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The scope of the general definition of "relevant evidence" in the Federal Rules of Evidence is ambiguous. It is unclear whether Congress, for instance, intended that certain issues be considered legislatively determined or that those issues rest within the discretion of the courts. There is also some uncertainty over the definition's applicability to several types of evidence—particularly undisputed facts such as those that provide background information or are judicially admitted.

I. INTRODUCTION

A. The Process of Determining Relevancy

By the time work began on the Federal Rules of Evidence, no serious dispute existed about the questions to consider in determining whether an item of evidence challenged as "irrelevant" was admissible. The first step requires identifying precisely the proposition or propositions the evidence is offered to prove.¹ Several issues are involved at this stage. At least one of the propositions must be provable under the governing substantive law, and the evidence must increase or decrease the probability that the proposition is true. It may

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1. As Professor James explained in a classic article:

Relevancy . . . is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved. If an item of evidence tends to prove or to disprove any proposition, it is relevant to that proposition. If the proposition itself is one provable in the case at bar, or if it in turn forms a further link in a chain of proof the final proposition of which is provable in the case at bar, then the item offered has probative value in the case.

James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 690 (1941).
occur that none of the suggested propositions is provable because none is of consequence under the substantive law.\textsuperscript{2}

On the other hand, even if the proposition to which the evidence is directed is of consequence under pertinent substantive law, the parties may have removed it from the case by stipulation or another pretrial device. Nevertheless, the party making an admission may seek relief from the conclusive effect of the admission, or the party benefiting from the admission may wish to offer proof of the admitted fact. In such cases the real question is often whether a judicial admission will bar proof of the admitted proposition. This question, too, may be posed in terms of the relevancy of the evidence.

If these threshold inquiries satisfactorily establish that an item has some probative worth, it is then necessary to decide if that value is sufficiently great to incur the costs entailed in admitting the item. Although evidence excluded at this stage has sometimes been labelled irrelevant, the decision is different. The threshold inquiries are based on experience and logic; the later decision involves an evaluation of the evidence in the particular institutional context of the trial of an issue of fact.

There are at least two broad classes of costs to be considered in deciding whether to admit evidence having some probative value. The first concerns the consumption of time. At a minimum the introduction of any item of evidence costs the time involved in the presentation of that evidence. It also includes the time consumed by receiving evidence that must be admitted once the first item is received, but that otherwise would have been excluded. The second class is comprised of ways in which an item of evidence may distort the fact-finding process. Evidence may induce the jury to decide against a party on emotional grounds. It may also induce an erroneous judgment because it is over-valued or because it diverts the jury’s attention from the real issues.

There is also a third class of costs, less openly acknowledged but apparently

\textsuperscript{2} For example, suppose there is a conflict between the holder of an unperfected article 9 security interest in certain goods and a judgment creditor of the debtor who has levied upon those goods. The holder of the security interest offers evidence that tends to show that the lien creditor knew of the unperfected security interest when he levied. The evidence would be relevant under the 1962 official text of the Uniform Commercial Code, which provides that a lien creditor defeats the holder of an unperfected security interest only if the latter had no knowledge of the interest when he became a lien creditor. U.C.C. § 9-301(1)(b) (1962 Official Text). But under the 1972 official text the evidence would no longer be relevant because the unperfected security interest is now subject to the rights of the lien creditor whether the latter knows of the interest or not. U.C.C. § 9-301(1)(b) (1972 Official Text).

All that has been changed is the substantive law, but that change converts the evidence from relevant to irrelevant. The fact that courts often mask determinations of the substantive law by casting their decisions as rulings on evidence has frequently been noted. See, e.g., James, \textit{supra} note 1, at 691-93. In the hypothesized case it is unlikely that the basis of the decision would be misunderstood, but there are cases in which it is difficult to tell whether the point of law decided is substantive or evidentiary.
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decisive in shaping certain specific exclusionary rules: interference with the attainment of some socially desirable objective unrelated to the goal of accurate resolution of disputed issues of fact. In sum, when evidence is admitted it may safely be concluded that at least one of the propositions to which an item of evidence is related is properly provable in the case, and that the item has sufficient probative value to make the risks and costs involved in using it worth incurring. When evidence is excluded, it has necessarily failed at least one of the tests.

B. The Prospects for Codification

Given a consensus on how relevance is determined, the question of what codification can accomplish arises. Testifying before the House Judiciary Committee, Judge Friendly warned: "[E]vidence to me seems just not the kind of subject that lends itself very well to codification." Rules would "freeze the law of evidence" between those occasions—necessarily far apart—when the legislature might occupy itself with the task of revising rules of evidence. Moreover, the rules would "stimulate appeals and increase reversals on evidentiary rulings," a phenomenon not to be offset by any reduction in appeals and reversals resulting from the added clarity that the rules would bring to the field: "[T]hey are not clear and in the nature of things they cannot be that clear." Judge Friendly overstates the case somewhat, but it does appear true, at least so far as the field of relevancy is concerned, that legislation can achieve but modest successes. First, it would be impossible for the legislature to anticipate more than a small percentage of the incredible variety of situations in which the relevancy of some item of evidence might be tested, which implies that the courts must retain the power to deal with a great many unanticipated cases. The legislature may provide for this by declining to attempt anything more than a partial codification, and acknowledging the courts' power to handle cases by employing the analysis sketched above. Or it might attempt to codify that analysis in the form of a general standard to be employed by the courts in all cases for which a more specific statutory rule has not been provided. By this

3. For example, the exclusion of evidence relating to the subsequent repair of a condition that caused an injury sued on seems to have been based on this notion. The inference that the defendant, by making repairs, was acknowledging that the condition had been dangerous seems perfectly plausible, and it should not be beyond the capability of counsel to offer competing inferences. Therefore it is hard to say that the conduct has no probative value, is too inflammatory, or would tend to mislead. However, apprehension that persons might delay correcting dangerous conditions if the evidence were admissible led to the rule of exclusion.

latter technique the legislature could essay a comprehensive codification without the danger of failing to provide for some cases.

Second, even if the legislature opted for this second course, it would not accomplish a dramatic reshaping of the law. Not only is there consensus about the analysis the courts are in fact employing, but there is agreement that this analysis is essentially correct, however many problems may exist in its application. A legislature providing a restatement of the analysis has little opportunity to attempt a major conceptual reworking of the existing law.

On the other hand, if there is consensus about the process, there has been none about nomenclature. Should evidence be labelled "relevant" if it has some connection with a provable proposition, or only if it is sufficiently probative to be admissible notwithstanding the costs involved? If the propositions upon which the evidence bears are not provable in the case, is the evidence just "irrelevant," or should some special word like "immaterial" be used to describe this particular difficulty? The absence of a standard terminology was a source of confusion and uncertainty in the pre-rules law.

By providing authoritative definitions of the terms to be employed, the legislature could make explicit the separate steps involved in analyzing the probative qualities of an item of evidence and thereby clarify the bases of opinions. If, for example, "relevant" were defined to encompass only the property of having some probative value with regard to a provable proposition, courts thereafter might be expected to find evidence "irrelevant" only if such value were absent. There would be far less difficulty in distinguishing those decisions from other cases in which "relevant" evidence was evaluated and excluded as insufficiently probative.

One can now discern the outlines of a modest legislative contribution that might avoid the pitfalls Judge Friendly feared. It could be comprehensive, attempting to provide a rule of decision for all cases. An important part of the enactment would be an articulation both of a general standard to be employed by the courts in assessing the evidence and a specification of the factors to be balanced against an item's probative value. The legislature might settle certain marginal controversies about the types of factors to be considered, adding to or subtracting from the set of factors previously employed by the courts. Overall the legislation should be a restatement of the analysis previously employed with its steps and vocabulary made more clear.

5. Wigmore is often associated with the latter position. See 1 J. WIGMORE, EVIDENCE § 28 (3d ed. 1940).
May the legislature usefully attempt more? May it, for example, treat by rule questions raised by certain kinds of evidence that have been the subject of repeated judicial treatment, like liability insurance or subsequent repairs? Those who oppose codification appear to deny this possibility, arguing that each decision evaluating an item of evidence is necessarily limited to its own facts. Subtle changes can augment or diminish an item's probative value or affect one's judgment about how much time it will take to receive it, how much additional evidence it will generate, how inflammatory it is likely to be, and so forth. A decision means only that in this case, between these parties, under these circumstances, this item may or may not be admitted to prove this proposition.

But if the legislator cannot speak generally, he cannot speak at all. This implies that any legislative rule will be overbroad, lumping together cases that have much in common, but call for a more discriminating treatment than the legislature can provide. Assuming this is true, tension will be generated between what appears to be commanded by the language and what is thought to be sensible. Courts will be unable to eliminate this tension, and this in turn may be what Judge Friendly foresaw when he spoke of appeals and reversals being stimulated.

This is not an argument against legislating, but rather against attempting to accomplish too much in the form of rules. The conclusion to which the argument points is that the legislature should stop with the modest contribution sketched above, which exhausts the possibilities for useful generalizing. But it may then be said that a legislative effort containing no rules is not worth the dislocation costs that inevitably accompany any legislative reworking of a traditional common law subject.

Although enacting any statutory rules dealing with relevancy is risky, it should be possible to avoid overbreadth by the careful phrasing of a small number of rules addressed to well-defined trouble areas. The risks of doing so may be reduced by discussion in legal periodicals. To that end, this article outlines the present state of relevancy under the Federal Rules of Evidence and examines the problems raised both by codification generally and by particular rules.

C. An Overview of the Federal Rules

Article IV of the Federal Rules of Evidence is denominated "Relevancy and

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7. Compare the suggestion of Professor Posner that the costs of securing legislative concurrence on some pieces of legislation are sufficiently high to provide an additional impetus toward inclusiveness in the statement of rules. R. POSNER, ECONOMIC ANALYSIS OF LAW 423 (2d ed. 1977).
Its Limits," but some of the rules in other articles—notably those dealing with authentication of documents8 and with the competency9 and impeachment10 of witnesses—might well have been classified as specialized rules of relevancy. By and large, all these rules demonstrate that the drafters were acutely aware of the theoretical matters just discussed. The rules resolve very little in an authoritative, clear-cut fashion. Most questions are left to the courts' discretion, guided by a general standard and by legislative delineation of the factors to be weighed against the probative value of the evidence.

This has largely been accomplished by rules 401 through 403. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Despite its brevity and apparent simplicity, this rule is probably the most significant of all the Federal Rules of Evidence. It most clearly indicates the drafters' purpose to deal comprehensively with all questions of admissibility of evidence,11 not merely to clarify or revise certain portions of the law, leaving the rest to judicial development.

First, the rule divides all items of evidence into one of two classes: Evidence is either relevant or it is not. No item can be both; nor can it be neither. Moreover the rule provides a starting place for analyzing whether any item of evidence shall be admitted. If the item is relevant it cannot be excluded unless justified by reference to one of the constitutional or legislative sources specified by the rule.12 The rule does not sanction the exclusion of relevant evidence on the basis of judicially developed rules of law (constitutional issues aside), and it thereby deprives any pre-existing exclusionary precedents of their force and denies the courts authority to fashion new ones. In effect, the limits of foresight are pressed into the service of admissibility. No additional rule of admissibility seems to be necessary.13 Unless excluded by rule 402 or by some other federal rule of evidence as not relevant, an item must be admitted.

The line between relevant evidence and evidence that is excluded as not

8. FED. R. EVID. 901-03.
9. FED. R. EVID. 601-06.
11. The rules do not address questions regarding the burdens of persuasion or production of evidence, for example, except in rules 301 & 302 on presumptions.
12. Hereafter, for purposes of simplicity, it will be assumed that the only applicable exclusionary rules are those found in the Federal Rules of Evidence. Taking account of other statutes or the various constitutional doctrines would complicate the exposition, and would probably not alter the analysis in a fundamental way.
13. But see text accompanying notes 19 & 20 infra.
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relevant is drawn by rule 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" The concept of relevant evidence is expansively defined, with an item's relevancy depending entirely upon its logical connection to the substantive propositions. If the propositions to which the item is related are determined to be of no consequence under the substantive law, or if experience indicates that there is no connection between the item and the issues, then it is not relevant evidence. But the definition does not incorporate any notion of evaluating the probative worth of the evidence and weighing that against its costs. Because the second sentence of rule 402 flatly excludes evidence that is not relevant, the breadth of the definition of relevancy reduces the scope of the rule of exclusion.

The consequence is that determining admissibility has, for practical purposes, been left to other rules—not just the familiar technical rules such as the hearsay rule\(^{14}\) and the best evidence rule\(^{15}\) but also any rules codifying decisions excluding evidence for insufficient probative value. Most significant is rule 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." With this rule, the drafters completed the codification of the traditional relevancy analysis employed by the courts. Since the discretion granted seems broad, it might fairly be noted that rule 402 does not provide the final word on the admissibility of most items of evidence.\(^{16}\) The drafters have at least accomplished some clarification of terminology. The evaluation called for by rule 403 does not affect whether an item of evidence is relevant. Thus it should be easier to determine whether an item of evidence is excluded because it is not relevant or because it lacks sufficient probative value to make the costs of admitting it worth incurring.

What is not clear at present is whether the definition of relevant in rule 401 was intended to apply to that word, or any variant of it, whenever it appeared in the federal rules or only when it appeared in rules 402 and 403. That is, it is unclear whether the drafters defined relevant evidence in rule 401 only to clarify the terminology employed in the basic operation involved in determin-

\(^{14}\) See FED. R. EVID. 802.

\(^{15}\) See FED. R. EVID. 1002.

\(^{16}\) But it will on some. See the discussion of the role of extrinsic policy in determinations of relevancy at notes 57-68 infra and accompanying text.
ing the admissibility of evidence attacked as lacking probative value, or whether they intended to provide an authoritative definition for use throughout the rules. This problem is discussed below.

Rule 403 does not give the courts unfettered discretion. First, it authorizes exclusion of evidence only after a particularized evaluation of the specific item has been made. In this sense the rule may prove liberating. If there are precedents purporting to exclude evidence as not worth the risks, those precedents may be deemed undermined by the failure of the legislature to codify their particular results. Although controversy surrounds the effect to be given a judicial decision on relevancy, there is certainly no agreement that such decisions may be ignored. *Stare decisis* dictates some fidelity to them, however difficult it may be to decide exactly what this means. However, rule 403 may be interpreted as an invitation, if not a command, to re-examine those results in light of the standard set forth by the rule. Since the standard is essentially the common law analysis, it is entirely possible that a court might decide that application of rule 403 produces the same result, but it will be attained by applying a legislative standard rather than a previous decision; and the court may well decide that the result of the precedent cannot be reached by applying rule 403.

Moreover, rule 403 limits the factors that may be balanced against the probative value of the evidence. Among other things, the fact that counsel is surprised by the introduction of an item of evidence is no longer an independent factor calling for the exclusion of the evidence. The Advisory Committee's Note to rule 403 gives two reasons for this. First, surprise is not usually the sole ground argued for exclusion. Generally surprise "coupled with the danger of prejudice and confusion of issues" is argued. Second, a continuance is a more appropriate remedy than exclusion of the evidence.

Perhaps of more consequence is the fact that the rule does not authorize the exclusion of probative evidence on the basis that its exclusion would further some extrinsic policy. The drafters have preserved this basis of exclusion, however, in several specific exclusionary rules. For example, rule 407 excludes evidence of "subsequent remedial measures" when offered to prove "negligence or culpable conduct in connection with the event." Although other hypotheses would explain the subsequent measures, the evidence would no doubt be "relevant" under the definition of rule 401 and thus admissible under rule 402 were it not excluded by rule 407. The question whether the same result could be reached under rule 403 will be examined below.

By limiting the factors that a court may weigh against the probative value of
the evidence, the drafters have biased rule 403 in favor of admissibility. A further bias appears in the standard to be employed in evaluating the evidence. Exclusion is authorized under that rule only if the countervailing factors "substantially outweigh" the probative value of the evidence. No authority to exclude appears to exist if the value and the counterweights seem equally balanced or even if the latter preponderate somewhat. Moreover, even if the trial court were to determine that the value of the evidence was "substantially outweighed" by the factors of rule 403, it would not be required to exclude the evidence.

To determine the object of the drafters in using this language, one must recognize that what seems to be at stake is the allocation of responsibility between counsel and the trial court and between the trial court and the appellate court. The choice of language was designed to reveal the drafter's views of how the responsibility was to be allocated.

Suppose a case in which the only objection to receiving evidence is that it would be very time consuming to hear it, and the item is of only marginal value. If the trial court admitted the evidence, that decision could hardly be the basis of a reversal. The time has already been expended; requiring a new trial could only waste more time, and the very lack of probative value of the item suggests that if it were not presented to the jury on retrial, the result would unlikely be affected. Nor would there be much value in a reversal as a guide to future decisions since so much depends on the particular situation when the question is whether the time needed to hear an item would be well spent or wasted.

On the other hand, the exclusion of probative evidence as time-wasting might well warrant a reversal. Certainly if the question were so close as to induce an experienced trial judge to regard it as superfluous, exclusion would often be harmless error. The original draft of rule 403 encouraged the trial court to be as liberal as possible in admitting evidence if the only argument against it was that it wasted time. A decision to admit evidence was essentially unreviewable; a decision to exclude might be reversible, but if the trial court followed the rule's bias in favor of admissibility the harmless error doctrine would likewise forestall reversals. In effect, the original rule 403 committed this matter to the trial court's discretion.

If the factors which mitigate against admission relate to possible distortions of the fact-finding process, the original rule 403 is less clear. The rule appeared to contemplate that a trial judge might commit reversible error by admitting evidence as well as by excluding it. By making exclusion mandatory it seemed
to accord the appellate courts a significant role in controlling the trial courts. At the same time the rule was sufficiently vague to allow a good deal of discretion by both the appellate courts and trial courts in its application.

The revision of the original rule 403 supports the conclusion that the drafters intended to make clear that, regardless of the factors urged in favor of exclusion, (1) the discretion granted in the rule embraced trial court discretion; and (2) that there was a bias in favor of admissibility. In effect, it is incumbent upon the party seeking exclusion not merely to suggest that the fact-finding process might be distorted, but to demonstrate that the risk is substantial both in terms of its likelihood and the impact the evidence might have. Under the rule, a trial judge should more readily be deemed to have abused his discretion when he fails to require such a showing before excluding evidence, than by admitting evidence notwithstanding the fact that some risk of distortion of the fact-finding process has been demonstrated.

Finally, the drafters of the federal rules did more than codify a general framework for the exercise of discretion; they purported to provide for certain problems by specific rules. Those rules may limit judicial discretion either by directing that certain items must be excluded or by directing that certain items must be admitted. Rule 411, for example, is a rule of exclusion within the meaning of rule 402’s phrase “except as otherwise provided . . . by these rules”:

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

However, this qualifies rule 402 only in regard to matters within the reach of its first sentence. If evidence of a person’s liability insurance were offered for some other purpose, rule 411 simply would not apply to the situation. The evidence would not be excluded by the first sentence, and the second sentence has no function other than to clarify the limits of the rule.

Since rule 411 does not “otherwise provide” for the exclusion of such evidence, the evidence would be inadmissible only if it were not “relevant”

17. In this respect rule 403 as enacted contrasts sharply with the original draft, which reads:

(a) EXCLUSION MANDATORY. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(b) EXCLUSION DISCRETIONARY. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.


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under rule 402 or if some other rule such as rule 403 applied. Rule 403 might exclude the evidence as being of insubstantial probative value and having high potential for harm.

The earlier statement that no rule of admissibility other than rule 402 is needed should be qualified somewhat. Since rule 402 is limited by the discretionary power of the court to exclude evidence under rule 403, a rule commanding the admission of evidence would be needed if the legislature wished to assure that particular evidence would be submitted to the jury regardless of a judicial determination of its probative value or its potential for distorting the fact-finding process. The rule authorizing impeachment of a witness by showing the witness's prior conviction of a crime is such a rule. Although the rule does give some discretion to the judge in certain situations, it grants far less discretion than the judge would have under rule 403, and in other situations the judge is given no discretion to exclude.

In other situations, the rules may raise questions about whether the discretionary power of the trial court to exclude evidence under rule 403 is still applicable. Rule 601 makes "every person . . . competent to be a witness except as otherwise provided in these rules" if the matter being tried is governed by federal law. If a witness displays characteristics that previously would have led to his or her exclusion on the basis of "incompetency," may the court decide any testimony the witness may give is inadmissible under rule 403? Or would that be an impermissible attempt to smuggle concepts of competency back into the rules? In a like vein, may some negative implication be extracted from the exclusionary rules that similar evidence not excluded by the rule must be admitted notwithstanding rule 403? The drafters seem to have intended to forestall such arguments by providing that the rule does not "require" the exclusion of evidence not described by it. Such language

19. See FED. R. EVID. 609.
20. Had the rule been enacted in the form submitted by the court, an argument might well have been made that rule 403 applied to such impeachment evidence, with rule 609 merely prescribing the outer limits of appropriate evidence. As the rule was enacted, there can be very little doubt that Congress intended to deprive the courts of the discretionary power to exclude the evidence. Not only is the language of rule 609(a) mandatory on its face ("shall be admitted"), but the recent congressional amendment to the D.C. Code to overturn Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), contained the same mandatory language. In Luck, the courts had asserted the discretion to exclude such evidence. This legislative history provided additional confirmation.
21. In United States v. Van Meerbeke, 548 F.2d 415 (2d Cir. 1976), a witness was asked to identify a suitcase as having been used in smuggling opium. Finding a bit of opium in the case, he swallowed it. The witness was permitted to testify after the trial judge made a determination that he was coherent. The Court of Appeals for the Second Circuit found no error in permitting the testimony, but commented that no inference should be made "that a judge must in all circumstances tolerate testimony by a witness under the influence of drugs." 548 F.2d at 419 n.3. Both the trial judge and the court of appeals clearly believed that a court can exercise discretion to exclude such testimony. Rule 403 is the most likely source of that discretion.

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appears in rules 407, 408, and 411. Other rules present problems, however, largely as a result of congressional changes. Rule 404(b), excluding "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith," contained similar language when it was submitted to Congress by the Supreme Court. The House amended the section to read that the evidence "may, however, be admissible for purposes" such as motive or intent, explaining its amendment as based on the view "that this formulation properly placed greater emphasis on admissibility than did the final Court version."\(^{22}\)

Since the effect of the Court version would have been to remit such cases to the trial court's discretion under rule 403 and since the House language is discretionary, the change might be regarded as purely stylistic were it not for the legislative history. The House seemed to indicate that it wanted the exercise of any discretion to be biased more heavily toward admissibility than would otherwise be so under rule 403. Some discretion, however, remains. One doubts that courts could alter their behavior to conform to so ineffable a change. The Senate Committee muddied the waters still further by declining to change the House language, but adding a gloss to the effect that "the discretionary word 'may' . . . is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403. . . ."\(^{23}\) The Senate seems to have been worried that the House's change, although designed to encourage admissibility, might be construed as in fact giving the trial court more power to exclude than it would have under rule 403. Taken as a whole, the legislative history seems to leave the trial court in about the same position it would have been in had the language not been amended, but the path to that position seems full of pitfalls.

The discussion now turns to several problems raised by the codified rules of evidence that concern relevance. Questions of interpretation and applicability necessarily arise which in turn affect what role courts are to play in an area no longer governed by the more flexible judge-made rules of evidence.

II. THREE PROBLEMS IN APPLYING THE RULES

A. The Definition of "Relevant Evidence"

1. The Scope of the Definition

The definition of "relevant evidence" in rule 401 was intended to apply to

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rules 402 and 403, but it is not clear whether the definition was intended to apply wherever the word "relevant" or a variant thereof appears in the rules. Unlike rules 801 or 1001, for example, in which definitions are expressly confined to articles VIII and X respectively, rule 401 is not so limited by its terms.

In actuality the words "relevant" or "relevancy" appear rarely in the rules other than 401 through 403. In two of these instances, the word is used as a synonym for "germane" or "related" rather than in the sense in which the word is defined in rule 401. Rule 410, making inadmissible certain pleas and offers to plead, also makes inadmissible "statements made in connection with, and relevant to, any of the foregoing pleas or offers." Rule 803(15), for example, contains an exception to the hearsay rule for a "statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document," unless later dealings have cast doubt on the trustworthiness of the statement or the document. In both cases the word "relevant" puts an outer limit on statements covered by the rule.

This does not necessarily mean that the definition contained in rule 401 is of limited scope. Although that section should not be regarded as defining the phrase "relevant evidence," it does appear designed to define "relevant" only in those rules in which the word modifies "evidence." Since "relevant" is not used to modify "evidence" in either rule 410 or rule 803(15), no problem is presented by giving the word a non-technical meaning there. In rule 406 and rule 104(b), however, the term "relevant" qualifies the term "evidence," raising the issue of whether the definition in rule 401 controls.

(a) Evidence of Habit

Rule 404(a) codifies the prevailing view that character evidence is generally inadmissible to prove that a person "acted in conformity" with his character or a "trait of his character" on a given occasion. But rule 406 also provides:

24. The rule makes one limited exception. If the statement was made "under oath, on the record, and in the presence of counsel," it may be admitted in "a criminal proceeding for perjury or false statement."

25. Fed. R. Evid. 404(a) provides that:

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, 609.
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.26

Have the drafters intended merely to prescribe that "habit" evidence meets the definition of rule 401, leaving it to the trial judge to decide whether the evidence is of sufficient value to be admitted under rule 403? Or is the rule intended to direct the admission of evidence in these cases so that "relevant" is synonymous with "admissible"? If the rule is to be given the latter construction, "relevant" must be defined separately for each rule in which it appears without regard to rule 401.

A priori there is much to be said for the former view. Not only is it consistent with rule 401, but it is more consistent with the overall framework of the rules. It would be reasonable to prescribe that "habit" evidence must be admitted only if the matter cannot safely be left to the discretion of the trial judge. Despite such anomalies as the no-eyewitness doctrine,27 however, the courts have generally been willing to admit evidence of habit or routine practice, providing that the existence of the habit or routine practice is adequately established.28 It is often difficult to determine when evidence establishes a "habit," as opposed to a character trait. Rule 404(a) excludes evidence of a character trait to prove conduct in conformity with that trait. Is it sensible to regard the boundary between character and habit evidence as separating a class of evidence that is never admitted from a class that is always admitted? It seems more plausible that rule 406 removes "habit" and "routine practice" from the ban of rule 404(a), leaving the ultimate question of admissibility to be resolved in each case.

However, certain aspects of rule 406 support a reading that equates "relevant" and "admissible." The rule itself makes the evidence relevant "regardless of the presence of eyewitnesses." By so doing, the rule rejects the majority position that habit evidence may be admitted only if there were no eyewitnesses to the conduct sought to be proved by habit evidence. According to this position, habit evidence is sufficiently suspect that it should not be admitted if alternative modes of proof are available, but habit evidence should be received if the choice is between it and no evidence. Rule 406's repudiation of that view implies a more hospitable evaluation of habit evidence. In

27. Some courts require that there be no eyewitnesses to an event at issue before evidence of a habit of specific conduct is admitted. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 463-64 (2d ed. 1972).
28. Id.
addition, the use of a factor such as the availability of other proof to determine whether an item is admissible is more appropriately an aspect of the evaluation called for by rule 403. Indeed, the Advisory Committee’s Note to rule 403 states: “In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . . The availability of other means of proof may also be an appropriate factor.” In other words, the availability of other evidence does not affect the “relevancy” of evidence as that term is defined in rule 401, but it might affect its “relevancy” in a broader sense that encompasses a rule 403 evaluation.

Moreover, the Advisory Committee’s Note to rule 406 contains much language to suggest that the drafters believed they were writing a rule of admissibility. It states: “Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion.” The requirement that evidence of a routine practice of an organization must be corroborated “as a condition precedent to its admission in evidence,” the note adds, “is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility.” Similar language is used in the portion of the note dealing with the no-eyewitness rule. Commentators also support the interpretation that “relevant” as used in rule 406 is a basis for admissibility independent of rule 401. Finally, giving the word “relevant” in rule 406 the meaning of rule 401 would rob rule 406 of any real significance. Even character evidence has enough probative value to pass the test of rule 401, or else there would be no sense in recognizing exceptions to the general rule of exclusion in rule 404(a). To declare that habit and routine practice have probative value is to state the obvious, further suggesting that “relevant” as used in rule 406 means more than logically probative. It means that such evidence is admissible without courts making a case-by-case determination under rule 401. There are, however, plausible explanations for all of these points. Undoubtedly the drafters assumed, and were warranted by prior law in assuming, that if a habit or a routine practice could be established, the evidence would be admitted. Even if rule 406 did not itself call for the admission of the evidence, it may well have been assumed that an evaluation of genuine habit or routine practice evidence under rule 403 would invariably lead to the admission of the evi-

29. Emphasis added.
30. Rule 406 is in accord with the Model Code of Evidence and the Uniform Rules of Evidence in adopting the generally accepted practice of admitting evidence of habit or routine practice as relevant to prove that an act was conducted in conformity therewith. The reason for accepting evidence of habit when evidence of character is excluded has generally been explained on grounds of greater probative value.

2 J. Weinstein & M. Berger, supra note 17, at 406-06.
idence. The primary focus of the drafters was probably on making clear that evidence of habit or routine practice was not to be considered as within the ban of rule 404(a) and that it was immaterial whether there was corroboration or an eyewitness. In this light, rule 406 would be of significance if "relevant" meant only logically probative and not "admissible." On balance it may be concluded that rule 406 does use the word "relevant" to mean "logically probative" and is thus consistent with the view that the definition in rule 401 was intended to be applicable throughout the rules.

(b) Conditional Relevancy

The Federal Rules of Evidence adopt the standard notion that it is the duty of the trial judge to pass on the admissibility of evidence. If admissibility of an item of evidence depends upon the resolution of a disputed issue of fact, the judge must make that determination. Rule 104(a) so provides subject, however, to the provisions of rule 104(b): "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Unlike the situation in which the preliminary question of fact determines whether a privilege or an exception to an exclusionary rule exists, in which case the judge would have to decide whether the facts support granting the privilege or admitting the evidence, rule 104(b) requires that the judge be convinced only that a reasonable jury might decide that the factual condition has been fulfilled.

To what cases does rule 104(b) apply? If the concept of relevancy in rule 104(b) has the limited meaning given "relevant" in rule 401, it will apply to far fewer cases than would be the case if relevancy were used broadly to encompass the sort of evaluation specified in rule 403. Suppose, for example, evidence of other accidents occurring at the location at which the plaintiff was injured is admissible only if sufficient similarity of circumstances has been shown. Should the trial judge decide whether the circumstances are sufficiently

32. See generally Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 HARV. L. REV. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 HARV. L. REV. 165 (1929).
33. Rule 104(b) does not address the question whether the jury must be instructed to resolve the preliminary question of fact first and consider the evidence conditioned upon it only if it finds the condition has been fulfilled. Neither does it provide whether the judge may simply send the evidence to the jury without comment, assuming it will be discarded if the jury believes the condition has not been fulfilled. In either case it seems clear that juries will be made aware of items of evidence that the trial judge would have excluded if he had had to be personally convinced that the condition had been fulfilled.
similar, or should the judge simply hear evidence on the similarity of circumstances until he is satisfied that a reasonable jury could consider them similar and then admit the evidence, with or without instructions?

The Advisory Committee’s discussion and its illustrative cases do not eliminate the uncertainty. The Advisory Committee’s Note to rule 104(b) begins:

In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled “conditional relevancy.”

What does it mean to speak of “relevancy . . . in the large sense”? On the one hand, it could mean that relevancy requires the item be of sufficient probative value to be admissible after an evaluation such as that provided in rule 403. Or the “large” sense could mean the “lay” or “ordinary” sense as contrasted with the “legal” sense of the word. Under this view evidence would be relevant in the “large” sense if it met the definition of rule 401.

In the illustrations the evidence is described as having “no probative value” unless the condition has been fulfilled, again implying that rule 104(b) is limited to those cases in which the question is whether the evidence meets the definition of rule 401. The matter is muddled a bit, however, because in neither of the note’s hypothetical cases is the evidence wholly without probative value unless the condition is satisfied. A warning given in X’s vicinity has some probative value on the issue of notice without any further evidence that X heard it. A letter purporting to be signed by Y certainly gives rise to the inference that Y wrote it and thus is of some probative value on the question whether Y admitted the facts stated in it. However, as the cases are described, it is possible to say this: If the jury decides that X did not hear the statement or Y did not write the letter, it should have no difficulty eliminating the evidence from its considerations. Leaving this to jury determination carries no risk of prejudicing, confusing, or misleading the jury. The only real argument against admissibility is waste of time, but it is more efficient in many cases simply to let the jury resolve the matter. As the Advisory Committee points out, allowing resolution by the jury constitutes less of a compromise of the right to a jury trial.

The note surely cannot be suggesting that the authorship by Y must be established in order to bring the letter within the admissions exception to the hearsay rule. The resolution of disputed issues of fact relating to the application of a technical exclusionary rule is clearly the judge’s responsibility under rule 104(a).
Evidence of other accidents is quite different. There is a risk of prejudice whether or not the conditions are the same. The jury will not necessarily discard evidence of other accidents should it decide that the conditions were dissimilar to those of the case being tried. The jury may rule against the defendant simply because he maintained a place where people were hurt. Some enhancement of the probative value by a demonstration of similarity of conditions might be deemed necessary before the risk is worth running. Moreover, there is a risk that the jury will over-value the evidence if it is insensitive to the differences in circumstances, and requiring a showing of similarity of circumstances reduces the latter risk.

It may, therefore, be argued that rule 104(b) should control only where it is safe to let the jury hear the evidence regardless of the resolution of the preliminary question of fact. Rule 104(b) would be limited in this manner if its concept of relevancy is defined consistently with rule 401. If the preliminary question of fact affected the evaluation of the probative value and the countervailing factors of rule 403, more would be at stake than relevancy. The matter would then be left to the determination of the judge under rule 104(a) unrestricted by the other rules of evidence. In all candor, no very satisfactory resolution of this question can be reached merely by choosing between alternative definitions of relevancy. It is hard to imagine cases in which an item of evidence is wholly without probative value unless a preliminary question of fact is resolved favorably. The real distinction seems to be between cases in which time consumption is the only counterweight and cases in which use of the evidence involves other costs. But a close approximation of this result can best be reached by starting with the notion that rule 104(b) applies only to cases involving relevancy in the rule 401 sense by then giving the phrase "no probative value" a sensible meaning.

2. Evidence of Undisputed Facts

If a proffered item of evidence is directed toward a proposition that is not in dispute, is the evidence relevant under the definition of rule 401? More specifically, is any fact on which the evidence bears "of consequence to the determination of the action" if it is not disputed? This problem may arise in a variety of situations. The proponent of an item may concede its remoteness from the issues in controversy, but nevertheless seek to justify its admission as background. A proposition may have been admitted by the pleadings, and yet a party may offer evidence that is relevant, if at all, only to support that proposition. If the defendant admits an element of the plaintiff's case, what happens if the plaintiff nevertheless offers proof of the element, or if the defendant offers proof negating it?
The Advisory Committee's Note to rule 401 addresses this problem:

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. . . . A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence § 210, defining relevant evidence in terms of a tendency to prove a disputed fact.

Thus, undisputed facts may be "of consequence" and therefore relevant under rule 401. However, some questions remain.

(a) Background Facts

At least one federal court initially relied on the Advisory Committee's Note to rule 401 in deciding that the Federal Rules of Evidence created a distinct basis for admitting background information.\(^{35}\) The court's reasoning, however, is arguably erroneous.\(^{36}\)

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35. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, modified, 540 F.2d 837 (5th Cir. 1976). The court did not wish to hold that certain evidence of remarriage was not admissible on retrial in a wrongful death action which would raise questions about whether the original error in excluding the evidence under the now inapplicable rule 43(a) of the Federal Rules of Civil Procedure should, in some sense, be deemed harmless. In addition it did not want to hold that it was required to apply the state statute rather than the federal rules on retrial. The way out was to find the evidence admissible under the federal rules:

The admissibility of evidence, including the particular kind of evidence involved in this case, is now governed by the Rules rather than by state law. See Fed. R. Evid. 402. The policy of the new Rules is one of broad admissibility, and the generous definition of "relevant evidence" in Rule 401 was specifically intended to provide that background evidence (the fact of remarriage is a part of Mrs. Conway's background) is admissible. See generally Advisory Committee's Note, 56 F.R.D. 183, 215-16 (1972). Although the Rules do not deal specifically with proof of a surviving spouse's remarriage, their treatment of comparable issues suggests that the evidence is admissible for background and perhaps various other limited purposes. See Fed. R. Evid. 407 . . . Fed. R. Evid. 411 . . .

Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 930 (5th Cir. 1976).

The court's reference to rules 407 and 411 is puzzling since neither rule authorizes the admission of any evidence. The court may simply be making the point that evidence not admissible for one purpose may nevertheless be admissible for another purpose. However, evidence must be relevant when so offered and of sufficient probative worth to satisfy the standard of rule 403.

36. The court's reference to the Advisory Committee's Note on the definition of relevant evidence seems designed to enlist the language quoted at note 35 supra in support of the view that evidence of plaintiff's remarriage met the definition of rule 401 despite the Texas damages rules. Taken as a whole, the note really does not support this position, but it cannot be denied that the drafters deliberately omitted the word "disputed" from the federal definition of relevant. Furthermore, the note contains language indicating that their purpose in so
To understand the notion of background facts requires some consideration of exactly when such facts might be excluded. To be distinguished are cases in which the evidentiary fact is undisputed. If the ultimate proposition is disputed, such evidence is admissible under either the federal or California definition without the invocation of any doctrine like background facts.

However, one can hypothesize a case involving personal injuries sustained in an intersection collision. With both the defendant’s negligence and the plaintiff’s contributory negligence being litigated, the case has boiled down to an argument about which party had the green light. Plaintiff is on the stand and wishes to tell her story of the accident, including testimony about her purpose in taking that particular route, the passengers in her vehicle, and her approach to the intersection. Little of this data is disputed. To what may she testify? Under a rule giving the opponent of such evidence the right to insist that some connection be shown between those facts and the matter of the green light, some of this testimony could not withstand challenge. Credibility issues aside, it might be possible to relate this data to the disputed issue (as by suggesting that her approach shows that her view of the light was unobstructed, etc.), but these theories have an air of desperation about them. Some of the facts might be useful in assessing the credibility of the witness, but unless one espouses the view that the jurors’ assessment of the witness’s credibility might be affected by their observation of her demeanor while she tells this story—a theory that might well allow her to read the seed catalog on the stand—even that is not without its limits.

But the major question is why such an exercise should be engaged in if opposing counsel cannot point out any serious ill effects. A rule confining a doing was not only to make background facts admissible, but to eliminate any argument to the contrary.

The effect of deleting the word “disputed” is not to convert inadmissible evidence into admissible evidence. Had that word been inserted, as it was in California, CAL. EVID. CODE § 210 (West 1965), it would be possible to object to evidence solely on the ground that the issues for which it is probative are uncontroversial. It would then fail to fit the definition of relevant evidence and would be automatically excluded under the second sentence of rule 402, even if the opponent of the evidence cannot point to any serious costs of admitting it.

Another way of looking at the choice made by the drafters is that the terms and the burdens of the argument are different. Exclusion now must ordinarily be predicated on a rule 403 evaluation. The opponent of the evidence is under an obligation to point out the costs involved in using the evidence. In evaluating the value of the evidence, he would have to consider whether it bears only on undisputed facts. Clearly, however, it would be inappropriate for the court to conclude that evidence bearing only on undisputed facts must automatically be excluded under rule 403 as not being worth the time it would take to hear it. The decision to reject the California definition of relevant must also be taken as a rejection of any construction of rule 403 that would produce identical results.

37. See note 36 supra.
38. Section 210 of the California Evidence Code, which requires that the evidence relate to a disputed fact, specifically mentions the credibility of a witness as a fact “of consequence to the determination of the action.”
DETERMINATION OF RELEVANCY

witness to disputed matter only would impose an artificiality on the proceedings that could only be deleterious. If the rule were conscientiously adhered to, the jury's ability to comprehend the event would be impaired by the fragmentary nature of the story it hears. Moreover, it would put a serious burden on witnesses who are generally not accustomed to such artificiality in narrating an incident. A witness would probably require a good deal of pre-trial coaching before she could limit her testimony to disputed matter and not venture into uncontroverted areas.

Although one would not expect that every such excursion would be met by an objection, such a system would afford counsel far too many opportunities to hector a witness into an incoherent state. Indeed, more time would be expended wrangling about the rule than would be saved by allowing the witness some latitude in testifying. The matter is quite different if the opponent can show serious risks of prejudicing, confusing, or misleading the jury.

By requiring all evidence to be evaluated under rule 403, the drafters have provided an opportunity for courts to engage in a more discriminating analysis of evidence often given off-hand treatment as background. Admissibility makes perfect sense when exclusion will produce confusion, and no serious countervailing factors appear to be present. In other cases, where there is no reason to believe that the whole story could not be told or comprehended by the jury, exclusion may be appropriate. Inadmissibility, however, will not be based upon irrelevance because it involves undisputed facts, but because in the trial court's determination under rule 403 (not rule 401), the benefits of such evidence do not outweigh its costs.

(b) Judicially Admitted Facts

The situation is a bit more complicated if evidence is offered to prove a proposition that is consequential under the substantive law, but has been admitted in the pleadings or otherwise. To what extent is a judicial admission

39. Compare Judge Learned Hand's famous remark about the opinion rule in Central R.R. v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926):

   Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

40. By suggesting that the drafters of the rules intended background evidence to come in despite low value and high potential for prejudice—in fact, without being evaluated at all under rule 403—the first opinion in Conway, 525 F.2d 927 (5th Cir. 1976), seems to have committed an error of major proportions. Nor would the result necessarily be affected by the fact that in Conway the plaintiff gave testimony most reasonably interpreted as saying she had not remarried. She could be cross-examined on the point for the purpose of shaking her credibility, but ordinarily extrinsic evidence of the remarriage could not be admitted as the fact is collateral if damages are not affected.
To what extent does it prohibit proof by the party benefiting from it? The common law answer was that in appropriate circumstances the court had "discretion" to relieve a party of the conclusive consequences of his admissions as well as to permit the introduction of evidence by the party benefiting.

It is also necessary in this area to make certain distinctions. A stipulation or other admission may not reach all the facts sought to be proved by the introduction of the evidence. In one recent case the defendant was charged with beating a prisoner in his custody. The defendant admitted that the prisoner had suffered the loss of an eye, but evidently the stipulation did not go so far as to remove all dispute about the nature and extent of the prisoner's injuries. Accordingly it did not forestall some proof of those inquiries.

Also distinguishable is the case in which the stipulation removes some but not all of the issues on which the evidence bears. For example, the defendant might admit that the plaintiff suffered serious injuries in order to forestall the admission of grisly photographs. However, he would not thereby render the photographs irrelevant even under California law if there was a dispute about the nature or extent of plaintiff's damages. Finally, it seems to be the rule that the defendant may not, by admission, force the plaintiff to try the case on a disfavored legal theory. If, for example, the plaintiff was injured when he was struck by a car driven by an employee of the defendant, and he seeks damages on theories of respondeat superior and negligent entrustment, the defendant may not automatically prevent the admission of evidence that bears upon both theories by essentially admitting the respondeat superior case. The plaintiff is entitled to choose his own legal theory, accepting both the advantages and the burdens of the choice.

In all of these cases the judicial admission would affect the value of the evidence, but in none would it render the evidence irrelevant, even under the California definition. Suppose, however, that the admission did remove from the case, by making it undisputed, the only proposition upon which the evidence might bear. Had the drafters of the federal rules adopted the California definition of relevant evidence, the proof would have to be rejected under the second sentence of rule 402. However, they chose not to do so, and

41. See 9 J. WIGMORE, EVIDENCE § 2590 (3d ed. 1940).
42. Id. § 2591.
43. United States v. Hearod, 499 F.2d 1003, 1004 (5th Cir. 1974).
44. Id. at 1055. When the doctor went beyond the disputed facts to discuss the loss of the eye, notwithstanding defendant's stipulation, the error was deemed harmless.
46. See Note, 30 OKLA. L. REV. 181 (1977). If the only significance of the choice of legal theory is to make evidence of an inflammatory nature inadmissible, the wisdom of this rule may be doubted. Pursuit of this question is beyond the scope of this article, however.
therefore the fact to which the evidence is related is not automatically of no "consequence to the determination of the action" merely as a result of the admission.

As was true in the case of background data, the evidence is relevant under the federal rules, but it must be evaluated under rule 403 before it is admissible. In *United States v. Speltzer*, 47 for example, the defendant was charged with escape from federal custody. An element of that charge was that the defendant had been in custody as a result of having been convicted of a federal crime. The defendant admitted this fact, but the prosecution was nevertheless permitted to introduce a copy of the judgment of conviction, which disclosed that the offense for which the defendant had been incarcerated was bank robbery. The Court of Appeals for the Fifth Circuit found this reversible error. In the court's view defendant's admission did not automatically deprive the prosecution of the right to introduce evidence of the conviction, but it was necessary to weigh the probative value of the evidence against the factors specified in rule 403. One factor affecting the value of the evidence is the prosecution's need for the evidence. Given the defendant’s admission there was no need for the evidence, and hence it should have been excluded.

Potentially, this analysis is very sweeping. Once it is accepted that the evidence is utterly unnecessary, it is hard to see how it can have any probative value. If evidence has no probative value, would not the scales of rule 403 always tip against admission? As previously observed, such a result would be inconsistent with the deliberate decision to reject the California definition of relevant evidence. It is true, of course, that the countervailing factors must "substantially outweigh" the probative value, and this might be enough to forestall automatic exclusion if all that could be put in the scales were time consumption. However, as a practical matter, the stipulating party is likely to be able to point to more serious costs of using the evidence. Assuming that very little pure altruism motivates trial lawyers, counsel is not likely to ease his opponent's task unless he gains something from it. In *Speltzer*, defense counsel was obviously desirous of keeping from the jury the nature of the crime the defendant had committed. Bank robbery is likely to be regarded as the work of a dangerous fellow, who ought to be off the streets. The risk of prejudice is serious, and the court's decision seems correct. However, one must question whether this means, in effect, that all proof of admitted facts will be excluded once some potential for prejudicing, misleading, or confusing the jury has been shown.

This was not the law prior to the federal rules, 48 and it is hard to believe that

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47. 535 F.2d 950 (5th Cir. 1976).
48. 9 J. Wigmore, *supra* note 41, at § 2591.
the drafters would have made rule 403 a vehicle for denying a discretion previously exercised. In *Spletzer*, proof of the crime for which defendant was held in custody was unrelated to the facts of his escape; the full details of the latter could be given to the jury without any discussion about the former. Several cases decided prior to enactment of the rules are consistent with the view that one party may not, by stipulation, force his opponent to present his story to the jury in fragmentary and confusing fashion.49

Thus, the reasons that have led courts to grant some latitude in the case of background facts have equal applicability here. The notion that one party should not be allowed control over his opponent’s presentation by stipulation points up the other “probative value” of this evidence that must enter into the evaluation under rule 403. Therefore, even if the evidence contained some potential for distorting the fact-finding process, exclusion would not be automatic in any case in which the evidence could also be “background” under the prior analysis.

If the party making the admission were to offer evidence tending to disprove the admitted proposition, a slightly different analysis is necessary. If the admission was made in the pleadings, rule 15(b) of the Federal Rules of Civil Procedure would seem to control the matter. That rule seems to contemplate amending the pleadings unless the objecting party can show real prejudice by having relied upon the admission to his detriment. Once that is shown the question becomes whether, by the granting of a continuance, the disadvantage may be removed. In such cases the amendment of the pleadings has the effect of shifting the fact from the undisputed to the disputed class, and analysis of the evidence under rules 401 through 403 may proceed under that assumption. It appears to be the view, however, that the amendment should be denied if a continuance cannot be granted.50

Exclusion of the evidence in such a case may also be justified under the Federal Rules of Evidence. The refusal to allow the amendment would mean that the fact to which the evidence was addressed would remain undisputed, but that would not mean that the evidence was not relevant under rule 401. The evidence might, however, be excluded under rule 403. It would not be enough to say that the opponent has been surprised, because the drafters omitted that as a separate ground for exclusion. It could be argued, however, that rule 403 would permit exclusion of evidence on one of the listed grounds, such as prejudice or confusion, even though the danger was serious only because the


opponent’s reliance upon the admission left him unprepared to counteract the evidence.

The Advisory Committee’s Note supports this notion:

The rule does not enumerate surprise as a ground for exclusion . . . Cf. McCormick . . . listing unfair surprise as a ground for exclusion but stating that it is usually “coupled with the danger of prejudice and confusion of issues”. . . . While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence . . .

This suggests an analysis similar to that called for under civil procedure rule 15(b), when the surprise results from reliance upon a judicial admission. The judicial admissions should not categorically exclude evidence on the admitted matter simply because the admission concerns an undisputed matter. Exclusion, if it occurs, should be under rule 403, the second step of analysis in determining admissibility, not the first step with regard to relevance.

B. Construing the Exclusionary Rule: Insurance

Since liability insurance came into widespread use, lawyers representing plaintiffs in personal injury litigation have wanted to inform the jury that any judgement entered for the plaintiff would not be paid by the crestfallen figure at the defense table, but by a wealthy insurance company. Conversely, defense attorneys have wanted the jury to know that the plaintiff’s injuries were covered by casualty insurance and that any damage awards paid by defendant would result in benefit to the insurance company. Depending on the nature of the case and the ingenuity of counsel, a variety of theories may be offered to rationalize the admissibility of evidence showing the existence of liability insurance.

If, in a personal injury case, counsel for the plaintiff seeks to show that defendant was covered by liability insurance for the sole reason that it makes it more likely that the defendant was negligent on the occasion in question, the chain of inferences that must be drawn looks something like this:

- Defendant had liability insurance
- Defendant was conscious of having liability insurance
- Defendant was less concerned about creating risks to others
- Defendant’s behavior was more risk-creating than it would have been
- Defendant’s behavior on the occasion was more risk-creating
This is certainly not a very persuasive set of inferences. At each stage, common experience suggests competing inferences of equal or greater strength. Most people do not give their liability insurance a second thought as they drive, and there are many potent reasons for avoiding injuring others besides the unwillingness to pay compensation. However, few would be prepared to assert that no one ever behaves less carefully because he is insured, and it is a rare trial judge who can honestly dismiss evidence of insurance as totally without value. To the extent that rules 401 and 402 make evidence relevant if a reasonable juror might deem the requisite connection to exist, exclusion of the evidence under rule 402 would almost never occur.

However, trial courts had a good deal of experience in this area. As a consequence, the inferences needed to link the evidence of insurance to the defendant’s fault had been subjected to critical examination and their weaknesses revealed. It was possible to decide that the probative force of such evidence was so slight as proof of fault that it should never be received for that purpose, given the risks involved, and rule 411 embodies that judgment.

It should be noted that rule 411 contemplates the exclusion of such evidence as proof of fault regardless of the force of the counterweights of the particular case. In almost all cases, proof of the existence of insurance could be made very quickly and would not be subject to reasonable dispute, making the consumption of time minimal. The extent to which the jury might be prejudiced would also vary depending upon the nature of the injury (e.g., commercial vs. personal) and the character of the parties. However, the very lack of probative force of this evidence on the issue of fault minimizes the instances in which the evidence would be offered without ulterior motive. It is a waste of judicial resources for the courts to sift through the particulars of each case, and a flat rule of exclusion therefore makes sense.

Since the rule is grounded largely on the fact that the chain of inferences set out above lacks force, it is readily construed as limited to situations in which the evidence is used to establish a party’s behavior based simply on inferences derived from the existence of insurance coverage. The second sentence of the rule underlines this and illustrates situations in which the evidence might be of more value. Such evidence might, of course, be excluded under rule 403 since the risk of prejudice would be the same in such cases and the additional

51. The insurance literature has a name for this phenomenon: "moral hazard." Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AMER. ECON. REV. 951, 961-62 (1963); Pauly, *The Economics of Moral Hazard: Comment*, 58 AMER. ECON. REV. 531, 535 (1968). However, few would assert that no one ever behaves more recklessly when someone else will pay the cost of that behavior—at least the first time it causes injury. Were that the case, the "moral hazard" would not exist.

52. See the rule quoted at text accompanying note 18 supra.
probative value might not tip the scales in favor of admission. Although many courts have seemed entirely comfortable with this two-step process, the evidence in the cases employing the process was clearly offered to prove something other than negligent or otherwise wrongful conduct.\(^5\) There are, however, two situations that might prove more troublesome because they are not clearly outside the reach of the first sentence of rule 411.

Consider the following hypothetical cases based upon two New Hampshire cases:\(^4\) Case Number 1: Plaintiff is riding as a guest in defendant’s car. Defendant is driving at a rate of speed which seems unsafe to plaintiff. Plaintiff asks the defendant to slow down before he hits something. Defendant replies, “I should worry. I’m insured for that.” Defendant hits something, injuring plaintiff. Case Number 2: A head-on collision occurs. After the collision, plaintiff points out to defendant that both cars are on plaintiff’s side of the road. Defendant replies, “Thank God I’ve got insurance.”

These cases are not taken out of the operation of rule 411 by the fact that the evidence is offered to prove something other than negligence or otherwise wrongful behavior by the defendant. In Case Number 1 it is offered to prove that the defendant was behaving recklessly; in Case Number 2 it is offered to prove negligence. But if recourse is had to the chain of inference contemplated in the usual rule 411 case, it will be seen that this evidence is used differently. One inference required is that the insured party is conscious of that fact while engaged in the activity. However, in Case Number 1, in which the defendant refers to his insurance immediately prior to the accident, his consciousness of insurance coverage cannot rationally be disputed. Furthermore, the statement as a whole draws the connection required by the second inference: The utterance itself is an admission that his being insured has made the defendant less careful about injuring others. The utterance is a good deal more impressive evidence of reckless conduct than is the mere fact that defendant is insured.

In Case Number 2, the statement is made after the accident has occurred. If it were offered to prove that the defendant was conscious of his insurance coverage while driving and thus by the standard chain of inferences had been at fault, it would not be much more impressive than the mere fact of insurance. Once an accident has occurred insurance is often pressed into one’s consciousness even though one was not thinking of it before the collision. However, the statement need not be so used. It can be taken as an admission of fault by the

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53. E.g., Charter v. Cheleborad, 551 F.2d 246 (8th Cir. 1977); Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976).
defendant and, as such, would be more persuasive on the question of defendant's fault than the mere fact of insurance coverage.

Under a proper construction of rule 411, neither of these statements would be excluded. We are not dealing with "evidence that a person was . . . insured against liability," i.e., with evidence of a status. We are dealing instead with statements directly evidencing the speaker's state of mind, and in both instances the existence of that state of mind is highly important. To be sure, the status is also revealed, but the language of the rule lends itself to the interpretation that evidence is automatically excluded only if it shows the status and nothing else.

This leads to Case Number 3, a variation of Case Number 2, in which the defendant responds, "You can always sue me; I've got insurance." This is not a clear-cut admission of responsibility; indeed, it is most readily construed as an indication of an intention to resist liability. However, because it occurs after the accident, it shares the same weaknesses as the statement in Case Number 2 when offered as evidence of the state of mind with which defendant drove his car.

However, if rule 411 is construed in the fashion described above, the statement in Case Number 3 will not be excluded automatically. Nevertheless, since all three of these statements are subjected to the same balancing process under rule 403, it may well happen that the statement in Case Number 3, lacking the probative force of either of the other two statements, will be excluded by that process while the statements in cases 1 and 2 will be admitted.

An even more difficult case is presented by the facts of People v. Steele where the defendant was charged with leaving the scene of an accident. Little doubt existed that he had collided with a parked car and then driven off. However, the impact was slight, and it occurred during a snowstorm when defendant's senses were impaired. It was entirely possible that the defendant did not know that he had struck the parked car, although knowledge of the collision was an indispensable element of the prosecution's case. Defendant's offer of evidence that he had liability insurance was refused by the trial court, a ruling held to be reversible error.

The reversal seems eminently correct. The fact that the defendant was insured eliminated one possible motive he might have had for leaving the scene of an accident—fear of paying a judgment for damages. Since it is the state of the defendant's mind after the accident that is important, the inference that the defendant was conscious of his insurance at the relevant time is stronger than it was before.

55. 179 Misc. 589, 37 N.Y.S.2d 199 (Erie County Ct. 1942).
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would be if it were the pre-accident state of mind that was important. Moreover, the alternate modes of proof are absent here. All in all the probative weight is substantially greater than it is in the paradigm case for which rule 411 was designed. On the other hand, there is little likelihood that the jury would acquit this defendant merely because he had insurance. The case for admissibility seems overwhelming.

Is this a case in which codification requires a different result? Does the necessary imprecision of language that must be regarded as authoritative cover a case that it ought not reach? In Steele there is no escape through the argument that the evidence is not offered to determine whether the defendant acted "negligently or otherwise wrongfully." That is the precise issue involved. Nor is escape afforded by the narrow construction of the type of evidence covered by rule 411. The defendant's status as an insured person is the evidence. Nevertheless, it would seem that the rule does not require the exclusion of the evidence.

The first sentence of the Advisory Committee's Note to rule 411 indicates that in the committee's mind, liability insurance is coupled with negligence or other wrongful behavior whereas the absence of such insurance is coupled with lack of fault or wrongfulness. But, in Steele, it is the existence of insurance that is offered to show lack of fault, the opposite of the contemplated case. Although rule 411 would bear the reading that evidence of liability insurance (or the lack thereof) is excluded irrespective of its tendency to inculpate or exculpate, it will also bear the reading suggested by the Advisory Committee's Note.56

Thus, only in a narrow area is evidence of insurance categorically excluded by legislative rule, while the remainder is subject to judicial analysis under rule 403.

56. Rule 411 applies only to liability insurance, not to other forms of insurance. The rule provides no obstacle, for example, to showing that the accused in a murder case was the beneficiary of the victim's life insurance policy. Literally the rule would have no effect on the attempt to indicate that the plaintiff in a personal injury action was contributorily negligent because he had collision insurance. The Advisory Committee's Note to rule 411 states: "The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant." However, given the rule's wording this can only mean the plaintiff's liability insurance. This seems anomalous. In regard to the behavior of the plaintiff, the chain of inferences is essentially the same whether casualty or liability insurance is involved; accordingly both suffer the same infirmity so far as probative value is concerned. With respect to prejudice, the apprehension is that the jury will reduce the size of any verdict if it believes that the plaintiff has already been compensated by insurance, see 2 J. WEINSTEIN & M. BERGER, supra note 17, at 411-[04], but it would be his casualty and not his liability insurance that provided the compensation. Mention of liability insurance would be risky precisely because it might trigger an association in the jurors' minds. However, these very factors suggest that if the matter is left to the judge under rule 403, evidence of casualty insurance will be excluded as easily as if it were covered by rule 411.
C. The Role of Extrinsic Policy Goals and Judicial Flexibility in Determining Relevancy

It has already been noted that the drafters of the federal rules included in article IV several exclusionary rules of judicial creation that rest on the interest in promoting some objective other than accurate, efficient fact-finding. Rule 407, for example, provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The Advisory Committee’s Note candidly acknowledges that social policy must be relied upon to explain the rule:

The Rule rests on two grounds: The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. . . . The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

In other words, the evidence would be relevant under rule 401. Its probative weight may not be terribly strong, but it is probably not so weak that it should be excluded under rule 403. Rule 407, however, does render it inadmissible.

To probe this a bit further, imagine the situation in which a party seeks to introduce evidence that remedial measures were taken by a person not a party to the litigation. Suppose, for example, an intersection collision has occurred, and the defendant driver offers evidence that after the collision the city installed a traffic light at that intersection. Or suppose that after the plaintiff was injured as a side effect of a drug, the Food and Drug Administration ordered the label warning to be strengthened. The probative value of the evidence in these cases seems no greater than it is in the case in which defendant takes the remedial measures, and, to the extent that the rule is based on the absence of probative value, it is an argument for interpreting the rule as barring the evidence. However, if one focuses on the policy behind the rule, the analysis is very different. There may be a slight deterrent effect in the first case, although it would not be great. There is no deterrent effect in the second case.

58. The possibility that the evidence will backfire against the plaintiff, leaving the jury to decide that it was the government and not the company who was responsible, is a fanciful notion.
If the defendant may introduce evidence of the city's action as part of his defense, he invites the jury to decide that the negligence of the city in not previously installing the light, rather than his negligent driving, led to the accident. If the driver escapes liability, the city may be the plaintiff's next candidate for a defendant. But it is very unlikely that this risk would enter into the city's calculations. With respect to the FDA, the agency can hardly be injured by the plaintiff's use of the conduct. To the extent that the rule rests on considerations of extrinsic policy, it can be argued that rule 407 should not be applied to this case to exclude the evidence.

The language of rule 407, however, would seem to reach both cases.\(^{59}\) It is possible by relying on the Advisory Committee's Note, which stresses policy, to read rule 407 as providing that evidence of subsequent remedial measures by a party is not admissible to prove negligence or culpable conduct.\(^{60}\) This is consistent with the view in the Note that the lack of probative value measured against the deterrent effect of admission leads to exclusion. However, the Note's limiting language does not appear in the rule, and the drafters may have believed more strongly in the lack of probative value theory than the Note suggests.

Suppose that the city installing the traffic light is the defendant or that the pharmaceutical manufacturer strengthens its own warning, and the plaintiff offers the evidence to prove that these precautions were feasible. The second sentence of rule 407 provides: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving . . . feasibility of precautionary measures, if controverted." In a sense the feasibility of taking cost-justified precautions is an issue, at least theoretically, in most negligence actions, but controverting negligence must not imply that feasibility is also controverted. It would appear necessary for the defendant specifically to deny that it could take the action it did before the plaintiff could offer the evidence for that purpose.

This requirement that the issue be controverted stands in contrast to the definition of relevant evidence, according to which the proposition the evidence is directed to need not be in dispute. The effect is to exclude the evidence unless the defendant injects some issue that would provide another purpose for

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59. There is an argument that rule 407 does not reach the traffic light case. In that situation the evidence is offered to prove negligence or culpable conduct of the city, but that is only of consequence as a basis for the further inference that the defendant was not negligent. The rule can be construed to reach only those cases in which the negligence or culpable conduct is an ultimate issue in the case and not those probably rare cases in which it is an intermediate or subsidiary issue. However, this line of argument would not exclude the FDA case from rule 407, and it seems anomalous to regard one of these cases as automatically excluded and the other not.

60. This seems to be the view of Judge Weinstein. See 2 J. WEINSTEIN & M. BERGER, supra note 17, at 407-[07]. See also Farner v. Paccar, Inc., 562 F.2d 518, 528 n.20 (8th Cir. 1977).
which the evidence might be admitted. Rule 407 in effect confers upon the
defendant a privilege to keep the evidence out, although the defendant may
waive his privilege by controverting some matter, such as control or feasibility,
on which the evidence might bear. This may discourage a defendant from
taking subsequent remedial measures. However, this is not a serious compro-
mise of the policy upon which rule 407 rests. This is one area in which a judicial
admission of, for example, control of the premises by the defendant does bar
proof of the issue if it is to be made by evidence of subsequent measures.

If the matter is contested, however, the court may not exclude the evidence.
Rule 407, like rule 411, does not render the evidence inadmissible. One would
still have to evaluate the evidence under rules 401 through 403, but the drafters
seem to have acknowledged in the Note to rule 407 that even on the issue of
negligence the evidence has sufficient value to meet the rule 401 definition of
relevant. Furthermore, rule 403 does not explicitly authorize a court to con-
sider extrinsic policy goals when weighing evidence under a rule 403 standard.
Consider, for example, the situation in Noble v. McClatchy Newspapers,61 in
which a publisher of a newspaper terminated a distributorship. The distributor
claimed the action had been taken because he would not abide by certain
territorial restrictions in his agreement, and he sought treble damages under the
antitrust laws. The publisher, on the other hand, claimed to have cancelled the
contract because of poor performance. Plaintiff offered evidence that after he
was terminated certain allegedly anticompetitive provisions were deleted from
the defendant's distributorship agreements, and he contended that an inference
of earlier wrongdoing could be drawn. The Ninth Circuit endorsed the trial
court's refusal to admit that evidence, invoking rule 407.

As others have observed,62 the case does not fall clearly within rule 407. The
Advisory Committee's Note indicates that the drafters were primarily concern-
ed that safety measures not be discouraged. One may be willing to suppress
relevant evidence if the risk of physical harm is involved, but not if the risk of
continued law violation is at stake. On the other hand, the rule speaks broadly
of subsequent measures, and it is certainly arguable that public policy would be
furthered if persons were encouraged to remove questionable provisions with-
out expending public resources to force them to do so.

Some commentators argue that it is not clear that earlier deletion of the
provisions might not have made the event of plaintiff’s termination less likely
to occur.63 But if the plaintiff’s theory is that he was terminated for violating
one of those provisions, would not prior deletion have made this less likely?

61. 533 F.2d 1081 (9th Cir. 1975).
62. 1 FED. RULES EVID. NEWS 68 (1976).
63. Id.
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One hypothesis is that the defendant had simply decided to replace contract provisions with covert pressures and would still have terminated the plaintiff's distributorship; another is that the defendant in fact decided to abandon the policy. There is, however, a further difficulty. The defendant contended that the distributorship was terminated for another reason. If that reason was in fact true, deletion would not have made plaintiff's termination less likely to occur. In this sense the preliminary issue of fact coincides with the ultimate issue, but the parties' positions are reversed. The defendant's objection, based on rule 407, forced him to argue that deletion would have made it less likely to occur, which is inconsistent with his main position. And the plaintiff's position would contain the opposite inconsistency. All of this may make rule 407 questionable as a basis for excluding the evidence. But rule 403 is likewise questionable as an alternative so that a court must construe ambiguous language without having rule 403 provide a secondary control on the admission of evidence.

A more painful example of the dilemma posed by the uncertain relationship between rule 403 and the rules based on extrinsic policy goals was presented by United States v. Verdoorn, involving rules 408 and 410 rather than rule 407. The defendants sought to introduce evidence that they were offered reduced or lighter sentences in return for their testimony. They contended that this would call into question the credibility of the government's case, but the trial judge declined to receive the evidence. The Court of Appeals for the Eighth Circuit affirmed, justifying exclusion in part upon the rationale of rule 408, which excludes offers of compromise:

Plea bargaining has been recognized as an essential component of the administration of justice. "Properly administered, it is to be encouraged." . . . If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.65

The court did not suggest that the evidence could not meet the standard of rule 401 and hence be inadmissible under rule 402. Presumably someone might reasonably infer that the government did have serious doubts about the potency of its other evidence if it was willing to make such offers. There may well be alternative explanations of the offers, but that would not mean the evidence did not fit the definition of rule 401. However, if evidence is relevant, then it is admissible unless some other rule excludes it, and the court was vague about which rule accomplishes this. It cited rule 408, but found only that the rationale of that rule supports exclusion, not that the rule commands it. In fact the case

64. 528 F.2d 103 (8th Cir. 1976).
65. Id. at 107.
seems to fall between two rules. Rule 410 rather clearly deals with a part of the plea bargaining process, but by its terms makes inadmissible only withdrawn guilty pleas, pleas of nolo contendere, offers to plead guilty or nolo contendere to the crime charged or any other crime, and "statements made in connection with and relevant to, any of the foregoing pleas or offers." Only the defendant may take advantage of that portion of rule 410 excluding the pleas and offers since only he can actually make or offer to make those pleas. The exclusion of certain related statements might be read to protect statements by the prosecution as well as the accused, but the statements must be made "in connection with, and relevant to, any of the foregoing pleas or offers," and there was no showing in Verdoorn that the defendant had made any such pleas or offers.

Rule 408 does deal generally with offers of compromise, but it is not obvious that it applies to criminal cases. In the first place, if it did apply to criminal cases, much if not all of rule 410 would be superfluous. Second, the language of the rule seems to contemplate civil litigation. The rule speaks of furnishing or accepting (or offering or promising to furnish or accept) a valuable consideration in compromising a claim which was disputed in regard to either validity or amount. All of this fits more readily the compromising of a civil claim than a criminal prosecution.

But if rules 408 and 410 do not apply, then exclusion must be justified by rule 403 or by an extension of rules 408 or 410 to reach a case within their rationales but not their language. Rule 403 would not seem promising. The Verdoorn court did not suggest that the evidence would in any way corrupt the fact-finding process, and the only factors that may be considered under rule 403 are "the danger of unfair prejudice, confusion of the issues, or misleading the jury," and factors related to undue time consumption. If the quoted factors are construed as concerning only the integrity of the fact-finding process, they do not permit excluding evidence which does not pose any risks of distorting that process. It is true that, linguistically, the phrase "unfair prejudice" might be construed to encompass the Verdoorn situation and the situation in Noble. The argument would be that prejudice includes any possibility that the evidence will adversely affect the prejudiced party's case. Prejudice is unfair when it induces the jury to base its decision on emotional factors (which would rather clearly be a distortion of the fact-finding process) or draw a perfectly plausible inference from socially desirable conduct (which would not necessarily involve any corruption of the fact-finding process). By this construction the courts could reclaim the power to exclude probative evidence on policy grounds under rule 403. An analogous way of reclaiming the same power would be to expand rule 408 or 410 by analogy. Essentially these two tech-
niques seem to amount to the same thing. Both admit that the legislature provided no authoritative resolution of the matter in either rule, and both assume that the legislature intended that the court have discretionary power to exclude. The latter technique seems to be more limited, however, since it does not assume unfettered discretion in the courts to fashion new exclusionary rules based on their own views of sound policy, but merely discretion to give due weight to a policy determination made by the legislature. Construing rule 407 to reach situations like *Noble* in effect treats the rule as providing legislative resolution of the question. This interpretation of rule 407, like the expansive readings given rules 408 and 410 above, would limit the cases in which evidence may be excluded on grounds of extrinsic policy. This position is in contrast to the broad construction suggested for rule 403. However, such limited solutions are to be preferred if one has serious doubts about whether the legislature in fact wished the courts to have the broader power.

If it were clear that the legislature essayed only an interstitial revision of some aspects of the law of evidence, there would be little difficulty in concluding that the power to exclude such evidence remains. However, it was concluded earlier that the federal rules were intended to provide a comprehensive framework within which questions relating to the admissibility of evidence are to be decided. If this is correct, the court's authority must be found in the rules themselves.

The strongest argument in favor of the power is the clear recognition in the rules that exclusion of marginal evidence to achieve extrinsic policy goals is perfectly appropriate. The Advisory Committee's Notes to such rules as rule 407 leave no doubt that those rules were based upon such grounds. Yet it may also be said that such Notes also make clear that the omission in rule 403 of any reference to extrinsic policy was not an oversight, and construing unfair prejudice in rule 403 to include notions of extrinsic policy would impute to the drafters an intention to achieve by indirection what might easily have been achieved expressly. Furthermore, there is no inconsistency involved in a construction of the rules that denies to the courts the power to create new exclusionary rules on grounds of extrinsic policy. Certain well-settled doctrines are legislatively endorsed, but any new ones must be legislatively created.

But this response may be thought to lead to an anomaly of a different sort. These rules are akin to privileges in that relevant evidence is barred on grounds unrelated to the validity of the fact-finding process. Rule 501 of the rules provides:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The rules as submitted to Congress by the Supreme Court contained an elaborate scheme for codifying the law of privileges, but Congress replaced them with rule 501. In many respects the proposed rules narrowed existing privileges and denied to the courts any authority to recognize old privileges, let alone create new ones. Congress apparently decided that the courts should define privileges. Is it sensible to read the rules as saying that the courts shall define all privileges labelled as such, but if new privileges are to masquerade as matters of relevancy the legislature must make that decision?

Treating the matter as a pure question of policy also produces an anomaly. Excluding evidence that would assist the fact-finder in order to encourage safety measures or other socially desirable activities has lost considerable favor. Doubts are expressed about the impact that such rules have on out-of-court behavior, and the losses involved in suppression are usually concrete and tangible. Yet the same doubts that may be voiced about suppressing evidence under, for example, rule 407 have been voiced about explicit privileges. The rules as proposed reflected this skepticism about privileges, and the congressional action seems to have been a vote in favor of privileges. In view of that courts may well feel more uneasy about admitting the evidence in cases like Noble and Verdoorn and far less certain that the legislature did not wish them to have the power to exclude it.

Nevertheless, the courts should not exercise this power. To some degree the congressional action may be urged in favor of the lack of power. It is clear that a major concern of Congress was the problem of harmonizing the rules with the Erie doctrine, and the last sentence of rule 501 as enacted was intended to mitigate that difficulty. Congress did not, however, recognize that similar difficulties are presented by rules that are ostensibly rules of relevancy but largely privilege rules. This problem is acute enough if rules such as rule 407

66. 2 J. WEINSTEIN & M. BERGER, supra note 17, at 407-[09] and 407-[10].
are involved; it is much more acute if the courts are empowered to develop new exclusionary rules on similar grounds.68

However, it still must be acknowledged that there is an anomaly in the rules as enacted which resulted from the congressional changes in article V. Perhaps all that can be done is recognize the anomaly and attribute it to the fact Congress' attention was largely focused on privileges and that to the extent that it made changes, it altered the intent of the Advisory Committee. The bias for admissibility then, was not affected in those areas in which no changes were made. One implication of this is that the courts may no longer, on their own initiative, exclude relevant evidence because they believe some extrinsic policy goal will be furthered.

III. CONCLUSION

Legislative revision of a branch of judicially developed law inevitably causes some transitional difficulties. Even if no real substantive changes are made, it often takes time before lawyers, judges, and law professors get used to thinking "legislatively" about the area. Naturally, any moderately complex statute will engender other questions. This article has attempted to highlight three types of problems almost inherent in codification. The first is the problem of charting the bounds of authoritative, legislative definitions of terms often previously used loosely. The second is the problem of deciding what the legislature has decided and what it has referred to the courts for decision. The third is the problem of deciding what changes, if any, have been mandated about how the courts shall do their job.

It is not a criticism of the federal rules that they have not avoided these difficulties. The task now falls to those of us in the profession to begin discussion of the problems in the hope of advancing the day when they are satisfactorily resolved.
