Rules. Act of Apr. 22, 1971, ch. 402, 1971 Nev. Stat. 775.

³⁵⁹ See *supra* note 353.

³⁶⁰ See *supra* notes 354 & 356.

³⁶¹ NEV. REV. STAT. §§ 47.020-52.395 (1979 & Supp 1991).

not adversely effect criminal defendants.³⁶² For instance, while one section was amended nine times, only one substantive change was made to permit a chemical expert in a drug case to testify by affidavit to the chemical analysis of drugs. Two of these efforts were addressed to this substantive change; the remaining seven made grammatical corrections.³⁶³ There is not a single amendment in Nevada that seems to be the product of public pressure in response to a particular verdict. Further, none of the Nevada Code changes are very different from developments in other states by either the statutory or common law process.

Looking to the substance of the amendments in all ten states further suggests that the politicization fear is unfounded. Most of the amendments have been technical changes, such as gender,³⁶⁴ or minor, neutral changes, such as expanding the definition of the doctor-patient privilege to include psychologists and social workers.³⁶⁵ Some of the changes have even favored defendants. Florida, which had not originally adopted Federal Rule 404(a)(2) (permitting the defendant to offer evidence of a pertinent trait of character of a crime victim), amended its law in 1990 to permit such evidence.³⁶⁶ This is not to say that the prosecution has had no success. Notably, almost every state has adopted statutes that make communications between rape victims and their counselors privileged³⁶⁷ and many have expanded the admissibility of child/victim testimony.³⁶⁸ However, the

³⁶² See, e.g., *id.* § 47.140 (Judicial Notice of Law) (which has been amended three times). In 1973, it was amended to include judicial notice of municipal codes; in 1977, it was amended to correct a change of name of a referenced provision; in 1985 it was amended to permit judicial notice of Nevada Administrative code and regulations.

³⁶³ In 1975, paragraphs two and three were added to section 50.315 which provides for the admissibility of an affidavit from chemical experts testifying in a drug case. Act of May 13, 1975, ch. 431, 1975 Nev. Stat. 647. This amendment was amplified in 1983 to define more clearly what information was admissible. Act of May 29, 1983, ch. 594, 1983 Nev. Stat. 1914. Other amendments to section 50.315 have been limited to changes in grammar or punctuation. See Act of Apr. 25, 1973, ch. 555, 1973 Nev. Stat. 891; Act of June 8, 1987, ch. 352, 1987 Nev. Stat. 798, and Act of June 18, 1987, ch. 658, 1987 Nev. Stat. 1544.

³⁶⁴ See *supra* note 353.

³⁶⁵ FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1992).

³⁶⁶ *Id.* § 90.404.

³⁶⁷ See, e.g., *id.* § 90.5035.

³⁶⁸ See, e.g., ARK. R. EVID. 803(25) (Michie 1992); FLA. STAT. ANN. § 90.803(23) (West 1979 & Supp. 1992). Illinois, one of the seven remaining common law states, adopted a statute specifically to admit this testimony and the Illinois Supreme Court upheld the

pressure to make these particular changes is intense and similar changes have been made in uncoded states by both courts and legislatures.³⁶⁹ There is simply no way to guarantee that the legislature will not enact rules that help prosecutors and hinder criminal defendants. Whether such rules help or harm society is another question. Whether a state has a code of evidence simply does not determine the outcome of this process.

The experience in most codified jurisdictions, particularly those modeled after the Federal Rules, is just the reverse. It may be that the New York legislature is more likely than others to react to public opinion. It may be that the history of codification in the states is too short to predict confidently the legislative response to codification over the long run. However, these preliminary results do not suggest that codification of the law of evidence will result in frequent, politically motivated, legislative changes. The fear of emotional legislative responses should not control the decision to codify since legislatures will respond to public outcry whether or not the law of evidence is codified.

CONCLUSION

The battle to codify New York's law of evidence is certainly not over. Codification can improve the quality of evidentiary arguments and unify the law within the state. The current proposal, although essentially a codification of existing common law, does modernize and clarify a number of evidentiary rules. Codification will not limit judicial development of the law of evidence. Moreover, it seems unlikely that the political process will produce the havoc that opponents predict. The worst fears of those opposed to the proposed New York code will not come to pass; their clients will not be thrown to the mercies of a hostile legislature that will decree more and more bad evidence law. In other states those fears, by and large, have not been realized in fifteen years of experience with codification of the national law

constitutionality of the provision. ILL. REV. STAT. ch. 115-10 (1989); *People v. Rocha*, 547 N.E.2d 1335 (Ill. App. Ct. 1989).

³⁶⁹ The New York legislature created a similar pro-victim statute in 1990 after model Marla Hansen was brutally slashed across the face and was later confronted with extraordinarily intrusive questioning during the trial of her assailant. N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1992). See Kevin Sack, *New York Limits Use of Sex History in Trials*, N.Y. TIMES, July 31, 1990, at B3. The fact that New York had not codified its law of evidence did not stop the legislature from acting in this instance.

of evidence.

Furthermore, opponents of the code are winning a costly pyrrhic victory. Even without a New York code, there is no pure New York common law of evidence. To the contrary, the Federal Rules of Evidence are fast becoming New York common law by osmosis. The defense bar may find that it can more effectively stem the perceived shift toward admissibility by joining the process of drafting a code for New York. The result of this effort will leave the defense bar better off in the war than in winning the current battle.