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Should Oregon Adopt the New Federal Rules of Evidence?

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In recent years, a growing number of states have restructured their evidence codes to emulate the Federal Rules of Evidence (FRE).[1] When Illinois adopted the federal model for the first time in the fall of 2010,[2] the total number of states following the basic structure of the FRE increased to forty-three.[3] Only California, the District of Columbia, Georgia, Kansas, Massachusetts, Missouri, New York, and Virginia have organized their evidence rules in a manner distinct from the basic framework of the FRE.[4]

Typically states borrow about ninety percent of the language in the FRE.[5] These states follow the macro-level structure of the FRE, but they adapt individual rules to suit local preferences.[6] In Oregon, approximately twenty-four individual rules depart significantly from their federal counterparts.[7] The similarities between the Oregon Evidence Code (OEC) and the FRE are more noteworthy than the differences.[8] Indeed, the appellate courts in Oregon rely extensively

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1 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1 (Joseph M. McLaughlin ed., 2d ed. 2011).

2 On September 27, 2010, the Illinois Supreme Court adopted an evidence code modeled after the FRE. The newly adopted evidence rules in Illinois are very similar to their federal counterparts in both format and substance. For the new rules, commentary, and order of approval, see ILLINOIS RULES OF EVIDENCE, COMMITTEE COMMENTARY (2010), *available at* http://www.illinoislawyernow.com/wp-content/uploads/2010/09/Evidence.pdf.

3 6 WEINSTEIN & BERGER, *supra* note 1 (indicating—in an analysis that apparently preceded the update in Illinois—that forty-two states have followed the FRE model).

4 *Id.* In Massachusetts, the Supreme Judicial Court has adopted the *Massachusetts Guide to Evidence*, which follows the framework of the FRE, but is not an evidence code. SUPREME JUDICIAL COURT ADVISORY COMM. ON MASS. EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE (2011), *available at* http://www.mass.gov/courts/sjc/guide-to-evidence/massguidetoevidence.pdf.

5 While no scholar has quantified the extent to which states' evidence codes track the federal template, a cursory glance at the similarities suggests that approximately ninety percent of the language in most states' codes derives from the FRE.

6 *See* 6 WEINSTEIN & BERGER, *supra* note 1 (detailing differences between the FRE and various states' codes).

7 For a detailed analysis of these provisions, see *infra* Part I.

8 Approximately half of the provisions in the OEC are virtually identical to the corresponding provisions in the FRE. *E.g.*, OR. EVID. CODE 103–104 (procedure for admitting evidence); OR. EVID. CODE 201 (judicial notice); OR. EVID. CODE 401–403 (weighing relevance versus prejudice); OR. EVID. CODE 407–412 (policy-based exclusions of otherwise relevant evidence); OR. EVID. CODE 601–606 (eligibility rules for witnesses); OR. EVID. CODE 611–615 (procedure for examining witnesses); OR. EVID. CODE 701–705 (expert witnesses); OR. EVID. CODE 801 (definition of hearsay); OR. EVID. CODE 901–903 (authentication); OR. EVID. 1001–1008 (best evidence doctrine).

on federal court decisions as persuasive authority in interpreting the OEC.[9]

The trend toward uniformity in state evidence codes will likely build momentum if the U.S. Supreme Court approves the "restyled" version of the FRE as expected in May 2011.[10] This approval will culminate a five-year effort to simplify the FRE without changing the substantive meaning of the rules.[11] The restyled FRE will provide a more attractive template for the states, and it may help to win over converts among state legislators and judges who disliked the turgid language of the old FRE.

The restyling coincides with increasing pressures on states to adopt standardized rules of evidence. The states' economies are growing more interdependent. Legal practice is more likely than ever to extend across state lines.[12] The number of pro se litigants is growing,[13] and they are demanding straightforward, standardized

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9 Stephanie Midkiff, *Oregon Law & Practice: A New Practitioners' Tool*, OR. ST. B. BULL., July 2004, at 25, 28, *available at* http://www.osbar.org/publications/bulletin/04jul/practice.html ("Because the Oregon Evidence Code is based on the Federal Rules of Evidence, it follows that federal case law plays a huge part in the interpretation of the Oregon Code."). On April 15, 2011, a search of the OR-CS database of Westlaw yielded 147 results in response to the following query: "fre" (federal /2 rule /2 evidence) "fed. r. evid." Given the paucity of evidence decisions by Oregon appellate courts, the frequency with which the Oregon courts cite the FRE is striking.

10 In August 2009, the Committee on Rules of Practice and Procedure released the entire package of draft amendments for public comment under the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006). The deadline for public comment was February 16, 2010. Judicial committees are now reviewing the draft rules, and the Supreme Court will decide by May 1, 2011, whether to issue the amendments. Absent any intervention by Congress, the restyled FRE would take effect on December 1, 2011. The restyling of the FRE would not have been possible without the able leadership of Daniel Capra, Reed Professor of Law at Fordham Law School, who has served as Reporter for the Judicial Conference Advisory Committee on the Federal Rules of Evidence since 1996.

11 ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING 12 (2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2006-04.pdf (initiating the project to restyle the FRE); Memorandum from Robert L. Hinke, Chair, Advisory Comm. on Evidence Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 2 (May 12, 2008), *available at* http://federalevidence.com/pdf/2008/07-July/Ad%20CommEvidMay2008.pdf (setting forth standards for restyling, which provide that the Committee should generally avoid proposing substantive changes to FRE).

12 Trippe S. Fried, *Licensing Lawyers in the Modern Economy*, 31 CAMPBELL L. REV. 51, 52 (2008) (noting the increasing prevalence of interstate practice).

13 Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 443 (2009) (discussing the rise in pro se litigation); Nina Inger VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 988 (2007) (noting that federal and state courts

rules. Indeed, the time is ripe for uniform acceptance of the restyled FRE.[14]

Yet, chances are good that Oregon will buck the trend and resist the wholesale adoption of the restyled FRE, at least in the near term. Oregon is a maverick state.[15] Oregon was slow to adopt national templates in other areas of the law such as civil procedure[16] and legal ethics.[17] Led by politicians who proudly proclaim that they are "as independent as Oregon,"[18] this state is unlikely to track national trends simply for the sake of conformity. Oregon legislators will

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"have seen significant increases in the number of self-represented civil litigants in recent years").

[14] Several authors have discussed the benefits of uniformity in evidence law. *See, e.g.*, Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 260 (1984) (discussing the benefits of the FRE); Stephen A. Saltzburg, *The Federal Rules of Evidence and the Quality of Practice in Federal Courts*, 27 CLEV. ST. L. REV. 173, 181 (1978) (arguing that uniformity improves practice by lawyers, decisions by judges, and the overall quality of the law); Kenneth Williams, *Do We Really Need the Federal Rules of Evidence?*, 74 N.D. L. REV. 1, 5–7 (1998) (summarizing arguments in favor of uniformity). *But see* Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809, 813–31 (2004) (criticizing the arguments for uniformity in the evidence rules).

[15] Tom Bates & Mark O'Keefe, *Suicide Law Reflects Oregon Politics: Voters Tend to Be Quirky But Consistent in Maverick State*, PLAIN DEALER (Cleveland), Nov. 21, 1994, at 3E (discussing Oregon's notorious independent streak); *see also* Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE L. REV. 1031, 1031–32 (2003) (noting various ways in which Oregon's laws and rules have departed from the national norm).

[16] The Restyled Federal Rules of Civil Procedure took effect in 2007, but as of May 12, 2011, the Oregon Rules of Civil Procedure have incorporated very few of the provisions in the restyled federal rules. *Compare* OR. R. CIV. P., *available at* http://www.leg.state.or.us/ors/orcpors.htm, *with* RESTYLED FED. R. CIV. P., *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf.

[17] The ABA promulgated the Model Code of Professional Responsibility in 1969, and Oregon adopted this code in 1971. *See In re* Porter, 320 Or. 692, 702 n.8, 890 P.2d 1377, 1383 (1995) (en banc). In 1983, the ABA discarded the Model Code and replaced it with the Model Rules of Professional Responsibility. Oregon waited an astounding twenty-two years to adopt the ABA Model Rules. Order Adopting Oregon Rules of Professional Conduct, Order No. 04-044 (2004), *available at* http://www.publications.ojd.state.or.us/RULE80.htm. Even then, Oregon did not adopt the interpretative comments that accompanied the ABA Model Rules.

[18] U.S. Representative Peter DeFazio of Oregon's Fourth District has long insisted that he is "as independent as Oregon." *E.g.*, *As Independent As Oregon*, PETER DEFAZIO FOR CONGRESS, http://www.defazioforcongress.org/ (last visited May 17, 2011). U.S. Senator Ron Wyden campaigned for reelection in 2010 with this slogan: "Different. Like Oregon." Steve Law, *Oregon Voters Not as Angry*, PORTLAND TRIB., Oct. 21, 2010, http://www.portlandtribune.com/news/story.php?story_id=128761184777815000 (noting Wyden's use of this slogan).

carefully evaluate whether the restyled FRE are a good fit for the state's unique legal system, not whether the new rules work well elsewhere.

This essay explores whether Oregon should adopt the restyled FRE, and if so, to what extent. Part I analyzes the most important differences between the present versions of the OEC and the FRE. (This Part may be useful to students who need to memorize the unique features of the OEC in order to prepare for the Oregon Bar Exam.) Part II considers the primary reasons why the Oregon rules have departed from the federal model over the last few decades. Part III explores the advantages of adopting the restyled federal rules. Part IV addresses the disadvantages of importing the restyled rules in the OEC. Part V suggests one possible compromise that would preserve the distinctive character of the OEC while benefiting from the improvements to the FRE.

I
THE DISTINCTIVE FEATURES OF OREGON'S EVIDENCE CODE

The OEC has diverged from the FRE in several respects. Some of these differences reflect deliberate policy judgments in 1981, when Oregon first considered the FRE and the closely related Uniform Rules of Evidence as models for Oregon's code.[19] Other differences are attributable to the timing of federal amendments since 1981; Oregon does not systematically update its evidence code to incorporate every new addition to the FRE, so federal rules added after 1981 do not always appear in the OEC.[20]

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[19] *See* Charles Steringer, *The Clergy-Penitent Privilege*, 76 OR. L. REV. 173, 181 n.52 (1997) (indicating that, in 1981, Oregon joined thirty-six other states in adopting evidence codes patterned after the FRE); *see also* Dara Loren Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 932, 950 n.98 (1999) (noting that Oregon is among the states that adopted the Uniform Rules of Evidence in whole or in part).

[20] For example, Oregon did not adopt a version of the "Hinckley Rule," FRE 704(b), the limitation on expert testimony that Congress adopted in 1984 after John Hinckley won a verdict of not guilty by reason of insanity in his trial for attempting to assassinate President Ronald Reagan. Oregon never added a counterpart to FRE 415, which Congress approved in 1994 to allow propensity evidence in civil suits for sexual assault and child abuse. Oregon waited nearly a decade to adopt a version of the federal forfeiture-by-wrongdoing rule, FRE 804(b)(6), which took effect in 1997; the Oregon Legislature added analogous rules, OEC 804(3)(f) and (g), in 2005. Oregon has not yet adopted a version of the federal privilege-waiver rule, FRE 502, which took effect in 2009.

Whether the uniqueness of the OEC is purposeful or accidental, it is noteworthy in about twenty-four provisions. A summary of these provisions appears below. An explanation of the reasons for the distinctiveness of the OEC appears in Part II.

List of presumptions. While the FRE do not address presumptions from a substantive standpoint, OEC 311 lists a total of twenty-six presumptions, ranging from the presumption of intentionality ("A person intends the ordinary consequences of a voluntary act.")[21] to the dead man's presumption ("A person not heard from in seven years is dead.").[22]

Effect of a presumption in a criminal prosecution. OEC 309 emphasizes that the judge shall not direct the jury to find a presumed fact against the accused.[23]

Propensity evidence. OEC 404 generally mirrors FRE 404, except that a striking exception appears in OEC 404(4): propensity evidence is admissible in criminal cases if it is simply relevant.[24] OEC 404(4) indicates that relevant propensity evidence is still excludable in criminal cases pursuant to federal or state constitutional law, or pursuant to the policy exclusions in OEC 406–412,[25] which are similar to their federal counterparts.[26]

Pattern of abuse. In civil or criminal cases, OEC 404-1 allows evidence showing a pattern of abuse. Expert testimony on such abuse is also admissible.[27]

Rape shield law. OEC 412 gives greater protection to complainants than does its federal counterpart. FRE 412 allows the defendant to introduce evidence of his prior consensual sex with the complainant;[28] OEC 412, by contrast, allows such evidence only when necessary to show bias or motive on the part of the

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21 OR. EVID. CODE 311(1)(a).

22 OR. EVID. CODE 311(1)(s).

23 OR. EVID. CODE 309.

24 OR. EVID. CODE 404(4).

25 *Id.*

26 *Compare id. with* FED. R. EVID. 404(b). Given the breadth of OEC 404(4), it is not surprising that Oregon lacks analogs of FRE 413 and 414, which allow propensity evidence in prosecutions involving allegations of sexual assault and child molestation. Oregon does not have any equivalent of FRE 415, however, which allows propensity evidence in civil suits of sex assault and child molestation. OEC 404(4) does not extend to such evidence because it applies only in criminal cases; OEC 404-1 applies to evidence showing a pattern of abuse, but this provision is not as broad as FRE 415.

27 OR. EVID. CODE 404-1.

28 FED. R. EVID. 412(b)(1)(B).

complainant.[29] OEC 412 goes further than FRE 412 in excluding opinion or reputation evidence concerning the complainant's past sexual behavior, and in excluding evidence suggesting that the complainant's clothes invited the defendant's advances.[30]

List of privileges. While the FRE do not enumerate privileges, OEC 503–510 list several: the lawyer-client privilege,[31] the psychotherapist-patient privilege,[32] the physician-patient privilege,[33] the nurse-patient privilege,[34] the school employee-student privilege,[35] the social worker-client privilege,[36] the spousal privilege,[37] the clergy-penitent privilege,[38] the counselor-client privilege,[39] the stenographer-employer privilege,[40] the interpreter privilege,[41] and the informer privilege,[42] among others.

Exception for future violent crime. OEC 504-5 allows a lawyer to reveal his client's intent to commit a crime involving physical injury.[43] By contrast, the federal crime-fraud exception allows revelation of such information only when the client intends to commit a crime or fraud *and* the client is seeking to use the lawyer's services in furtherance of that crime or fraud.[44]

Prohibition of comments on privileges. OEC 513 prohibits lawyers from commenting to the jury about whether a witness has invoked a privilege.[45]

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29 OR. EVID. CODE 412(2)(b)(A).

30 OR. EVID. CODE 412(1)(b) (barring "reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim of the crime incited the crime or indicated consent to the sexual acts alleged in the charge").

31 OR. EVID. CODE 503.

32 OR. EVID. CODE 504.

33 OR. EVID. CODE 504-1.

34 OR. EVID. CODE 504-2.

35 OR. EVID. CODE 504-3.

36 OR. EVID. CODE 504-4.

37 OR. EVID. CODE 505.

38 OR. EVID. CODE 506.

39 OR. EVID. CODE 507.

40 OR. EVID. CODE 508a.

41 OR. EVID. CODE 509-1, 509-2.

42 OR. EVID. CODE 510.

43 OR. EVID. CODE 504-5.

44 *See* United States v. Zolin, 491 U.S. 554, 556 (1989) (interpreting the crime-fraud exception under federal law).

45 OR. EVID. CODE 513(2).

Qualification of a juror to testify. Both OEC 606 and FRE 606 prohibit a juror from testifying in the very trial in which she is serving as a juror. FRE 606 goes further, disqualifying a juror from testifying in a hearing concerning the jury's deliberations in the first trial.[46] OEC 606 does not include this restriction on subsequent testimony.[47]

Cross-examination of a witness about a specific unconvicted act. FRE 608(b) allows a cross-examining attorney to impeach with evidence of a specific unconvicted act bearing on truthfulness, so long as the attorney takes the answer of the witness.[48] OEC 608 is much more restrictive. Under Oregon's version, an attorney may not even elicit intrinsic evidence (i.e., admissions on cross) regarding a specific unconvicted act bearing on truthfulness.[49] In other words, Oregon lawyers generally need to impeach with convictions, not with unconvicted acts.

Time limit for convictions. OEC 609 allows impeachment with a conviction that is up to fifteen years old.[50] The time limit under FRE 609 is ten years.[51]

Impeachment of the accused with a prior act of domestic abuse. In prosecutions alleging violent crimes against household members, OEC 609 allows the government to impeach with misdemeanor convictions involving domestic violence, menacing, or harassment—even if these misdemeanors did not involve any sort of deceit.[52]

Impeachment with evidence of bias. OEC 609-1 specifically authorizes impeachment with evidence of bias. A subpoint of OEC 609-1 forbids additional evidence of bias after the impeached witness has fully admitted his bias.[53] The federal impeachment rules do not directly address bias, although evidence of bias is generally admissible under FRE 401.[54]

No rule authorizing the court to call a witness. The OEC has no counterpart to FRE 614,[55] which allows the judge to call and interrogate a witness.

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46 FED. R. EVID. 606(b).

47 OR. EVID. CODE 606.

48 FED. R. EVID. 608(b).

49 *See* OR. EVID. CODE 608(2).

50 OR. EVID. CODE 609(3)(a).

51 FED. R. EVID. 609(b).

52 OR. EVID. CODE 609(2)(a).

53 OR. EVID. CODE 609-1(2).

54 *See* FED. R. EVID. 401.

55 FED. R. EVID. 614.

No "Hinckley rule." Oregon lacks a version of FRE 704(b), which prohibits experts from opining on whether the accused had the requisite mens rea to commit the charged offense.[56] Congress added this provision to the FRE in 1984 after John Hinckley won a verdict of not guilty by reason of insanity in his prosecution for attempting to assassinate President Ronald Reagan. OEC 704 allows an expert witness to opine about the ultimate issue in any case, including a criminal case.[57]

No rule authorizing the appointment of an expert on the court's own motion. The OEC has no version of FRE 706, which allows the judge to select and appoint an expert witness on the judge's own initiative.

Deposition in the same case is exempted from the hearsay definition. Under OEC 801(4)(c), the definition of hearsay does not extend to a deposition taken in the same proceeding in order to preserve the testimony of a witness expected to be absent at trial.[58]

No hearsay exception for present sense impression. Oregon chose not to include a hearsay exception along the lines of FRE 803(1), which admits statements that immediately describe perception.

Hearsay exception for a complaint of child abuse or elder abuse. OEC 803(18a)[59] allows such hearsay statements if the declarant is available for cross-examination or, when the declarant is unavailable, if the statement bears sufficient indicia of reliability under a multi-factor test reminiscent of the reliability analysis pursuant to *Ohio v. Roberts*.[60] The rule includes a fifteen-day notice requirement.[61]

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56 FED. R. EVID. 704(b).

57 *See* OR. EVID. CODE 704 (adopting the language and legislative history of FRE 704).

58 OR. EVID. CODE 801(4)(c).

59 OR. EVID. CODE 803(18a).

60 In *Ohio v. Roberts*, the Court developed a two-part test for the admissibility of hearsay offered against the accused. 448 U.S. 56, 65–66 (1980). One component of the test focused on the availability of the declarant, and the other component focused on the reliability of the evidence. *Id.* In interpreting the reliability prong of the *Roberts* test, subsequent rulings examined a list of circumstances similar to the list appearing in OEC 803(18a)(b). Crawford v. Washington, 541 U.S. 36, 60–65 (2004) (listing various factors considered by courts applying the reliability test under *Roberts*). While *Crawford* overruled *Roberts*, several states such as Oregon have not eliminated language in their evidence statutes memorializing the *Roberts* criteria. *E.g.*, Snowden v. State, 846 A.2d 36, 39 n.7 (Md. Ct. Spec. App. 2004) (discussing the prevalence of "tender years statutes" that require assessment of reliability using *Roberts* standards and listing examples of such statutes); Wesley Fain, *The Constitutionality of Alabama's Tender Years Statute After* Crawford, 40 CUMB. L. REV. 919, 919–20 (2010).

61 OR. EVID. CODE 803(18a)(a).

Procedure for remote testimony by a vulnerable witness. OEC 803(24) sets forth guidelines for a young child or developmentally disabled witness to testify from a remote location via closed-circuit television. An expert must demonstrate that the witness in question is substantially likely to suffer severe emotional or psychological harm if required to testify in open court.[62] Oregon has basically memorialized the requirements of *Maryland v. Craig*[63] in an evidence rule.

Hearsay exception for a statement narrating domestic abuse. OEC 803(26) admits statements purporting to describe domestic violence, if the statement was recorded or made to a police officer, an emergency responder, or certain other categories of government employees.[64] This rule includes a reliability requirement that imports some of the *Roberts* jurisprudence.[65]

Broader hearsay exception for a dying declaration. While FRE 804(b)(2) allows dying declarations only in homicide prosecutions and civil trials,[66] OEC 804(3)(b) allows dying declarations in all categories of trials, including criminal prosecutions alleging crimes other than homicide.[67]

Hearsay exception for a statement made in a professional capacity. OEC 804(3)(e) admits a hearsay statement concerning observations made in the declarant's professional capacity and in the ordinary course of professional conduct, so long as the statements are at or near the time of the observations.[68]

Broader hearsay exception for forfeiture by wrongdoing. OEC 804(3)(f) and (g) are significantly broader than FRE 804(b)(6). Oregon's version of the doctrine allows a hearsay statement if the

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[62] OR. EVID. CODE 803(24).

[63] 497 U.S. 836, 853 (1990) (holding that the "State's interest in the physical and psychological well-being of child abuse victims [was] sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court" if denial of this face-to-face confrontation was necessary to protect the accuser from "emotional trauma").

[64] OR. EVID. CODE 803(26)(a)(A).

[65] OR. EVID. CODE 803(26)(a)(B); *Roberts*, 448 U.S. at 65–66; *see also supra* note 60.

[66] FED. R. EVID. 804(b)(2).

[67] OR. EVID. CODE 803(3)(b). Most states limit the dying declaration exception to civil cases and homicide prosecutions, but a few states follow Oregon's approach and admit this evidence in every category of case. *E.g.*, CAL. EVID. CODE § 1242 (West 2011); COLO. REV. STAT. § 13-25-119 (2010); KAN. STAT. ANN. § 60-460(e) (2009); WIS. STAT. ANN. § 908.045(3) (2009). For a discussion of the two alternatives, see Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 315–20 (2007).

[68] OR. EVID. CODE 804(3)(e).

opponent has purposefully procured the absence of the declarant, either through classic witness tampering[69] or through some other misconduct causing death or incapacity.[70] So long as the opponent intentionally and knowingly committed the act that caused the unavailability, the opponent need not have specifically intended that the declarant become unavailable as a trial witness.[71]

II
REASONS FOR OREGON'S DISTINCTIVE APPROACH

The Oregon Legislature has provided little record of the reasons for its refusal to adopt all of the provisions in the FRE. Nonetheless, it seems likely that Oregon's unique approach is due, at least in part, to five factors: the unusual strength of confrontation rights in Oregon, the state's zealous commitment to privacy, the populist tradition that has led Oregonians to trust juries and to distrust judges, the low tolerance for deceitful tactics by lawyers, and the state's special concern about domestic violence. The following subparts will explore each of these factors in turn.

A. Confrontation Rights in Oregon

The accused enjoys greater confrontation rights in Oregon courts than in federal courts. While the U.S. Constitution guarantees the accused the right "to be confronted with the witnesses against him,"[72]

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69 OR. EVID. CODE 804(3)(g).

70 OR. EVID. CODE 804(3)(f).

71 *See* OR. EVID. CODE 803(3)(f). Oregon approved its unique forfeiture rules in 2005. *See* 2005 Or. Laws 1232. These rules stand in contrast to the U.S. Supreme Court's ruling in *California v. Giles*, 554 U.S. 353 (2008). In *Giles*, the Court held that the constitutional doctrine of forfeiture by wrongdoing requires proof of specific intent to silence the declarant as a trial witness. *Id.* at 359–62. The *Giles* majority noted in a footnote that Oregon's forfeiture rules are broader than their counterparts in other states, and they are broader than the forfeiture doctrine that the Court approved in *Giles*. *Id.* at 367 n.2 ("Only a single state evidentiary code appears to contain a forfeiture rule broader than our holding in this case (and in *Crawford*) allow. . . . . The lone forfeiture exception whose text reaches more broadly than the rule we adopt is an Oregon rule adopted in 2005." (citations omitted)). Of course, the *Giles* holding applies only to hearsay offered against the accused, while the Oregon forfeiture rules apply to civil and criminal trials. The Oregon rules are not unconstitutional on their face because they do not necessarily offend the Confrontation Clause, which applies only when the government offers evidence against the accused.

72 U.S. CONST. amend. VI. The Sixth Amendment of the U.S. Constitution provides as follows:

the Oregon Constitution goes a step further. Article 1, section 11 of the Oregon Constitution grants to the accused the right "to meet the witnesses face to face"[73]—a right that the Oregon courts have interpreted to impose higher requirements than are necessary under the Federal Confrontation Clause.[74]

Oregon's unique confrontation clause places a heavy burden on prosecutors. They cannot offer hearsay against the accused when live testimony is available from the same declarant. Whether the prosecutor is invoking a restricted or unrestricted hearsay exception,[75] the Oregon Constitution will not abide the admission of hearsay against the accused until the prosecutor has shown that the declarant is unavailable. This requirement goes far beyond present federal constitutional jurisprudence.[76] Oregon is one of the few states that continue to enforce the "unavailability prong" of the *Roberts* test.[77]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

73 Article 1, section 11 of the Oregon Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor . . . .

OR. CONST. art. I, § 11.

74 State v. Moore, 334 Or. 328, 331–41 (2002) (discussing the difference between the federal and state confrontation clauses and declining to follow the post-*Roberts* federal confrontation jurisprudence that dispensed with the unavailability test when the prosecution offered evidence against the accused pursuant to the firmly rooted hearsay exception).

75 The term "restricted hearsay exception" refers to exceptions under OEC 804, all of which require as a predicate that the proponent show the declarant is unavailable for one of the enumerated reasons. OR. EVID. CODE 804(3). The term "unrestricted hearsay exception" refers to exceptions under OEC 803, which do not require unavailability. OR. EVID. CODE 803.

76 The unavailability requirement derives from *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). The Court's subsequent rulings dispensed with the unavailability requirement when the prosecution offered the evidence pursuant to a firmly rooted hearsay exception. *E.g.*, United States v. Inadi, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."). The Court abrogated

Commensurate with the preference for confrontation in Oregon's constitutional jurisprudence, the OEC assigns a high priority to cross-examination.[78] For example, the Oregon Legislature has memorialized some of the confrontation requirements of *Roberts* in hearsay rules such as OEC 803(18a) and OEC 803(26), and it has retained that language even after the U.S. Supreme Court struck down *Roberts* in 2004.[79] The Oregon Legislature has also memorialized the confrontation requirements for remote testimony by child witnesses.[80] Commentators have noted that confrontation of child witnesses is more common in Oregon due to the OEC's distinctive provisions for child witnesses.[81]

Oregon's preference for confrontation is evident in the OEC's list of unrestricted and restricted exceptions. Oregon seems wary of the

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Roberts altogether in *Crawford*. Crawford v. Washington, 541 U.S. 36, 60–65 (2004). Oregon, however, continues to apply the unavailability requirement in *Roberts* because Oregon shares the "preference for face-to-face accusation" that the U.S. Supreme Court discussed in *Roberts*. 448 U.S. at 65; *accord* State v. Lucas, 213 Or. App. 277, 278–79 (2007) (noting that Oregon continues to follow the unavailability requirement in *Roberts* even after *Crawford*); *Moore*, 334 Or. at 331–41 (indicating that Oregon's continued application of the unavailability test does not depend on the U.S. Supreme Court's continued adherence to that test).

[77] *See, e.g.*, State v. McGriff, 871 P.2d 782, 790 (Haw. 1994) (holding that the state constitution imposes the unavailability requirement); State v. Lopez, 926 P.2d 784, 789 (N.M. Ct. App. 1996) (same); *see also* State v. Branch, 865 A.2d 673, 371–72 (N.J. 2005) (declining to require the declarant's testimony or unavailability as a condition of admissibility, but stating that "the issue deserves careful study," and submitting the matter "to the Supreme Court Committee on the Rules of Evidence to consider whether a rule change would be advisable").

[78] Confrontation is important as a policy matter. Confrontation advances utilitarian objectives because it aids in the discovery of the truth. 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 1697 (1904) (characterizing cross-examination as "the greatest legal engine ever invented for the discovery of the truth"); 3 WILLIAM BLACKSTONE, COMMENTARIES *373 (indicating that the "open examination of witnesses . . . is much more conducive to the clearing up of truth"); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713) (adversarial testing "beats and bolts out the Truth much better"); *cf. Crawford*, 541 U.S. at 61–62 (discussing the utility of cross-examination). There is also an equitable rationale for confrontation; the accuser must be accountable in court for his accusation, and face-to-face confrontation assures accountability. Confrontation serves deontological objectives by according respect to both the declarant and the accused, and by granting them autonomy in giving and challenging evidence.

[79] *Crawford*, 541 U.S. at 60–65 (holding that *Roberts* is no longer good law).

[80] OR. EVID. CODE 803(24) (prescribing the procedure for closed-circuit testimony).

[81] Crawford, Davis *& the Right of Confrontation: Where Do We Go from Here?*, 19 REGENT U. L. REV. 507, 520 (2007) (printing comments of Robert Mosteller, a professor at Duke Law School, during a symposium on the Supreme Court's recent jurisprudence under the Confrontation Clause).

unrestricted hearsay exceptions in the FRE because these exceptions do not give preference to live testimony. Thus, Oregon has declined to adopt FRE 804(1), the unrestricted hearsay exception for present sense impressions. On the other hand, Oregon has adopted all of the restricted hearsay exceptions in the FRE. Oregon has even broadened the scope of OEC 804(3)(b), the restricted exception for dying declarations, and Oregon has added some restricted hearsay exceptions that do not appear in the FRE, such as OEC 804(3)(e) and (g). The curtailment of unrestricted hearsay exceptions, coupled with the expansion of restricted hearsay exceptions, suggests that Oregon favors confrontation of live declarants and feels more comfortable treating hearsay as "a last resort."

In many ways, cross-examination in Oregon courts is more robust than it is in federal courts. OEC 609 permits impeachment with convictions that are up to fifteen years old, while FRE 609 sets the time limit at ten years. OEC 609 allows impeachment with prior misdemeanor crimes of domestic violence, while FRE 609 excludes this evidence. OEC 609-1 specifically authorizes impeachment with evidence of bias; the FRE have no on-point rule for bias. While FRE 614 and 706 allow the judge to call lay and expert witnesses, the OEC does not—an omission that may reflect concern about the difficulty of cross-examining the "judge's witness."

In sum, Oregon demands a higher degree of confrontation than is minimally necessary in federal court. This fundamental difference finds expression in several unique provisions of the OEC that require, or at least facilitate, cross-examination.

B. Privacy Rights in Oregon

While Oregon favors confrontation in court, this state also zealously protects its citizens' right to privacy. The state has a libertarian culture that traces back to its frontier history. Oregonians have always enjoyed a large measure of privacy due to the state's sparse population relative to its size.[82] Ever since Lewis and Clark blazed a trail to the mouth of the Columbia River in 1805, Oregon has

[82] Of the thirty-six counties in Oregon, only one, Multnomah, is predominantly urban. *See Local Government*, OR. BLUE BOOK, http://bluebook.state.or.us/local/index.htm (last visited May 17, 2011) (providing detailed information about each county's population and area).

celebrated an "ethos of rugged individualism,"[83] and privacy is an important part of that legacy.

The drafters of the Oregon Constitution made sure that this state would protect privacy rights in a manner befitting its libertarian history. Article 1, section 9 of the Oregon Constitution defines the privacy right with language different from that used in the Federal Fourth Amendment, and Oregon courts have seized upon this difference as authorization to protect privacy rights more strictly.[84]

Oregon's deep commitment to privacy is evident in this state's criminal justice system. For example, Oregon courts have repudiated the federal "open fields" doctrine.[85] Oregon courts hold that warrants are necessary before police may monitor suspects' cars with GPS technology,[86] while the federal courts in this state permit such tracking.[87] Oregon courts have rejected the federal "good faith exception" to the exclusionary rule.[88] The Oregon Legislature prohibited state and local police officers from inquiring about the immigration status of any person.[89] Oregon lawmakers recently created a criminal offense for "invasion of personal privacy."[90]

Oregon's Rules of Civil Procedure also protect privacy to an unusual degree. Oregon does not allow civil litigants to use all the discovery techniques that are available in federal court. For example, interrogatories are not permissible in Oregon.[91] Oregon does not

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[83] Brian Fox, Op-Ed, *Oregon's Future at Risk*, OREGONIAN, Mar. 26, 2010, http://www.oregonlive.com/opinion/index.ssf/2010/03/oregons_future_at_risk.html.

[84] For an excellent discussion of the difference between the U.S. and Oregon constitutions with respect to privacy rights, see Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819, 851–59 (2008).

[85] State v. Dixson, 307 Or. 195, 208, 766 P.2d 1015, 1022 (1988) (en banc).

[86] State v. Campbell, 306 Or. 157, 172–73, 759 P.2d 1040, 1048–49 (1988) (holding that an electronic tracking device on an auto requires a warrant absent an emergency).

[87] United States v. Pineda-Moreno, 591 F.3d 1212, 1215–17 (9th Cir. 2010) (allowing police to install GPS devices on suspects' vehicles without search warrants).

[88] State v. Toste, 196 Or. App. 11, 21 n.4 (2004) (noting that Oregon lacks an equivalent to the federal good faith exception).

[89] OR. REV. STAT. § 181.850 (2009) (prohibiting state and local law enforcement officials from assisting in any way with investigation of immigration offenses).

[90] OR. REV. STAT. § 163.700 (2009) (criminalizing the "invasion of personal privacy," which includes photographing or otherwise recording a person in a state of nudity, among other provisions).

[91] *See* OR. R. CIV. P. 36 A (listing various discovery methods similar to those available in federal court, but omitting interrogatories).

allow civil litigants to depose their opponents' experts, or even to discover the identity of those witnesses, in advance of trial.[92]

Other legislative acts show Oregonians' deep concern about privacy rights. Oregon passed the strictest law in the nation to safeguard the personal information that employers maintain concerning their employees.[93] Oregon has pioneered legislation to protect genetic and medical privacy.[94] Oregon has prohibited the use of credit checks as a means of screening prospective employees.[95] Oregon legislators refused to cooperate in the federal government's recent attempt to establish a standardized ID card for U.S. citizens; among other concerns, legislators cited their fear that the new regime would compromise personal privacy.[96]

Given Oregon's zeal to protect privacy in so many different contexts, it is not surprising that the OEC has surpassed the FRE in safeguarding the personal information of witnesses. Oregon has established strong evidentiary privileges for a wide range of relationships. Oregon recognizes the lawyer-client privilege, the psychotherapist-patient privilege, the physician-patient privilege, the nurse-patient privilege, the school employee-student privilege, the social worker-client privilege, the spousal privilege, the clergy-penitent privilege, the counselor-client privilege, the stenographer-employer privilege, the interpreter privilege, and the informer privilege, among others.[97] Oregon courts enforce privileges strictly,

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[92] *See* OR. R. CIV. P. 36 B (indicating scope of permissible pretrial discovery); Gwin v. Lynn, 344 Or. 65, 71, 176 P.3d 1248, 1252 (2008) ("ORCP 36 B does not authorize trial courts to order pretrial disclosure of the identity and intended testimony of expert witnesses.").

[93] Phillip Gordon, *New Oregon Law Imposes Most Stringent Information Security Standards Yet on Employers*, LITTLER WORKPLACE PRIVACY COUNSEL (Aug. 13, 2007), http://privacyblog.littler.com/2007/08/articles/data-security/new-oregon-law-imposes-most-stringent-information-security-standards-yet-on-employers/.

[94] *Oregon Genetic Privacy Law*, OR. HEALTH AUTHORITY, http://public.health.oregon.gov/DiseasesConditions/GeneticConditions/Pages/research.aspx (last visited May 17, 2011) (containing summaries of genetic privacy laws in Oregon).

[95] Only a handful of states have such laws. Jessica Van Berkel, *New Law Prohibits Credit History Checks by Most Employers*, OREGONIAN, June 30, 2010, http://www.oregonlive.com/politics/index.ssf/2010/06/new_law_prohibits_credit_check.html.

[96] Michelle Cole, *Oregon Lawmakers Reject Federal Real ID Costs*, OREGONIAN, May 29, 2009, http://www.oregonlive.com/politics/index.ssf/2009/05/oregon_lawmakers_reject_federa.html (reporting that the Oregon House of Representatives approved a bill that directed state agencies not to comply with the federal "Real ID" law).

[97] OR. EVID. CODE 503–510 (setting forth various evidentiary privileges); *see supra* notes 31–42 and accompanying text. The FRE do not enumerate privileges in the federal system. Most states have not established as many evidentiary privileges as Oregon has,

declining to find waiver except in clear cases,[98] and prohibiting attorneys from commenting on the invocation of a privilege.[99]

Outside the context of privilege law, the OEC includes several unique provisions that reflect the state's respect for privacy. Oregon's rape shield law, OEC 412, goes much further than its federal counterpart in protecting the privacy of complainants in rape cases; Oregon's version excludes evidence of the complainant's dress, reputation, and prior consensual sexual history, unless the latter is offered for a narrow list of permissible purposes.[100] OEC 311 lists presumptions that seem intended, at least in part, to protect privacy: the presumption that children born in wedlock are legitimate,[101] the presumption that a man and woman holding themselves out to be married are in fact married,[102] and the presumption that a person takes ordinary care of the person's own concerns.[103]

In sum, several unique provisions of the OEC are attributable to this state's unusual commitment to privacy. Oregonians have long valued their freedom from intrusion by others, including the government. Such values have influenced the development of evidentiary rules that protect privacy more than their federal counterparts.

C. Oregon's History of Populism and Faith in Juries

Oregon is arguably the most populist state in the nation. No state has a stronger tradition of direct democracy than does Oregon. Over the last century, Oregonians have voted on more initiatives and

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and most states do not enforce their privileges as strictly as Oregon does. *See* 3 WEINSTEIN & BERGER, *supra* note 1, §§ 501–10.

98 *E.g.*, OR. EVID. CODE 511 (providing for waiver of privilege by voluntary disclosure); OR. EVID. CODE 512 (refusing to find waiver for matters disclosed under compulsion or without the opportunity to claim privilege).

99 OR. EVID. CODE 513 (prohibiting adverse comment on, or inference from, invocation of privilege).

100 *See supra* notes 28–30 and accompanying text (comparing OEC 412 with FRE 412).

101 OR. EVID. CODE 311(1)(v) (establishing the presumption that "[a] child born in lawful wedlock is legitimate").

102 OR. EVID. CODE 311(1)(u) (establishing the presumption that "[a] man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage").

103 OR. EVID. CODE 311(1)(b) (establishing the presumption that "[a] person takes ordinary care of the person's own concerns").

referenda than have voters in any other state.[104] Some of the most important laws in this state's history—relating to crime, property rights, taxation, assisted suicide, and environmental protection, among other topics—owe their genesis to ballot measures, not to legislative enactments.[105]

Just as Oregon reveres direct democracy, Oregon places great trust in juries. The jury allows the common man to control the courtroom in the same way he controls the rest of the state government. The Oregon Constitution uses strong language in Article 1, section 17, which provides that "the right of Trial by Jury shall remain inviolate."[106] Scholars comparing state constitutions have noted that Oregon's clause requiring jury trials uses more emphatic language than is typical in such clauses.[107]

Attempts to check the power of juries have usually proven unsuccessful in this state. When advocates for tort reform persuaded legislators to approve a $500,000 cap on noneconomic damages, the Oregon Supreme Court struck down this law as a limitation on the right to trial by jury.[108] Oregon gained notoriety when the state's appellate courts reinstated a jury's $80 million verdict against Philip Morris, then reinstated the same verdict again after the U.S. Supreme Court remanded the case based on concerns about possible

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104 Norman R. Williams, *Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting* Pacific Telephone, 87 OR. L. REV. 979, 980–81 (2008) ("[B]etween 1902 and 2007, Oregonians put 340 initiatives and 62 referenda on the ballot. Of those, 118 of the initiatives and 21 of the referenda passed. During the same period, the Oregon Legislature referred 407 measures to the people, of which 233 passed."). Oregon leads the nation in its reliance on direct democracy. *See* Jeff Mapes, *Only a Few Ballot Initiatives Look to Qualify for Oregon Ballot This November*, OREGONIAN, Apr. 3, 2010, http://www.oregonlive.com/politics/index.ssf/2010/04/only_a_few_ballot_initiatives.html (observing that Oregon "has had more ballot initiatives than any other state—357—since it pioneered direct democracy in 1904").

105 *See Oregon Election History*, OR. BLUE BOOK, http://bluebook.state.or.us/state/elections/elections06.htm (last visited May 17, 2011) (maintaining a list of all ballot measures in Oregon elections and the results in each election).

106 OR. CONST. art. I, § 17.

107 Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 77 (2008) (noting that the Oregon Constitution uses relatively emphatic language requiring jury trials in civil cases).

108 Lakin v. Senco Prods., Inc., 329 Or. 62, 78–79, 987 P.2d 463, 473 (1999) (striking down limits on damage awards under OR. REV. STAT. § 18.560(1) because this law violated the constitutional right to jury trials in civil cases under Article I, section 17 of the Oregon Constitution), *clarified*, 329 Or. 369, 987 P.2d 476 (1999).

overreaching by the jury.[109] Oregon stands by its controversial rule permitting nonunanimous jury verdicts in felony cases, even though forty-eight states and the U.S. courts insist upon unanimous verdicts in all felony trials.[110] Oregon voters even approved a measure allowing prosecutors to veto defendants' waivers of jury trials in criminal cases.[111]

Oregon's confidence in juries manifests itself in several distinctive provisions of the OEC. While FRE 404(b) forbids the introduction of propensity evidence except for limited purposes, OEC 404(4) allows the use of propensity evidence in criminal cases: "In criminal cases, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant . . . ."[112] Oregon also has declined to adopt FRE 704(b), the so-called "Hinckley Rule" that prevents the jury from considering expert testimony on the mental state of the accused. OEC 609 allows juries to consider convictions of witnesses that occurred within the prior fifteen years,[113] while the time limit under FRE 609 is ten years.[114] As these examples illustrate, Oregon trusts its juries to hear a wider range of evidence than is admissible in federal court.

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109 Williams v. Philip Morris, Inc., 344 Or. 45, 61, 176 P.3d 1255, 1263–64 (2008) (reinstating a jury verdict awarding $80 million in damages, even though the U.S. Supreme Court had remanded the case); *see also* Ashbel S. Green, *Justices Uphold Cigarette Damages: Oregon's High Court Once Again Affirms $79.5 Million Verdict Against Philip Morris*, OREGONIAN, Feb. 1, 2008, http://blog.oregonlive.com/oregonianextra/2009/03/history_of_the_williams_family.html#11.

110 UCLA law professor Eugene Volokh has challenged the Oregon rule by filing a petition for writ of certiorari on September 9, 2010, in *Herrera v. Oregon*. Petition for a Writ of Certiorari, Herrera v. Oregon (No. A141205), *available at* http://www.law.ucla.edu/volokh/herrera.pdf. The U.S. Supreme Court previously rejected such a challenge to Oregon's rule in *Apodaca v. Oregon*, 406 U.S. 404 (1972). For a general discussion of Oregon's distinctive rule and the cert petition filed by Professor Volokh, see Editorial, *A New Challenge to Non-Unanimous Jury Convictions*, WASH. EXAMINER (Sept. 17, 2010), http://www.washingtonexaminer.com/opinion/blogs/Examiner-Opinion-Zone/A-new-challenge-to-non-unanimous-jury-convictions-103160269.html (indicating that only Oregon and Louisiana allow nonunanimous verdicts in felony trials).

111 In 1996, Oregonians approved Ballot Measure 40, which gave the public, through the prosecutor, the right to demand jury trial in criminal cases. The measure passed with a majority of nearly sixty percent, but the Oregon Supreme Court later invalidated this result because the ballot measure in question stated multiple questions in violation of the Oregon Constitution. Armatta v. Kitzhaber, 327 Or. 250, 256–58, 959 P.2d 49, 53 (1998) (holding that multiple propositions require separate votes).

112 OR. EVID. CODE 404(4).

113 OR. EVID. CODE 609(3)(a).

114 FED. R. EVID. 609(b).

Conversely, Oregon's evidence rules reflect a distrust of judges. Perhaps fearing that judges would usurp the fact-finding role of juries, the framers of the Oregon rules declined to adopt provisions of the FRE that allow judges to call and question witnesses, and that allow judges to summon expert witnesses at public expense.[115] OEC 309, which governs presumptions, departs from the federal model in emphasizing that "[t]he judge is not authorized to direct the jury to find a presumed fact against the accused."[116] The Oregon rules also differ from the federal rules in allowing jurors to testify after rendering their verdict; Oregon's approach permits jurors to reveal procedural improprieties that occurred during the trial, including improper influence brought to bear on the jury by the judge.[117]

Oregon's populist values pervade the state's evidentiary rules. Provisions of the FRE that limit the scope of evidence heard by the jury, or that increase the power of judges in the fact-finding process, are conspicuously absent from the OEC.

D. Oregon's Insistence on Honesty and Fair Play in Litigation

Oregon takes an unusually hard line against deceit by lawyers. The Oregon Supreme Court has interpreted the state's ethics code to prohibit *any* dishonesty by lawyers, even the use of undercover investigative techniques that are common in the other forty-nine states.[118] The Oregon Supreme Court issued an order insisting upon

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115 The OEC has no counterpart to FRE 614, which allows the court to call and interrogate witnesses.

116 OR. EVID. CODE 309(1).

117 *Compare* FED. R. EVID. 606 (preventing a juror from testifying in the present trial or in a subsequent hearing concerning the jury's deliberations) *with* OR. EVID. CODE 606 (preventing a juror from testifying in the present trial but not preventing the juror from testifying in a subsequent hearing concerning the jury's deliberations).

118 *In re* Conduct of Gatti, 330 Or. 517, 532–33, 8 P.3d 966, 976 (2000) (en banc) (interpreting Oregon's ethical rule against dishonesty by lawyers, then labeled DR 1-102(A)(3), to forbid lawyers' involvement in deceptive undercover investigations). While all states share the same provision in their codes of ethics, every other court addressing this issue has held that the rule against dishonesty does not automatically bar lawyers from supervising deceptive undercover operations by police. *See, e.g.*, Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998) (holding that a public or private lawyer could properly employ an undercover investigator to detect ongoing violations of law, especially where detection of these violations would otherwise be difficult); MINN. LAWYERS PROF'L RESPONSIBILITY BD., OP. NO. 18, SECRET RECORDINGS OF CONVERSATIONS (1996) (same); BD. OF COMM. ON GRIEVANCES & DISCIPLINE, SUP. CT. OF OHIO, OP. 97-3 (1997) (same); ETHICS ADVISORY COMM., UTAH STATE BAR, OP. 02-05 (2002) (a government attorney does not violate the ethical rule prohibiting dishonesty if the lawyer directs a covert investigation involving dishonesty); VA. STATE BAR, VA.

civility and candor by lawyers appearing in the state's courts.[119] This concern about deceit by lawyers is not new. A notorious 1974 ruling by the Oregon Supreme Court suspended an assistant attorney general who mischaracterized answers given by a government witness in response to a discovery request.[120]

When Oregon legislators considered whether to adopt the FRE at the end of the 1970s, they modified rules that appeared to be too indulgent of mendacity. For example, Oregon adopted a unique crime-fraud exception to various privileges, allowing disclosure where necessary to reveal "a clear and serious intent" to commit certain categories of crime.[121] The federal crime-fraud exception is more restrictive,[122] and its narrow scope hinders the detection of some criminal and fraudulent schemes.

Oregon's intolerance of gamesmanship manifests itself most clearly in the OEC's unique hearsay exceptions. OEC 804(3)(f) and (g), which set forth the doctrine of forfeiture by wrongdoing, are particularly noteworthy. If an opponent of hearsay has purposefully procured the unavailability of a hearsay declarant, or has intentionally engaged in conduct that would foreseeably cause such unavailability, then that opponent forfeits any objection that might otherwise be available under the hearsay rules.[123] The U.S. Supreme Court indicated recently that Oregon's doctrine of forfeiture by wrongdoing is the most expansive in the nation.[124] Similarly, Oregon's version of the dying declaration exception is among the most expansive in the

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LEGAL ETHICS OP. 1738, ATTORNEY PARTICIPATION IN ELECTRONIC RECORDING WITHOUT CONSENT OF PARTY BEING RECORDED (2002) (same). No state other than Oregon interpreted this rule to prohibit lawyers' involvement in deceptive undercover investigations.

119 OR. STATE BAR, STATEMENT OF PROFESSIONALISM (2006), *available at* http://www.osbar.org/_docs/rulesregs/professionalism.pdf.

120 *In re* Preston, 269 Or. 271, 272, 525 P.2d 59, 59 (1974) (en banc) (indicating that the respondent was less than candid in complying with interrogatories directed at the government witness).

121 *Supra* notes 43–44 and accompanying text.

122 *See, e.g.*, *In re* Green Grand Jury Proceedings, 492 F.3d 976, 982–83 (8th Cir. 2007) (setting forth elements of the crime-fraud exception and collecting opinions in other federal circuit courts listing similar requirements).

123 OR. EVID. CODE 804(3)(f)–(g).

124 In *California v. Giles*, 554 U.S. 353 (2008), the Court noted that Oregon's forfeiture rules are broader than their counterparts in other states, and they are broader than the federal forfeiture rule in FRE 804(b)(6). *Id.* at 367 n.2.

nation, reflecting this state's commitment to the equitable principle[125] that one who kills a witness should not profit from the absence of that witness at trial. Simply put, Oregon's evidentiary rules do not reward the litigant or attorney who has unclean hands.

E. Oregon's Special Concern About Domestic Violence and Sexual Assault

Oregon has earned a national reputation for innovating new strategies to facilitate prosecution of domestic violence and sexual assault.[126] A coalition of Democratic and Republican legislators has found common ground in the campaign to protect victims from such crimes.[127] While Oregon's Democrats are generally wary of laws and rules that burden the accused, the imperative of prosecuting violence against women has generally trumped concerns about procedural protections for the accused.

Oregon's evidentiary rules are replete with special provisions for prosecutions of domestic violence and sexual assault. Several examples appear in Oregon's hearsay rules. OEC 803(18a) admits hearsay statements from children or seniors complaining of abuse.[128] OEC 803(24) prescribes a procedure for young children or disabled witnesses to testify from a remote location via closed circuit

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125 One rationale for the dying declaration exception is the equitable concern that murderers should be accountable for the hearsay statements of their victims. Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 467 (2004) ("[T]he admissibility of dying declarations . . . is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial."). FRE 804(b)(2), the federal version of this exception, admits a hearsay statement by a person who believes his or her death is imminent, if the statement concerns the cause or circumstances of the declarant's death, and if the present proceeding is either a civil trial or a prosecution for homicide. FED. R. EVID. 804(b)(2). Oregon is among a handful of states extending the dying declaration exception to all categories of criminal prosecutions, not just homicide cases. *See supra* notes 66–67 and accompanying text.

126 Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE L. REV. 1031, 1033 (2003) (discussing Oregon's leadership in innovating strategies for prosecuting domestic violence).

127 *E.g.*, Vicki Walker & Tom Lininger, *Bill Would Help Prosecute Batterers*, REGISTER-GUARD (Eugene, Or.), Apr. 18, 2004 (copy on file with author) (sounding themes that would appeal to both Democrats and Republicans). *See generally* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 582–86 (2009) (explaining the alliance between progressive feminists and conservative advocates of crime control).

128 OR. EVID. CODE 803(18a).

television when necessary to avoid psychological harm.[129] OEC 803(26) admits statements narrating domestic violence to police and other professionals within twenty-four hours of the incident.[130] Neither the FRE nor any other state evidence code devotes so many of its unrestricted hearsay exceptions to the express purpose of prosecuting intimate violence.[131]

The OEC freely admits evidence of past misconduct by the accused if the present prosecution alleges domestic violence or sexual assault. OEC 609 allows impeachment of testifying defendants with evidence of their prior misdemeanors involving domestic violence, even if those misdemeanor offenses did not include dishonesty as an element.[132] FRE 609 would never abide such evidence.[133] Similarly, OEC 404-1 departs from FRE 404 in allowing the prosecution to admit evidence that the accused has engaged in a pattern of abuse or harassment; there is no need for the defendant to "open the door" before the prosecution can offer such evidence in Oregon.[134] By contrast, OEC 412 is far stricter than its federal counterpart in limiting evidence of the complainant's history in cases involving allegations of rape.[135] Critics complain that Oregon has tilted the playing field significantly in such cases.[136]

The special rules for prosecution of domestic violence and sexual assault are not doctrinally consistent with the rest of the OEC. There is no principled reason why intimate violence requires such special treatment, while the OEC relegates other categories of violent crime to the baseline rules. The only explanation lies in the politics of violence against women, which make for strange bedfellows in the Oregon Legislature.

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129 OR. EVID. CODE 803(24).

130 OR. EVID. CODE 803(26).

131 *See* FED. R. EVID. 803; 6 WEINSTEIN & BERGER, *supra* note 1, art. VIII (comparing states' analogs to FRE 803).

132 OR. EVID. CODE 609(2).

133 FED. R. EVID. 609 (allowing impeachment with convictions only for misdemeanor offenses that include dishonesty as an element).

134 *Compare* OR. EVID. CODE 404-1 *with* FED. R. EVID. 404.

135 *Compare* OR. EVID. CODE 412 *with* FED. R. EVID. 412. OEC 412 is longer than FRE 412 and sets forth more limitations on the use of evidence concerning the prior sexual activity and dress of the complainant.

136 *E.g.*, Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Objection*, 37 WILLAMETTE L. REV. 299, 304–06 (2001) (noting criticisms of OEC 803(26) raised by the Oregon Criminal Defense Lawyers Association and the Juvenile Rights Project).

III
ADVANTAGES OF ADOPTING THE NEW FRE IN OREGON

Adoption of the restyled FRE could prove beneficial in Oregon for several reasons. First, the new language would simplify Oregon's evidentiary rules, eliminating idiosyncratic and confusing language. Second, the adoption of the FRE would enlarge the universe of citable case law for Oregon judges and practitioners. Third, the standardization of evidence law could help to facilitate the regional practice of law. Fourth, greater uniformity could reduce the incentives for "forum shopping." Finally, adoption of the FRE would provide an excuse to fix imperfections in the OEC, particularly in OEC 608 and 609. Each of these potential advantages is discussed in turn below. Part IV then considers disadvantages of importing the restyled FRE to Oregon.

A. Enhanced Clarity

The primary advantage of the restyled FRE is their simplification of the evidentiary rules. Such clarity streamlines trial practice and improves the likelihood that cases will settle in advance of trial because parties will be better able to predict the admissibility of their evidence at trial. Rates of malpractice would hopefully drop as lawyers would better understand the requirements of the evidentiary rules, and the number of convictions reversed due to ineffective assistance of counsel would hopefully drop as well. Pro se litigants would welcome the simplification of the OEC, especially now that the recession has necessitated that a growing number of litigants represent themselves. Law students would find evidence law more accessible, and the similarity of the FRE to the OEC would ease the difficulty of preparing for the Oregon Bar Exam.

One way that the drafters of the restyled FRE improved the clarity of the rules is by substituting plain language for the existing versions of the rules, which were often convoluted, technical, and verbose. The restyled FRE minimized the use of inherently ambiguous words; for example, the restyling eliminated the use of "shall," which can mean "must," "may," or something else, depending on the context.[137] The restyled FRE reduced the use of inconsistent terms, such as switching between "accused" and "defendant" in a single rule, or

[137] RESTYLED FED. R. EVID. 101 advisory committee's note, *available at* http://federalevidence.com/pdf/2009/Misc/FRE_Restyle_101-415.pdf.

switching between "party opponent" and "opposing party" within the same rule.[138] The restyled rules reduced the use of redundant "intensifiers" because these phrases merely state the obvious and suggest unwarranted inferences when they are absent from other rules.[139] The restyled FRE present many of the rules in outline form, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists.[140]

A few examples show the improvement to the rules. Some rules have benefited greatly from the deletion of redundant or unnecessary language. Examples include FRE 401,[141] FRE 601,[142] and FRE 604.[143] Oregon has followed the original federal model for all three

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[138] *Id.*

[139] *Id.*; *see, e.g.*, RESTYLED FED. R. EVID. 104(c) (omitting "in all cases"); RESTYLED FED. R. EVID. 602 (omitting "but need not"); RESTYLED FED. R. EVID. 611(b) (omitting "in the exercise of discretion").

[140] RESTYLED FED. R. EVID. 101 advisory committee's note.

[141] The current version of FRE 401 reads as follows:

> RULE 401. DEFINITION OF "RELEVANT EVIDENCE." "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 restyled FRE 401 reads as follows:

> RULE 401. TEST FOR RELEVANT EVIDENCE. Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

[142] The current version of FRE 601 reads as follows:

> RULE 601. GENERAL RULE OF COMPETENCY. Every person is competent to be a witness except as otherwise provided in these rules. 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 competency of a witness shall be determined in accordance with State law.

The restyled FRE 601 reads as follows:

> RULE 601. COMPETENCY TO TESTIFY IN GENERAL. Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

[143] The current version of FRE 604 reads as follows:

> RULE 604. INTERPRETERS. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

The restyled FRE 604 reads as follows:

> RULE 604. INTERPRETER. An interpreter must be qualified and must give an oath or affirmation to make a true translation.

rules,[144] so Oregon should strongly consider adopting the restyled versions.

The use of vertical lists has significantly improved several rules. FRE 104(c),[145] FRE 609(d),[146] FRE 702,[147] and FRE 803(6)[148] all

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144 Of course, Oregon would not need to adopt the second sentence of the restyled FRE 601, which specifies which state's competency rules will apply in a federal diversity action.

145 The current version of FRE 104(c) reads as follows:

> (c) HEARING OF JURY. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

The restyled FRE 104(c) reads as follows:

> (c) MATTERS THAT THE JURY MUST NOT HEAR. A hearing on a preliminary question must be conducted outside the jury's hearing if:
>
> (1) the hearing involves the admissibility of a confession;
>
> (2) a defendant in a criminal case is a witness and requests that the jury not be present; or
>
> (3) justice so requires.

146 The current version of FRE 609(d) reads as follows:

> (d) JUVENILE ADJUDICATIONS. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The restyled version of FRE 609(d) reads as follows:

> (d) JUVENILE ADJUDICATIONS. Evidence of a juvenile adjudication is admissible under this rule only if:
>
> (1) it is offered in a criminal case;
>
> (2) the adjudication was of a witness other the defendant;
>
> (3) a conviction of an adult for that offense would be admissible to attack the adult's credibility; and
>
> (4) admitting the evidence is necessary to fairly determine guilt or innocence.

147 The current version of FRE 702 reads as follows:

> RULE 702. TESTIMONY BY EXPERTS. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The restyled FRE 702 reads as follows:

became much clearer when presented with progressively indented subpoints. The reorganization makes the rules easier to scrutinize quickly, allowing the reader to find the relevant portion right away. Oregon borrowed the old versions of all four rules from the FRE, so Oregon should update the OEC in accordance with the revisions to the FRE.

A few "restylings" of the FRE actually introduce slight substantive nuances. For example, the old version of FRE 201(f) provides that judicial notice "may be taken at any stage of the proceeding." This

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RULE 702. TESTIMONY BY EXPERT WITNESSES. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

148 The current version of FRE 803(6) reads as follows:

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The restyled FRE 803(6) reads as follows:

(6) RECORDS OF A REGULARLY CONDUCTED ACTIVITY. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity; and

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

language is objectionable because, to the extent that it is accurate, it is unnecessary. The language also seems to be somewhat misleading because judicial notice is not permissible on appeal in a criminal case.[149] The restyled version of the FRE drops subpoint (f) entirely. Similarly, the restyling of FRE 407 has improved that rule by making clear that evidence of subsequent remedial measures is admissible only to prove ownership, control, or feasibility when the opponent has raised a genuine dispute as to these matters.[150] The present version of FRE 407 uses the qualifier "if controverted" at the end of several permissible purposes, creating ambiguity as to whether it modifies the whole or just the last antecedent.[151] "Restylings" of this sort have both substantive and stylistic dimensions, but they would be welcome additions to the OEC.

The present opacity of the FRE is not an urgent problem, but it needlessly causes confusion, hinders efficiency, and impedes pro se practice. The restyled FRE clarify the original rules without distorting their meaning. Oregon would benefit by adopting at least

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[149] *E.g.*, United States v. Jones, 580 F.2d 219, 224 (6th Cir. 1978) (holding that judicial notice is not permissible on appeal in a criminal case because it would violate the right to jury trial).

[150] The current version of FRE 407 reads as follows:

> RULE 407. SUBSEQUENT REMEDIAL MEASURES. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. 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 converted, or impeachment.

The restyled FRE 407 reads as follows:

> RULE 407. SUBSEQUENT REMEDIAL MEASURES. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

[151] As applied in statutory construction, the rule of the last antecedent provides that a modifier generally refers to the most proximate prior noun. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (6th ed. 2000).

some of the restyled FRE, so litigants in this state can more easily understand the rules of evidence.

B. Expansion of Citable Case Law

Oregon attorneys sometimes complain about the dearth of appellate court decisions interpreting this state's evidentiary rules. There are only two appellate courts in Oregon: the Oregon Supreme Court and the Oregon Court of Appeals. Oregon's appellate courts issue approximately thirty to fifty opinions per year that cite the terms "Oregon Evidence Code" or "OEC."[152] A significant portion of these decisions address the evidentiary rules only in dicta or in summaries of procedural history, so the actual number of opinions interpreting the OEC is significantly less than thirty to fifty per year.

States considering whether to adopt national uniform rules have sometimes cited the benefit of enlarging the case law available to practitioners and judges in those states. For example, when Kentucky decided to adopt the FRE, an advisory committee noted that "there is a substantial and growing body of case law construing these Rules, case law which can be of invaluable assistance in the application of a new set of evidence rules for Kentucky."[153] The widespread adoption of a standardized code helps small states achieve the economies of scale that are necessary to establish a comprehensive body of case law.

C. Facilitation of Regional Practice

Oregon lawyers increasingly practice in other states. Oregon's largest city, Portland, sits across the Columbia River from Vancouver, a sizeable city in Washington, and the citizens of these cities interact as if they live in the same community. As the number of interstate commercial transactions grows, clients require lawyers who can represent them in several different jurisdictions.[154] At least fifty law firms in Portland have offices in one or more other states.[155] In

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[152] These figures derive from the following search in the OR-CS database of Westlaw: da(last 10 years) & ("oregon evidence code" OEC).

[153] Garrett v. Commonwealth, 48 S.W.3d 6, 13 (Ky. 2001) (quoting KY. R. EVID. prefatory note (1989)).

[154] Fried, *supra* note 12, at 52 (noting the increasing prevalence of interstate practice).

[155] Martindale Hubbell maintains a searchable database that lists all the firms in Portland and indicates which firms have an office in another state as well. A search of this database on November 15, 2010, indicated that at least fifty firms in Portland have offices

addition to lawyers at these multistate firms, a wide range of other lawyers—including government officials, in-house counsel for businesses of all sizes, and even solo practitioners—are handling cases that require them to cross state lines. The volatility of the economy has only heightened the interest in interstate practice, as lawyers are more willing than ever to travel great distances in order to find work.

State bars are recognizing the increasingly interstate character of legal practice, and many are taking steps to assist lawyers whose caseloads straddle state boundaries. The Oregon Bar has entered into a reciprocal arrangement with thirty-eight other state bars, whereby members of one bar may gain admission to the other bars after having served as a lawyer in good standing for three years.[156] The state bars have amended their rules regulating unauthorized practice of law, and they have allowed limited practice by lawyers admitted in other states.[157]

In light of this trend toward the regional integration of law practice, the standardization of evidentiary rules is a sensible proposition. Uniformity in evidence rules reduces inefficiency in interstate practice.[158] The greater the harmony between the OEC and neighboring states' evidence codes, the more easily Oregon-based lawyers can practice in those states. Oregon, Idaho, and Washington have all modeled their evidence codes after the FRE, so these jurisdictions may wish to remain in step with one another by adopting the restyled federal rules.

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in other states. The database is available at MARTINDALE.COM, http://www.martindale.com/Find-Lawyers-and-Law-Firms.aspx (last visited May 17, 2011).

156 *Admissions*, OR. STATE BAR, http://www.osbar.org/admissions#reciprocity (last visited May 17, 2011) (detailing Oregon's policy on reciprocal agreements).

157 *See, e.g.*, OR. R. PROF'L CONDUCT 5.5 (setting forth many procedures through which lawyers may appear on a short-term basis, even without membership in the bar of that jurisdiction). The foreign lawyer may seek *pro hac vice* admission, may associate with local counsel, or many confine his or her work to some tasks for which local admission is not necessary, such as mediation, interviews of witnesses, or negotiation of contracts. *Id.* Prior to 2005, the Oregon Code of Professional Responsibility was less accommodating of interstate practice. DR 3-101(B) provided simply that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." OR. CODE OF PROF'L RESPONSIBILITY, DR 3-101(B) (2003).

158 *But see* Kirgis, *supra* note 14, at 813–31 (suggesting that uniform evidence rules are not crucial for efficiency and that the major challenges in interstate trial practice arise from the novelty of each case and the logistics of trial preparation rather than from the variation between states' evidence rules).

D. Decreased Incentives for "Forum Shopping"

Parties filing lawsuits often have a choice of venues. They may choose between many states in which there are sufficient minimum contacts for jurisdiction. They may also choose between the state and federal courts, assuming that the matter implicates a federal question, meets the requirements for diversity jurisdiction, or otherwise qualifies for hearing in a federal court.

Criminal prosecutions are also portable. In a case involving interstate criminal activity, prosecutors can elect to file charges in one or more of the states in which the acts occurred, or prosecutors may file charges in federal court. Even purely intrastate crimes, such as drug and gun offenses, are potentially subject to dual federal and state jurisdiction. The U.S. Code has criminalized over 4500 offenses, and it overlaps significantly with state criminal codes.[159]

The potential to file in many different fora naturally invites "forum shopping"—i.e., the comparison of advantages and disadvantages that each jurisdiction might offer. If evidence rules vary significantly between jurisdictions, these differences might become a factor in the selection of a forum.[160] There is usually no practical remedy for the party aggrieved by an opponent's forum shopping, although some courts have listed forum shopping among the factors that might support abstention.[161]

Forum shopping is objectionable for a number of reasons. It could require defendants to appear in faraway jurisdictions. It allows the plaintiff or prosecutor to select the very most favorable system of rules. It erodes public confidence in the judicial system because the party on offense gets to "customize" the set of rules according to that party's liking.

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[159] *E.g.*, Lindsey C. Boney IV, *Forum Shopping Through the Federal Rules of Evidence*, 60 ALA. L. REV. 151, 188–89 (2008) (noting that differences in evidence law and other procedural rules lead to forum shopping).

[160] Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21 (2010) ("Congress has slowly but surely obtained a general police power to enact virtually any offense, adopted repetitive and overlapping statutes, criminalized behavior that is already well covered by state law, created a vast web of regulatory offenses, and extended federal jurisdiction to almost any sort of deception or wrongdoing, virtually anywhere in the world. At last count, there were about 4500 federal crimes on the books, with the largest portion enacted over the past four decades.").

[161] Anthony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 188 (2000) (noting that forum shopping or "rule-of-evidence shopping" might be a factor influencing a court's decision to abstain).

Uniform rules reduce the opportunities for forum shopping. While other reforms might also be helpful—e.g., the curtailment of overlapping substantive jurisdiction and the limitation of prosecutors' discretion to file charges wherever they please—the standardization of procedural rules such as evidence codes will be a crucial part of the campaign to reduce forum shopping.

E. Significant Changes to the Substance of the OEC

One additional advantage of adopting the restyled FRE is that Oregon could copy a few federal rules that are substantively different from, and superior to, their counterparts in Oregon. The restyling project did not change the substance of these rules, but the states' review of the restyled FRE provides an excuse to consider substantive differences between the FRE and OEC that predated the restyling.

Oregon should consider importing two federal rules that are substantively different from their counterparts in the OEC. The first is FRE 608(b). That rule allows impeachment with specific unconvicted acts that bear on character for truthfulness—either acts by the witness himself or by another about whom the witness has given opinion or reputation evidence inconsistent with the specific acts.[162] FRE 608(b) requires the impeaching attorney to take the answer of the witness, rather than proving up the acts by extrinsic evidence.[163] OEC 608(2) is far more restrictive than FRE 608(b). Oregon's rule not only bans extrinsic evidence of specific unconvicted acts but also prohibits the impeaching attorney from inquiring at all about such acts on cross-examination.[164] This

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[162] The restyled version of FRE 608(b) provides as follows:

> (B) SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> (1) the witness; or
>
> (2) another witness whose character the witness being cross-examined has testified about.

[163] FED. R. EVID. 608(b).

[164] OEC 608(2) provides as follows: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of a crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness." OR. EVID. CODE 608(2).

limitation is inconsistent with Oregon's general preference for rigorous confrontation and cross-examination.[165] OEC 608(2) also undermines the OEC's goal of promoting candor in court because witnesses can give general opinion and reputation evidence without any accountability when the specific facts contradict these generalizations.[166] Oregon made a mistake in adopting its unique version of OEC 608(2) back in 1981, and the restyled version of FRE 608(b) would fit better in the overall schedule of the OEC at the present time.

A second federal rule that presents substantive advantages over its Oregon counterpart is FRE 609(a). This rule sets forth the procedure for impeaching witnesses with evidence of convictions that bear on character for truthfulness.[167] Until 2001, Oregon adhered to the federal model, permitting impeachment with felonies and misdemeanor crimes involving dishonesty and false statements. In 2001, the Oregon Legislature added a third category of crimes to the list of impeachable offenses under OEC 609. When a defendant is prosecuted for certain crimes of violence against a family or household member, and when that defendant elects to testify, the prosecutor may impeach the defendant with a prior misdemeanor conviction for a crime involving assault, menacing, or harassment of a family or household member.[168] Oregon is the only state in the

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[165] *See supra* Part II.A.

[166] *See supra* Part II.D.

[167] The restyled version of FRE 609(a) provides as follows:

> (a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> (A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and
>
> (B) must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and
>
> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

[168] *See supra* note 52 and accompanying text. OEC 609(2)(a), the provision that admits misdemeanor crimes of domestic violence in order to impeach the accused, does not include any requirement that the crimes must have involved dishonesty. OR. EVID. CODE 609(2)(a). The only requirement is that the crimes must be similar to the presently

nation that allows such impeachment under its version of Rule 609. The prior commission of misdemeanor crimes involving violence has little bearing on the tendency of a witness to lie on the stand. Oregon's zeal for the prosecution of domestic violence[169] is misplaced in OEC 609. The time has come to adopt the federal version of this rule.

IV

DISADVANTAGES OF ADOPTING THE NEW FRE IN OREGON

Notwithstanding the considerations explored in Part III, wholesale adoption of the restyled FRE in Oregon would be detrimental for at least three reasons. First, Oregon would lose the unique evidentiary rules that it has crafted over the last four decades; most of these rules are well suited to the peculiar culture and constitutional law in this state. Second, if Oregon completely discarded the OEC, this state would lose the benefit of appellate case law that has interpreted the OEC since 1981. Third, the adoption of the FRE in Oregon might stultify innovation, and it might necessitate that Oregon march in lockstep with other jurisdictions that adhere closely to the FRE. The following subparts discuss each of these considerations in turn.

A. Loss of Unique Substantive Rules

With the exception of OEC 608(b) and 609(a), discussed in Part III.A above, the OEC is a good fit for this state, at least on a substantive level. The rules mirror the unique culture of Oregon. This state values accountability, so confrontation takes on a greater significance in the OEC than in the FRE. Oregon values privacy, so the OEC carefully protects the secrets of parties and lawyers. Oregon has great faith in juries, so the OEC shows juries a wider range of evidence than federal juries can see. Oregon insists upon honesty and fair play, so the OEC imposes strict penalties for gamesmanship in litigation. Oregon regards violence against women and children as an urgent problem, so the OEC includes several customized provisions designed to facilitate prosecutions of these crimes. Simply put, the restyled FRE do not match the values and culture of this state as well as the OEC.

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charged offense. Under the guise of impeachment, OEC 609(2) explores the propensity of the accused to commit crimes of domestic violence.

169 *See supra* Part II.E.

Aside from such policy concerns, the restyled FRE do not align well with the contours of the Oregon Constitution. Oregon's confrontation clause is more demanding than its federal counterpart. The OEC demands more confrontation than the FRE because the Oregon Constitution demands it. The OEC also admits a wider range of hearsay because the confrontation requirements under Article 1, section 11 of the Oregon Constitution provide a backstop to the statutory regulation of the OEC. The symbiotic relationship between the Oregon Constitution and the OEC is evident in other contexts. Article 1, section 9 protects privacy as strictly as the OEC's privilege rules. Article 1, section 17 insists on jury trials with the same ardor that OEC 404(4) insists on showing juries all relevant evidence.

Given this state's unique policy concerns and constitutional framework—not to mention Oregon's fierce sense of independence—the wholesale importation of the restyled FRE into the OEC seems inconceivable. A more plausible alternative would be for Oregon to adopt the restyled versions of those federal rules that Oregon had already adopted before the restyling project. Part V of this essay offers a list of particular provisions in the restyled FRE that Oregon should adopt because they comport with the policy goals and constitutional foundations of the OEC.

B. Confusion in Applying Old Case Law

If Oregon were to overhaul the OEC to match the FRE, appellate decisions interpreting the old versions of Oregon rules could lose their force. Ironically, the improvement of the evidentiary rules would come at the cost of losing three decades' worth of interpretive decisions. Oregon's appellate courts infrequently issue opinions interpreting Oregon's evidentiary rules, so it might take decades for these courts to replace their existing precedents with new opinions interpreting the revised rules.

This cost is too high. The Oregon Legislature should take care to memorialize when a new rule is substantively identical to its predecessor. Oregon chose not to adopt any of the FRE's commentary back in 1981, but now commentary is crucial. Every time the commentary to the revised OEC makes clear that new rules track the old, the case law predating the amendments will remain persuasive.

C. Ossification of the OEC

Some critics fear that adoption of a uniform code will stultify innovation in the future.[170] According to this view, the states are valuable "laboratories" in which to experiment with new evidentiary rules. Once the states adopt a national template, they may become more reluctant to depart from that template.[171]

This concern might make sense in another state, but Oregonians feel little compunction about coloring outside the lines. One encouraging example is Oregon's adoption of the ABA Model Rules of Professional Conduct in 2004. At the time of the initial adoption, Oregon emulated the style of the ABA version but preserved, in large part, the substance of the preexisting Oregon rules. Thereafter, Oregon made several revisions to the ABA template, virtually on an annual basis.[172] Oregon's ethical code remains a dynamic document, and there is no reason to expect that Oregon's evidentiary rules would fare differently if Oregon were to adopt the restyled FRE.

V

PROPOSAL: SELECTIVE ADOPTION OF THE RESTYLED FRE

The most prudent course for Oregon would be to adopt most, but not all, of the restyled FRE. Oregon should adopt any restyled federal rule that replaces a prior federal rule that Oregon adopted wholesale. In other words, if a comparison of an Oregon evidentiary rule to a federal evidentiary rule revealed no substantive differences in 2010, then Oregon should adopt the restyled version of that rule.

Oregon should not, however, replace the following rules in the Oregon Evidence Code: OEC 309 and 311 (governing presumptions), OEC 404 and 404-1 (governing the use of uncharged misconduct), OEC 412 (rape shield), OEC 503–13 (privileges), OEC 614 (setting forth the procedure for Oregon courts to call and interrogate witnesses), OEC 704 (allowing experts to testify regarding the mental

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170 *See generally* Kirgis, *supra* note 14, at 837–38 (discussing the tendency of uniform rules to become obsolete due to "legislative inertia").

171 *See* Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 178 (2007) (commenting that, with respect to the restyled Federal Rules of Civil Procedure, "adoption of the restyled rules may make it harder for more substantial reform to be made").

172 The Oregon Rules of Professional Conduct reflect the date on which amendments take effect. Many amendments postdated the adoption of these rules in 2004. OR. RULES OF PROF'L CONDUCT (2010), *available at* http://www.osbar.org/_docs/rulesregs/orpc.pdf.

state of the accused), OEC 801 (setting forth Oregon's unique definition of hearsay), and OEC 803 and 804 (setting forth Oregon's unique hearsay exceptions). These rules comport with Oregon's distinctive legal and cultural history. Oregon has made a deliberate choice not to follow the federal template as to these rules, and the stylistic revision of the federal template does not necessitate that Oregon revisit its choice regarding the substance of these rules.

Oregon should change two of its rules that currently diverge from the federal versions. OEC 608 and 609 are inferior to their federal counterparts. OEC 608 forbids Oregon attorneys from eliciting intrinsic evidence of unconvicted acts bearing on untruthfulness.[173] This provision limits the cross-examination and confrontation that Oregon values so much in other contexts. Further, given the decline in resources for criminal prosecution in this state, the lack of a conviction is not necessarily a sign that the unconvicted conduct is innocent.

In prosecutions of domestic violence, OEC 609 allows the government to impeach the defendant with evidence of his prior domestic violence, including misdemeanors.[174] This rule is unwise. Prior misdemeanors that consist solely of violent acts (as opposed to deceitful acts) are not automatically probative of truthfulness. Such evidence might be useful in showing the defendant's character for violence, but OEC 404-1 already permits this use of the evidence without resort to OEC 609.[175] There is no compelling reason why defendants accused of domestic violence should be more vulnerable to impeachment on grounds of truthfulness than defendants accused of other serious crimes, such as murder of a victim who is not an intimate partner.

CONCLUSION

There are several compelling reasons for Oregon to incorporate most of the new changes to the FRE. The restyling of the FRE will improve accessibility, will reduce forum shopping, will enhance the predictability of judicial rulings, and will facilitate interstate commerce by promoting consistency in litigation procedures. Just as simplicity and uniformity are valuable in other states, they would be salutary in Oregon. This state should promptly adopt the restyled

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173 OR. EVID. CODE 608(2).

174 OR. EVID. CODE 609(2).

175 *See* OR. EVID. CODE 404-1.

versions of any rules in the OEC that presently mirror their federal counterparts.

Most of Oregon's unique evidentiary rules, however, should survive the restyling process. After all, the purpose of restyling was not to change the substance of any evidence code. Oregon attorneys and judges have become accustomed to this state's distinctive evidence rules, and dramatic changes to the rules would bring confusion rather than clarity. While Oregon should end its misguided experiments with OEC 608 and 609, most of Oregon's unique rules suit this state well.