Are the Federal Rules of Evidence a Statute?

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For evidence scholars, the Federal Rules of Evidence (Rules) are not unlike a Rorschach test.[1] When some of us, like myself, look at the Federal Rules of Evidence, we see the skeletal structure of a richly complex evidentiary system that embodies the principles identified in Evidence Rule 102: "fairness . . . , elimination of unjustifiable expense and delay, . . . promotion of growth and development of the law of evidence . . . truth . . . just[ice]. . . ."[2] These values predominate our perception of the Rules, and we see the text of the Rules as a way of organizing our evidentiary advocacy and discourse.[3] When others look at the Rules, however, they see a statute.[4] And seeing a statute, they invoke a host of doctrines pertinent to interpreting legislative enactments that have been developed by commentators and theorists outside the sphere of evidence.[5] I

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[1] Justin L. Weiss & Larry J. Seidman, *The Clinical Use of Psychological and Neuropsychological Tests*, *in* THE NEW HARVARD GUIDE TO PSYCHIATRY 46-66 (Armand M. Nicholi Jr. ed., 1988).

[2] FED. R. EVID. 102. The entire text of Rule 102 reads as follows:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Id.

[3] *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990). Professor Jonakait has argued that recent Supreme Court decisions have stifled the dynamic quality of evidence law. *Id.* at 749.

[4] *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 113 S. Ct. 2786, 2793 (1993) (stating that Supreme Court will "interpret the legislatively-enacted Federal Rules of Evidence as [the Court] would any statute" and citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988)); United States v. Salerno, 112 S. Ct. 2503 (1992) ("To respect [Congress'] determination, we must enforce the words that it enacted."); *see also* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993) (defending moderate textualist approach of the Supreme Court and its use of legislative intent).

[5] The "plain meaning" doctrine is clearly the most notable doctrine used by the

confess, my vision of the Rules is not so confining and constraining. I also confess, I am not so ready to invite legislative thinkers into evidence's domain.

Proving that what you see is what you see are two recent articles on the interpretation of the Federal Rules of Evidence. In an article I originally published in this journal, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*,[6] I abandoned any hope of realizing that ultimate law professor fantasy of being cited approvingly by the highest court in the land, and I frontally assaulted the Supreme Court's approach to interpreting the Federal Rules of Evidence.[7] In essence, my position has been accurately summarized in this fashion:

> There has been sharp criticism of the textualist approach to construing the Rules of Evidence [adopted by the Supreme Court]. Professor Weissenberger notes that the Rules "originated in, and were designed by, the judicial branch and not the legislative branch. . . ." He argues that the textualist approach represents a threat to judicial discretion in administering the Rules and that with few exceptions, Congress' only intent was to ratify the drafters' attempt to preserve and guide judicial discretion. . . . He warns that a textualist construction of the Rules ignores "the common-law heritage of the Rules" and may undercut "the inherent discretionary powers of the federal trial judiciary."[8]

In a responsive article, Professor Edward J. Imwinkelried, a highly respected and gifted commentator, has stated:

> Professor Weissenberger's article is both thoughtful and thought-provoking. However, in the final analysis, his argument is flawed. The purpose of this Article is to unmask that flaw. Professor Weissenberger's argument amazingly

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Court. Succinctly put, the doctrine mandates that if the words are plain and give meaning to the statute, then the courts must not speculate in search of a different meaning. Rather, the sole function of the Court is to enforce the statute according to its terms. *See* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1310 n.12, 1325 (1992) (citing Caminetti v. United States, 242 U.S. 470, 490 (1917)). As Professor Imwinkelried noted in his article, "[f]inding a lack of plain meaning is a condition precedent to considering extrinsic material." Imwinkelried, *supra* note 4, at 270; *see also* Jonakait, *supra* note 3, at 761 (pointing out that under the approach of the Supreme Court, when a Rule has clear language, the plain meaning doctrine will control).

[6] Weissenberger, *supra* note 5.

[7] *See id.* at 1311–18, 1324–38 (discussing and criticizing Supreme Court's view of Federal Rules of Evidence as having statutory identity).

[8] RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 4 (3d ed. Supp. 1993) (coauthored with Edward J. Imwinkelried and Edward J. Kionka).

> overlooks the central importance of a Federal Rules provision cited nowhere in his article—Federal Rule 402. Once that provision is understood, it will become clear why both Professor Weissenberger's reading of the cases and his policy arguments are unsound.[9]

Apparently, Professor Imwinkelried's greatest disagreement is with my endorsement of courts' power to create new doctrines, not expressly stated on the face of the Rules, that would limit the admissibility of evidence:

> [Weissenberger] believes that by emphasizing the words approved by Congress, the Court has slighted the essential design of the Rules—namely, protecting the judiciary's "substantial inherent discretion in interpreting, expanding upon, and applying the Rules." He asserts that "the preservation or engraftment of additional evidentiary doctrines and principles was not precluded, but rather, specifically contemplated as integral to the structural scheme of the Rules."[10]

At the risk of oversimplification, Professor Imwinkelried's argument appears to focus on the text of Rule 402 as directive authority for the interpretation of Rules of Evidence. Specifically, he sees the language of the Rule as preempting the power of federal courts ". . . to create uncodified exclusionary rules and superimpose or engraft such rules onto the statutory language."[11] Decrying an approach which would allow such an other-than-statutory flexibility to the interpretation of the Rules of Evidence, and citing the legislative doctrine of *expressio unius est exclusio alterius*,[12] Professor Imwinkelried concludes that the drafters of the Rules of Evidence, whoever they were,[13] intended to exclude any basis for rendering evidence inadmissible except those bases expressly

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[9] Imwinkelried, *supra* note 4, at 272.

[10] *Id.* (footnotes omitted).

[11] *Id.* at 273 (footnotes omitted).

[12] The English translation essentially provides "if a document provides for one thing, other things are impliedly excluded." *Id.* at 273–74; Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 130 (1987). *See generally* 2A STATUTES AND STATUTORY CONSTRUCTION § 57.10, 664 (N. Singer ed., Sands rev. 4th ed. 1984).

[13] The actual drafting process of the Federal Rules of Evidence is described in detail in my prior article. *See* Weissenberger, *supra* note 5, at 1319–20. Basically, the Rules were promulgated by the Supreme Court pursuant to congressional enabling authority. *Id.* at 1320. Congress modified certain specific, isolated provisions, and then expressly approved the Rules. *Id.* It is my contention that although legislation was the end result of the promulgation process, "treating the Federal Rules of Evidence as a statute for the purpose of interpretation places undue emphasis on the terminal point of a process in which the judiciary was the predominant participant." *Id.* at 1319.

identified in Rule 402: "[t]he Constitution of the United States, . . . Act[s] of Congress, . . . these rules, or . . . other rules prescribed by the Supreme Court pursuant to statutory authority."[14] While the only real justice to Professor Imwinkelried's position can be achieved by reading his article in its entirety, it is fair to state that his keystone premise is what I would contend to be a misplaced emphasis on Rule 402, a Rule of Evidence never intended to function as an instruction for interpretation of the Rules of Evidence.[15] I simply do not see what Professor Imwinkelried sees in Rule 402—and for good reasons. This brief rebuttal will identify those reasons.

First, I have a logical reason not to see Rule 402 as precluding the creation of uncodified evidentiary doctrines. Logically, to find a mandate so formalistic and positivistic in Rule 402 is to view the rule through a legislative lens. It is simply begging the question to look at any Rule of Evidence with an eye toward discerning intent when the issue is whether one ought to be looking for the drafters' intent in the first place.[16] In this context, Professor Imwinkelried attributes to my article a position which simply is not there. He states: "Professor Weissenberger urges that rather than simply focusing on the statutory text approved by Congress, the courts should also weigh 'the subjective intent of the drafters' of the Federal Rules" in construing the

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[14] *See* Imwinkelried, *supra* note 4, at 273–75.

[15] FED. R. EVID. 402 reads as follows:

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

Id.

[16] Professor Imwinkelried writes:

> Irrespective of whether we label Rule 402 a "judicial" or "legislative" document, the maxim [*expressio unius est exclusio alterius*] gives us important insight into the intent of the drafters of Rule 402. Their words specifically list exclusionary rules of evidence based on four sources of law: "the Constitution of the United States, . . . Act of Congress, . . . these rules, or . . . other rules prescribed by the Supreme Court pursuant to statutory authority." However, this list contains no mention of a fifth source, namely, case, common, or decisional law. The inference is that the drafters intended to exclude that fifth source. The maxim thus points to the conclusion that Rule 402 precludes the courts from enforcing uncodified exclusionary rules of evidence; case law or decisional authority is *not* a permissible basis for excluding relevant evidence.

Imwinkelried, *supra* note 4, at 274–75 (footnotes omitted).

Rules.[17] That is not my position. Rather, I argued that applying the doctrine of "legislative intent" to the interpretation of the Rules of Evidence is counterintuitive—if not irrational—because the subjective intent of the drafters is predominantly traceable not to the legislative branch but rather the judicial branch.[18] I further argued that the principles of separation of powers are inapposite to interpreting the Rules of Evidence and, consequently, there is no basis for holding that courts should be deferential to Congress in construing the Rules of Evidence.[19] I never argued that the intent of the judiciary should be employed as a basis for interpretation and construction of the Rules. In fact, what I argued is that much of what is most important in applying the Rules of Evidence, such as judicial discretion, is simply not expressly codified on the face of the Rules.[20] My references to intent were offered to demonstrate that the originators of the Rules of Evidence were not seeking (or intending) to construct a statutory scheme.[21] But this point should not be construed as an argument advocating that "judicial intent" is the talisman for interpreting the Rules.

Second, I have a substantive reason for not viewing Rule 402 as containing any direction as to the interpretation of the Rules of Evidence. By simply looking at the facial qualities of Rule 402, one does not see a rule which in any way purports to inform the process of interpreting the Rules of Evidence.[22] Rather, Rule 402 has a wholly distinct function. It is the embodiment of a structural construct regarding the function of any system which attempts to organize the theory of evidence.[23] As confirmed by the reference to Thayer in the Advisory Committee Note to Rule 402, the rule is "a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence."[24] The chimerical quality of finding interpretive guidance in Rule 402 is further focused by the presence in the Federal Rules of Evidence of Rule 102, a rule which expressly addresses the matter of interpretation. Only the beholder of an extreme legislative bias can allow his or her eye to fix on Rule 402 as a source of interpretive guidance when the

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[17] *Id.* at 273.

[18] Weissenberger, *supra* note 5, at 1319–20, 1324–38.

[19] *Id.* at 1321–24.

[20] *See id.* at notes 14, 127–32 and accompanying text.

[21] *Id.* at 1307–09, 1319–21.

[22] *See supra* note 15 for the text of Rule 402.

[23] *See generally* 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE §§ 111–14 (1977); 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 402[01] (1993).

[24] JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898), *quoted in* FED. R. EVID. 402 advisory committee's note.

language of Rule 102 is substantively and preemptively on point:

> Rule 102. Purpose and Construction
> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[25]

Rather than containing any message whatsoever about applying such statutory interpretation doctrines as "legislative intent" and the preemption of the common law, Rule 102 articulates values which have historically been recognized as guiding and inspiring the application of evidentiary rules.[26] Most important, Rule 102 does not say: "hold fast, remain static, and do not expand upon the text of the rules." Rather, it could not be clearer in its language in contemplating "the growth and development of the law of evidence" in the construction of the Rules.[27] Accordingly, I would rely on the express text of Rule 102 in concluding that the Rules should be interpreted in a generous fashion, and not, as would Professor Imwinkelried, on some interstitial inference to be derived from Rule 402, a rule not oriented toward interpretation. Moreover, in following the express textual mandate of Rule 102, I cannot escape an interpretation of the phrase "growth and development of the law of evidence" as one which authorizes the development of novel evidentiary doctrines. Growth cannot be achieved but through these evidentiary principles, preserved in case law precedent. Surely, the idea of growth cannot only mean admitting more and more evidence. It cannot help but mean that, in some situations, admissibility is narrowed, tightened, or restricted when fairness, efficiency, truth, and justice so require.[28]

Third, I have a commonsense reason for believing that Rule 402 does not mandate a prohibition against uncodified evidentiary doctrines. Using a legislative lens, Professor Imwinkelried fails to see any reference to common law doctrines on the face of Rule 402 and, consequently, concludes that such doctrines have been legislated away.[29] Nevertheless, a close reading of the text of Rule 402 yields a very different conclusion. Rule 402 expressly refers to

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[25] FED. R. EVID. 102.

[26] *See* 1 LOUISELL & MUELLER, *supra* note 23, § 3; 1 WEINSTEIN & BERGER, *supra* note 23, ¶ 102[01].

[27] *See* FED. R. EVID. 102. *See generally* 1 WEINSTEIN & BERGER *supra* note 23, 102[01] (discussing need for flexibility in interpretation of Federal Rules of Evidence); GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 102.1 (1987) (same).

[28] Obviously, Rule 102 contemplates the growth of the law of evidence, not the growth of the body of admissible evidence.

[29] Imwinkelried, *supra* note 4, at 273–75; Imwinkelried, *supra* note 12, at 130.

bases of excluding evidence which, among others, include "Act[s] of Congress" and "these rules," a formulation which distinguishes the Rules from legislative enactments.[30] Consequently, it is apparent that the phrase, "these rules," is to be interpreted according to the Rules' distinct identity and not as an "Act of Congress." The point may be overly nice were it not for the commonsensical reading of Rule 402, which inevitably suggests that the reference to "rules" in Rule 402 obviously means more than the bare words of the Rules' text. The term "rules" obviously applies to the text of the Rules as well as their attendant construction. Otherwise, Rule 102, entitled "Purpose and Construction," would have no meaning.[31] Inevitably, every legal rule must be interpreted as it is applied. The question is how and how much. To illustrate the point, Rule 402 does not, nor does any Rule of Evidence, identify Latin phrases as a basis for interpreting the Rules of Evidence, yet Professor Imwinkelried invokes *"expressio unius est exclusio alterius"* to fulfill his perception of Rule 402. The more justified approach, however, is to bring to bear a more pertinent heritage of evidentiary thought to the process of giving life to the bare text of the Rules.[32] The day the Federal Rules of Evidence went into effect, the language of the Rules was not lifeless, and courts were not befuddled by their application. Indeed every trial judge had a sense of how to apply such undefined words as "plain error" in Rule 103(d), "condition of fact" in Rule 104(b), "adjudicative facts" in Rule 201(a), "probative value" in Rule 403, "character" in Rule 404, "habit" in Rule 406, "competent" in Rule 601, "assist" in Rule 702, "excitement" in Rule 803(2), and "impending" in Rule 804(b)(2).[33] These textual words, and literally hundreds of others, have been interpreted and reviewed, expanded and contracted in the case law.[34]

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[30] *See supra* note 15 for the complete text of Rule 402.

[31] *See* 1 WEINSTEIN & BERGER, *supra* note 23, ¶ 102[01].

[32] As stated by Professor Cleary: "In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978). This passage was recently quoted with approval by the Supreme Court in Daubert v. Merrell Dow Pharm., Inc., 113 S. Ct. 2786, 2794 (1993). *See also* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979) (arguing that courts are free to use inherent power and substitute their judgment for that of Congress when applying Rules of Evidence).

[33] FED. R. EVID. 103(d), 104(b), 201(a), 403, 404, 406, 601, 702, 803(2), 804(b)(2).

[34] *See, e.g.*, *Daubert*, 113 S. Ct. 2786 (interpreting Rule 702); United States v. Salerno, 112 S. Ct. 2503 (1992) (interpreting Rule 804(b)(1)); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (refusing to adhere to "plain meaning" of Rule

Commonsensically, we know that this is the way the word "rules" works in Rule 402. And of equal commonsense quality, we know that courts will look to precedent as the body of case law accumulates in the interpretation of the Rules. Consequently, it is unavoidable that the Rules will acquire engrafted legal doctrines.[35] It is formalistic nonsense to think otherwise.

In my original article I pointed out that, not only were there rational and substantive reasons to reject treating the Federal Rules as a statute, but also that the Supreme Court has never explicated its basis for its repeatedly announced premise that the Rules should be construed by the "traditional tools of statutory construction."[36] As one of the Court's most statured apologists of the Rules-as-statute thesis, Professor Imwinkelried has defended the Court's position and advanced an argument that might appeal to someone who starts with a legislative bias. But starting with such a bias is a mistake that is derived from placing undue emphasis on the ratifying legislation which was the terminal point of a process in which the judiciary, not the legislature, was the predominant participant.[37] It is also a mistake that leads to the irrational and unproductive exercise of attempting to discern legislative intent and plain meaning when the legislature's intent is fictional at best and the meaning was designed as something less than plain.[38] Professor Imwinkelried's argument, which strains to find interpretational messages in the interstices of Rule 402, carries weight only if one assumes as a premise the very conclusion it seeks to prove: that Rule 402, like all the Rules, should read like a statute with an eye toward discerning intent.[39] Even then it is an argument which ignores Rule 102, "Purpose and Construction," and the commonsensical notion of what we all know happens when courts apply and interpret Rules of Evidence.[40]

In this Article I have endeavored to shed light on Professor Imwinkelried's misplaced emphasis on Rule 402, although I have not endeavored to respond to every criticism of my position that he has advanced.[41] I have purposely used a thematic brush because my position advocates an image of the Rules of Evidence that is intuitively more appealing while simultaneously being substantively defensible. It is also a position which, from a realist perspective,

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609(a)); Huddleston v. United States, 485 U.S. 681 (1988) (interpreting Rule 404(b)).

[35] See discussion of *Daubert*, *infra* notes 42–46 and accompanying text.

[36] Weissenberger, *supra* note 5, at 1307 (discussing Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)).

[37] *See id.* at 1307–09, 1319–20; *see also supra* note 18 and accompanying text.

[38] *See* Weissenberger, *supra* note 5, at 1324–39.

[39] *See* Imwinkelried, *supra* note 16.

[40] *See supra* notes 34–35 and accompanying text.

[41] In truth, Professor Imwinkelried's legislative bias is so pervasive that, once it is illuminated, it is clear that nearly all of his criticisms are inapposite.

reflects the latest behavior if not the words of the Supreme Court. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[42] the Court interpreted Rule 702 which governs the admissibility of expert testimony. Starting with its customary Rules-as-legislation postulate, the Court found "[n]othing in the text of this Rule [which] establishes 'general acceptance' [—a pre-Rule test employed by some circuits pertaining to expert testimony based on novel scientific theories—] as an absolute prerequisite to admissibility."[43] Nevertheless, the Court acknowledged the "pertinence of background common law"[44] and engrafted on the rule a series of "observations" concerning its application which were obviously inspired from pre-Rule and post-Rule common law and which only a person with the wildest of imaginations could believe were derived from the literal text of the Rule itself.[45] Moreover, some of these guiding principles announced by the Court are unquestionably restrictive of admissibility.[46] To debate whether such restrictive "observations" are "uncodified exclusionary rules" or something else, is to allow this discussion to devolve into the silliest of semantic argumentation. Quite simply, these "observations" are not on the face of the rule, and, simultaneously, they operate to keep some evidence out.

Ultimately, the difference between Professor Imwinkelried's position and mine, no matter how theoretically fundamental, plays out functionally in the issue of whether certain pre-Rule common law doctrines survive the adoption of the Rules of Evidence[47] and, in the corollary issue of whether any judicially

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[42] 113 S. Ct. 2786 (1993).

[43] *Id.* at 2794.

[44] *Id.*

[45] *See id.* at 2796–98. The Court noted that the trial court should consider the following factors:

> (1) whether the scientific theory or technique "can be (and has been) tested;" (2) whether the theory or technique "has been subjected to peer review and publication;" (3) "the known or potential rate of error" of a particular technique; (4) if there does indeed exist "general acceptance" of the theory or technique within the relevant scientific community; and finally (5) if another Rule, such as Rule 403, operates to exclude such scientific evidence.

Id.

[46] Clearly, if the trial court, in applying these factors, found that a specific technique had not been tested and had a substantial rate of error, then exclusion of the evidence would likely be justified. *See id.* Similarly, a technique or theory which attracts only minimal support within the relevant scientific community "may properly be viewed with skepticism." *Id.* at 2797.

[47] *See* Imwinkelried, *supra* note 4, at 273–79; Weissenberger, *supra* note 5, at

created rules which restrict the admissibility of evidence can be superimposed on the Rules of Evidence.[48] A central point of my original article was that the Supreme Court's position, embracing the postulate that the Rules of Evidence are a statute as a device for concluding the pre-Rule evidence law was legislated away, involves incoherent notions of "legislative intent."[49] I also argued that the Court's approach depends on tenuous fictions which do not serve the development of the law.[50] Nevertheless, I have no real trouble with an analysis which concludes that the adoption of the Rules neither mandates nor precludes the continuation of pre-Rule evidentiary law as long as there is a recognition that courts are not constrained by notions of separation of powers from either continuing pre-Rule evidence law or, in the alternative, creating new evidence law in conjunction with their interpretation and construction of the Rules of Evidence.[51] To trace byzantine paths, trying to discern whether the pre-Rule law metaphorically survived the adoption of the Rules or, in the alternative, may merely be continued or resurrected by inherent judicial powers, appears to be a hyperanalytic exercise having little consequence worth worrying about.[52] Nevertheless, to suggest that courts lack the power to construe the Rules of Evidence in the expansive manner expressly condoned in Rule 102 would be wrong, and no amount of formalistic ratiocination should lead anyone who has read Rule 102 to that conclusion.

Ultimately, I see in the Federal Rules of Evidence an evidentiary system designed to bring some coherence and manageability to principles of admissibility and inadmissibility. I certainly see nothing in this system which instructs courts suddenly to discontinue their time-honored role in interpreting and expanding evidentiary doctrines according to such traditional and expressly articulated values as "truth" and "justice." If the roles of courts were that dramatically changed, I would expect to see an express directive, not a hidden, encoded implication such as that scavenged by Professor Imwinkelried from Rule 402.

If, however, the reader after reviewing my original article and that of

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1331–38.

[48] *See* Imwinkelried, *supra* note 4, at 272–75; Weissenberger, *supra* note 5, at 1311, 1318, 1330–31.

[49] *See* Weissenberger, *supra* note 5, at 1319–24.

[50] *Id.* at 1311, 1324–32, 1338–39.

[51] *Id.* at 1319–39.

[52] The Supreme Court has consistently affirmed the notion that the common law is to be used as a guide when interpreting the Federal Rules. *See* Daubert v. Merrell Dow Pharm., Inc., 113 S. Ct. 2786, 2794 (1993) (citing United States v. Abel, 469 U.S. 45 (1984)). Consequently, a court may be legitimately guided by the common law in reaching a result and not run afoul of the policy or the legal force of the Federal Rules.

Professor Imwinkelried, looks at the Federal Rules of Evidence and sees a statute, the reader can rest assured that she is in the good company of the Supreme Court and an extremely respected evidence scholar. Perhaps such a different perception simply represents a different point of view. But maybe not. As has been said regarding the Rorschach test:

> [O]ne patient may show a strong tendency to use tiny and unusual areas of the blots, while another may tend to organize major elements into coherent wholes. It is a short inferential leap to suggesting that the first individual usually organizes experience in a piecemeal or analytic fashion, attending to details at the expense of the larger view, and that the second is more able to integrate and to generalize.[53]

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[53] Weiss & Seidman, *supra* note 1, at 52.