THE RULES OF EVIDENCE—AN EMPIRICAL STUDY
IN PSYCHOLOGY AND LAW*

Steuart Henderson Britt

I

Our law reviews are filled with what we as lawyers think about everything
from bailments to bailiwicks, from problems of hearsay to problems of
homicide.

"The time has come," the Lawyer said,
"To talk of trusts and torts;
Of shares—and stocks—and secret trusts—
Of carriers—and courts—
And why a judge gets boiling hot—
And whether rules are things."

Yes, the time has come to talk, but the time has also come to know certain
things about the law, especially that much maligned body of law known as
the rules of evidence. As Professors Morgan and Maguire say:

"The time has come to make a searching inquiry into the policy of
preserving the recognized privileges, and to subject the orthodox as-
sumptions and assertions by which they are ordinarily justified to an
impartial analysis. The rule excluding opinion evidence continues to be
a source of needless litigation in the appellate courts, and to have no
foundation in common or uncommon sense. The worst features of the
adversary system continue to show themselves in the rules concerning
the impeachment of witnesses. In short there is scarcely a segment of
the subject which does not call for re-examination and revision."

The day of theorizing is by no means over. But in the law today we also
demand facts to which theories may be practically applied. Rules of evi-
dence for any hearing should be designed to supply facts, whether that
hearing is before a "court" or a "commission."

Recently we have been made more and more aware of the significance of
administrative law. In fact, the rise of administrative law and of adminis-
trative agencies has been one of the most important developments of our
time. So much has this been the ease that the question raised in the 1938

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are due to Professor Frank M. Weida of The George Washington University for his
many helpful suggestions concerning the statistical treatment of the data. Finally, appec-
iation is hereby expressed to every one of those 136 persons who gave his time so
generously in evaluating the rules of evidence used in this study.

2Morgan and Maguire, Looking Backward and Forward at Evidence (1937) 50 Harv.
L. Rev. 909, 922.

2This has recently been emphasized by Dean Landis—Bell, Landis Guides Young
essay contest of the American Bar Association was: to what extent should fact-finding boards be bound by rules of evidence? This question raises in turn a series of other questions. How has administrative law been influenced by the rules of evidence which make up our civil and criminal law? Should these rules of evidence be incorporated wholesale into administrative law? Or some of them only? Or none at all? Should our various commissions and fact-finding boards be bound by the time-honored rules, or be free to follow their own ideas concerning the evaluation of evidence? The applicability of the common-law rules to proceedings of administrative tribunals has been carefully considered by various writers.3

However, before prognosticating as to the usefulness of evidence rules before administrative tribunals, it would seem desirable, first of all, to determine the extent to which certain rules should be used in court proceedings. How has civil and criminal law been influenced by the rules of evidence? Should all these rules of evidence be continued in use? Or some of them only? Or none at all? Should our various courts be more bound by the time-honored rules, or more free of them?

Lawyers may have real difficulty in examining such questions objectively. It is much easier simply to favor the use of those evidence rules which apparently help to win verdicts and/or judgments. Thus a practicing lawyer may remember fondly a case that he had last month in which loose interpretation of the rules of evidence aided the court in giving a judgment—in his favor. Another lawyer may recall another case in which stricter application of the rules of evidence was a real help—to his client.

Such mulling over of cases in retrospect is interesting, but where does it lead? It usually leads into wordy arguments and discussions of points of view. We may spend so much energy in “battles of words” that no one thinks of the possibilities of experimentation. Almost no one thinks of an empirical4 approach to the problem. We as lawyers often spend a dis-

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3Lawyers to New Fields, N. Y. Times Magazine, Nov. 28, 1937, p. 11. The Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board—such organizations have had a mushroom growth.


5“Empirical”=1. pert. to experience; 2. pert. to methods or conclusions based on
proportionate amount of time discussing exact definitions and points of view.

Of course, this is not new to us as a group. Law has always consisted of a good deal of arm-chair philosophizing. But is not the time now ripe for investigations which are more empirical? Profitable though our talk-fests may be, it seems high time that we made use of the empirical method in studying the rules of evidence. Let us be done temporarily with arm-chair philosophizing!

II

With such a philosophy, the writer made an empirical attack on the present problem. As he is a member of the bar who formerly practiced law, he believed that an empirical study of the rules of evidence should necessarily involve an investigation of the views of practicing lawyers, of law professors, and of evidence "experts." As the writer is also a psychologist now specializing in the field of legal psychology, he believed that such a study should also involve an investigation of the views of psychologists who are not dealing with legal problems. Psychologists, being outside the field of law, might be more objective about the rules of evidence than lawyers, and might have information of particular value on some of the rules which involve not only legal but psychological problems.

From the entire body of principles and definitions known as the "rules of evidence," 154 rules were selected for intensive statistical study. These 154 rules were intended to be a sampling of the rules of all sorts of categories—admissibility, circumstantial evidence, testimonial qualifications, documentary evidence, testimonial privilege, etc. These 154 rules were selected by careful analysis from the 3,150 rules in Wigmore's Code of Evidence. Forty-three of the rules were selected because an adequate evaluation of them calls for some type of psychological judgment. Rule 61 is an example of such a rule:

**Testimonial Qualifications:**

**Testimonial Knowledge (Observation):**

*Sanity.* A witness to sanity or the reverse is qualified who has had sufficient observation of the person to form a belief as to his mental condition.

Dean Wigmore's typographical marks indicate every rule which "is the law

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*observation or experiment. [Syn. (1) experiential. Contr. (2) w. deductive and rational, whether as a term of reproach (i.e. lacking necessary theorizing), or as a term of praise (i.e. avoiding rigorously all hypothesis except working hypotheses).]" Warren (ed.), *Dictionary of Psychology* (1934) 92.

*The empirical method may be characterized by three important techniques: the experimental method; the use of first-hand observation; and the employment of statistics." Brit, *Past and Present Trends in the Methods and Subject Matter of Social Psychology* (1937) 15 Social Forces 462, 464.

in some jurisdictions, but not in all;\footnote{Id. at xv.} rules thus marked were not included in the present study. Dean Wigmore’s typographical marks, plus footnotes, also indicate those rules which are the law in every jurisdiction but which in his opinion “ought not to be law”;\footnote{Id. at xv.} 22 such rules were included in the 154. An independent evaluation by the writer, both as a lawyer and as a psychologist, revealed 21 additional rules which he believed to be “bad” or “probably bad.” This made a total of 43 (28\%) of the 154 rules which were considered to be of questionable value.

It should be clear, however, that the evaluations by Wigmore and by the writer needed to be checked empirically.

Therefore, four different groups were selected to give their judgments on the 154 rules: Group I, 34 Evidence Experts (professors of Evidence). Group II, 34 Law Professors who do not teach Evidence. Group III, 34 Practicing Lawyers. Group IV, 34 Psychologists. This was a total of 136 persons.

Group I (referred to hereafter as “Evidence Experts”). Professors of Evidence were chosen as representing experts on the rules of evidence. An expert is “one qualified by study or experience, or both, to understand and explain the subject under consideration; a person who has technical and peculiar knowledge in relation to matters with which the mass of mankind are supposed not to be acquainted.”\footnote{25 C. J. 176.} In order to secure only those who could thus qualify as experts on the subject of Evidence, the following criteria were adopted for inclusion in this group: (a) professors of Evidence, (b) teaching in law schools which belong to the Association of American Law Schools, (c) who had taught Evidence for over five years. The Directory of Teachers in Member Schools of the Association for 1935, and for 1936-37,\footnote{Published by West Publishing Co.} yielded the names of 62 professors of Evidence who had taught Evidence for over five years. Of these 62, it was found that three were deceased. An additional 18 were not considered in the present study because they were apparently engaged in law practice as well as in teaching Evidence in a law school. They were eliminated from consideration in order to prevent confusion between Group I (Evidence Experts) and Group III (Practicing Lawyers). This meant that there were only 42 “experts” on Evidence in the entire country who could meet the criteria adopted for inclusion in Group I.

Judgments were received by mail from 34 of the 42. This is a remarkably
high percentage of returns in any questionnaire study. It represents 80% of the total number 110.

GROUP II (referred to hereafter as "Law Professors"). Law Professors who do not teach Evidence were also chosen from the Directory of Teachers in Member Schools of the Association of American Law Schools. Just as with Group I, this group of professors was widely scattered. It included teachers in the law schools of Chicago, Colorado, Columbia, Denver, George Washington, Illinois, Iowa, Louisiana State, Michigan, Minnesota, Missouri, Ohio State, Temple, Washington (Seattle), Washington (St. Louis), and Yale. These 34 men were experts in such diversified branches of the law as contracts, constitutional law, criminal law, property, etc., and were thus primarily concerned with the rules of evidence only as they pertained to their own special fields.

GROUP III ("Practicing Lawyers"). Practicing Lawyers were chosen in such a way as to give a wide sampling as to age, income, and amount of trial practice. To this end 34 friends of the writer were selected from the bars of the three jurisdictions of which he is a member: Missouri, New York, and the District of Columbia.

GROUP IV ("Psychologists"). Psychologists were chosen from the 1936 and the 1937 Year Book of the American Psychological Association.10a All 34 had Doctor's degrees in psychology. They were widely scattered, both geographically and as to fields of specialization. Although psychologists ordinarily lack legal training, and so are not in a position to make legalistic judgments on a great many of the rules of evidence, there are certain rules where a psychological analysis is especially desirable. On many of the 154 rules, judgments of psychologists might introduce valuable extra-legal considerations which might escape the notice of persons with non-psychological training.

Seventeen sets of 154 identical rules were typed on separate slips of thin paper 3½ by 8½ inches. Each rule was a quotation from Wigmore's Code of Evidence, although this was not indicated. In fact, the only mark of identification on any slip was a number from 1 to 154. Thus, the first rule was:

1 Weight of Evidence; Credibility of Witnesses; Judge's Comments.

The judge may not express to the jury, after the close of evidence and argument, his personal opinion as to the credibility or weight of the evidence or any part thereof.

10 Many a publication utilizing data from a mailed questionnaire is based on a return of less than 40%.

10a Published by The American Psychological Association, Inc.
A set of the 154 rules was mailed to each of the 34 persons in each of the four groups, making a total of 136 persons. The following instructions were enclosed:

Write your name here .................
Your name will not be used in this study.
The above is simply for identification.

INSTRUCTIONS AS TO RULES OF EVIDENCE

On these slips you will find 154 separate rules of evidence. Please mark on the lower bottom edge your judgment of each rule, according to the following plan:

+2 = Good
+1 = Probably good
0 = Doubtful whether good or bad
-1 = Probably bad
-2 = Bad

In doing this, simply read each rule in turn and mark it; in case of doubt, pass on to the next rule and come back later to any not marked.

As to the criterion of good and bad, use any that fits in with your ideas of the general field of Evidence.

Please do not refer to any secondary sources, but give your own opinion in each case.

Put your numbers on the extreme lower bottom edge, so that these numbers may later be clipped off, and the rules submitted to someone else for judging. Do not add any other marks or writing to these slips; if you have comments to make on any particular rule, please write these on a separate sheet of paper and return herewith.

Just as soon as the judgments were received from any of the 136 individuals who participated, his numerical judgments were copied onto a master sheet, and his markings were clipped off the bottom edge of each slip. The entire set of rules and instructions were then mailed to another person for judging.

In several of the rules, e.g., Rule 56 infra, there was more than one part to the rule. This raised the question in the minds of some judges of how to rate the rule adequately in only one answer. Where this question was specifically raised, the rater was told simply to note down his general impression of the rule in its entirety; that is, considering the rule as a whole, what numerical rating would he give it? In a number of instances, how-

\[\text{The only exceptions to considering the rule as a whole were in the case of Rules 114 and 123, where the instructions typed at the heading read, 'Consider (d) only,' and 'Consider (3) only.'}\]
ever, a judge would mark the various parts of a rule separately. In these cases the present investigator struck an average of the ratings of the separate parts of the rule, and then gave the rule the corresponding numerical rating as being the rating of that judge.

III

Naturally the criteria of “goodness” and “badness” varied between the groups, and even between members of the same group. Some of the standards employed, according to some participants, were knowledge of legal usage; knowledge of legal abuses; social feasibility; logical considerations; ethical considerations; psychological interpretations.

However, a statistical treatment of the data revealed a surprisingly high consistency between members of the same group. For the 34 Evidence Experts, a coefficient of correlation (a measure of agreement) was determined between the judgments of the half whose replies were received in the order 1, 3, 5, .., 33, and between the other half whose replies were received in the order 2, 4, 6, .., 34. Such a selection is a random selection for the purpose of determining consistency. Coefficients of correlation were likewise determined between the 17 “odd-numbered” Law Professors (who do not teach Evidence) and the 17 “even-numbered” Law Professors (who do not teach Evidence); likewise between the two halves of the group of Practicing Lawyers; and also in a similar manner between the two halves of the Psychologists.

The correlation coefficients were: +.95 for Evidence Experts; +.94 for Law Professors; +.90 for Practicing Lawyers; +.95 for Psychologists. The formula for the coefficient of correlation is written in such a way that +1.00 means perfect positive correlation, that 0.00 means no correlation at all, and that −1.00 means perfect inverse correlation.

Therefore, the above correlations indicate an extremely high degree of consistency between the judgments of the members of each group and other members of that same group. (In each case the probable error was .01; this means that it is as likely as not that the true correlation coefficient differs from the one found as much as .01.) In other words, each one of the groups is in close agreement among its own members. Apparently the ideas of the members of a particular group are much the same as to the “goodness” or “badness” of the respective items.

The original correlation coefficients of the two halves of each group were: +.91 for Evidence Experts; +.89 for Law Professors; +.82 for Practicing Lawyers; +.90 for Psychologists. These were “stepped up” to +.95, +.94, +.90, and +.95 respectively by the Spearman-Brown formula. Garrett, Statistics in Psychology and Education (2d ed. 1937) 318-319.
The next question was: to what extent do the judgments of the other three groups agree with the judgments of the Evidence Experts? The coefficient of correlation between the judgments of the Evidence Experts and those of the Law Professors who do not teach Evidence was +.94 (±.01). This indicates a very high degree of agreement between these groups on the 154 rules as a whole.

The measure of agreement between the judgments of the Evidence Experts and of the Practicing Lawyers was considerably less but still quite significant. It was +.75 (±.02). This indicates a rather high agreement between the two groups, but shows that they probably differ in their standards of judgment on a number of the rules.

The coefficient of correlation between judgments of Evidence Experts and of Psychologists was only +.62 (±.03). This indicates a positive relation between their judgments of the rules, but also suggests lack of agreement on a substantial number.

Also, the coefficients of correlation between judgments of Law Professors and of Practicing Lawyers was +.75 (±.02); between judgments of Law Professors and of Psychologists was +.76 (±.02); and between judgments of Practicing Lawyers and of Psychologists was +.70 (±.03).

The total relationships obtained are presented in Table I.

<table>
<thead>
<tr>
<th></th>
<th>Evidence Experts</th>
<th>Law Professors</th>
<th>Practicing Lawyers</th>
<th>Psychologists</th>
</tr>
</thead>
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<tr>
<td>Evidence Experts</td>
<td>+.95 ±.01</td>
<td>+.94 ±.01</td>
<td>+.75 ±.02</td>
<td>+.62 ±.03</td>
</tr>
<tr>
<td>Law Professors</td>
<td></td>
<td>+.94 ±.01</td>
<td>+.75 ±.02</td>
<td>+.76 ±.02</td>
</tr>
<tr>
<td>Practicing Lawyers</td>
<td></td>
<td></td>
<td>+.90 ±.01</td>
<td>+.70 ±.03</td>
</tr>
<tr>
<td>Psychologists</td>
<td></td>
<td></td>
<td></td>
<td>+.95 ±.01</td>
</tr>
</tbody>
</table>

The internal coefficients of correlation are printed in bold face type in order to emphasize the great amount of agreement within each group of the judgments of the members composing that group.

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\gamma_{xy} = \frac{\sqrt{\gamma_{x1}^2 + \gamma_{y2}^2} \sqrt{\gamma_{x1}^2 + \gamma_{y2}^2}}{\gamma_{x1}^2 + \gamma_{y2}^2} \quad \text{Yule, An Introduction to Theory of Statistics (8th ed. rev. 1927) 213.} \]

The same formula was used for the remaining coefficients of correlation between different groups.
That the groups were not judging the rules on the same basis was found by computing the critical ratios for the coefficients of correlation. "Critical ratio" is a statistical measure of the relation between a magnitude (a difference between two numbers) and its standard deviation. A critical ratio must be at least 2.0 to be considered even somewhat significant. Any critical ratio between 2.0 and 3.0 is of some significance statistically, while a critical ratio over 3.0 indicates that the difference in results is of genuine statistical significance, that is, due to factors other than chance.

In the present study, critical ratios were computed for the difference between the correlation coefficient of the judgments of each group with the judgments of the Evidence Experts, and the correlation coefficient of the judgments of each of the other two groups with the judgments of the Evidence Experts. The critical ratios found were: 4.8 for Law Professors as compared with Practicing Lawyers; 6.4 for Law Professors as compared with Psychologists; and 2.2 for Practicing Lawyers as compared with Psychologists. Therefore, these ratios indicated that the differences in the judgments of the groups were very reliable statistically.

The judgments of any one person on any one rule could be +2, +1, 0, -1, or -2; and there were 34 individuals in each group. Therefore, it was theoretically possible for the judgments of any one group on any one rule to vary from as high as +68 to as low as -68. Actually they varied only from +68 to -40.

Inspection of the judgments of each group revealed that the judgments of the Evidence Experts varied from as high as ±67 to as low as -40. The range of the judgments of the other three groups were: Law Professors, from +68 to -28; Practicing Lawyers, from +68 to -31; Psychologists, from +67 to -39. These figures do not suggest any great amount of difference between the four groups in terms of the numerical degree of their "best" and "worst" judgments.

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14 This shows that the degree of linear relation between the judgments of the Evidence Experts and those of the Law Professors is sufficiently greater than the degree of linear relation between the judgments of the Evidence Experts and those of the Practicing Lawyers to be attributable to factors other than chance.

15 This shows that the degree of linear relation between the judgments of the Evidence Experts and those of the Law Professors is sufficiently greater than the degree of linear relation between the judgments of the Evidence Experts and those of the Psychologists to be attributable to factors other than chance.

16 This shows that the degree of linear relation between the judgments of the Evidence Experts and those of the Practicing Lawyers is sufficiently greater than the degree of linear relation between the judgments of the Evidence Experts and those of the Psychologists to be attributable probably to factors other than chance.
Much more important is the question: what were the arithmetic means of the four groups on the entire 154 rules? Evidence Experts, for example, might have a tendency to rate the majority of the rules as "good" or "probably good," as compared with, say, Practicing Lawyers, who might tend to put in more "bad" or "probably bad" judgments. Accordingly, the arithmetic mean (average) of the judgments was calculated for each of the four groups. The mean of the judgment scores on all 154 rules was highest for the Practicing Lawyers, lowest for the Psychologists: $+39.0 \ (\pm 16.1)$ for the Evidence Experts; $+35.9 \ (\pm 15.6)$ for the Law Professors; $+42.0 \ (\pm 12.3)$ for the Practicing Lawyers; and $+25.0 \ (\pm 15.2)$ for the Psychologists.

The above ranges in judgments, and the above means, reveal the general tendency of each of the four groups to judge the rules as fairly good. It is quite true that such a result may be due in part to the fact that the investigator chose only 43 (28%) of the 154 rules as bad or probably bad. However, it must be said that the writer had real difficulty in finding "bad" rules as compared with the tremendous number of "good" rules. Several letters written by judges at the time they returned their sets of rules contained specific comments as to the general "goodness" of most of the rules. Even with the many "bad" rules purposely inserted in the 154, many of the judges mentioned how sensible most of the rules of evidence are. This was of particular interest in the case of the Psychologists, many of whom were previously inclined to be critical of the whole field of law, but who were now agreeably surprised to find themselves in essential agreement with a large number of the rules.

VII

Since the arithmetic mean of the judgments of the Evidence Experts was $+39.0$, of the Law Professors $+35.9$, of the Practicing Lawyers $+42.0$, and of the Psychologists $+25.0$, the next question is: how significant statistically were the differences between these arithmetic means? In order to answer this question, critical ratios were determined for the arithmetic mean of each one of the other three groups as compared with the arithmetic mean of the group of Evidence Experts. As an example, the critical ratio was computed for the $+35.9$ mean of the Law Professors as compared with the $+39.0$ mean of the Evidence Experts.

A critical ratio of only 1.3 showed that the difference in the total judgments of the Evidence Experts and of the Law Professors was not statistically significant. Neither did a critical ratio of only 1.1 indicate a significant difference statistically between the total judgments of the Evidence Experts.
and those of the Practicing Lawyers. However, a critical ratio of 5.3 between the arithmetic mean of the judgments of the Evidence Experts and of the Psychologists was very significant statistically; that is, the difference between these two means was due to factors other than chance.

A coefficient of variability (a measure of homogeneity) was also computed for each group. In this way each of the other three groups was compared with the Evidence Experts as to degree of variability of judgments. The coefficient of variability for Evidence Experts was 61.4%; for Law Professors, 64.4%; for Practicing Lawyers, 43.3%; for Psychologists, 89.8%. In other words, the Evidence Experts and the Law Professors tended to have about the same degree of variability in their judgments of the entire set of rules. Practicing Lawyers, on the other hand, tended as a group to concentrate their numerical ratings at about the same level of "goodness." The Psychologists were more variable than the other groups in that they rated many rules on the "good" side and many on the "bad" side.

VIII

A complete statistical analysis was next made of the judgments on each one of the separate 154 rules by the group of 34 Evidence Experts. That is, the 17 "odd-numbered" Evidence Experts were again matched with the 17 "even-numbered" ones, and the critical ratio was determined for each one of the 154 rules. Not a single rule showed a critical ratio as high as 3.0. This means that statistically significant differences were not found between the two halves of the group of experts. Here was an additional check on the internal correlation coefficient of +.95, supra, of Evidence Experts, which had indicated high consistency in their judgments. The idea was thus validated that the Evidence Experts agreed remarkably well among themselves as to the desirability or undesirability of particular rules.

IX

An analysis was now made of each one of the 154 rules. This required the statistical computation of 462 different critical ratios (154 for each of the three groups as compared with the Evidence Experts).

Critical ratios were computed for each one of the 154 rules separately, comparing the mean judgments of the Evidence Experts on each rule with those of the Law Professors. Similarly, 154 critical ratios were computed...

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17 The coefficient of variability is the standard deviation expressed as a percentage of the arithmetic mean.

18 Rules 32, 98, and 142 did have critical ratios as high as 2.1, 2.0, and 2.1 respectively. These were the highest critical ratios. The critical ratios of the other 151 rules were less than 2.0.
for the mean judgments of the Evidence Experts on each rule as compared with the mean judgments of the Practicing Lawyers. Likewise, 154 critical ratios were determined by comparing the mean judgments of the Evidence Experts on each rule with those of the Psychologists.

In a great many instances all four groups were in fairly close agreement that the particular rule was "good" or "bad." In many such cases, the critical ratios were not statistically significant, indicating that the small differences in judgments between the groups were simply due to chance factors.

On many rules, however, significant statistical differences were found (1) between the judgments of the Evidence Experts and those of the Law Professors; (2) in other instances, between Evidence Experts and Practicing Lawyers; and (3) in still others, between Evidence Experts and Psychologists. Where such a statistically reliable difference occurred between the judgments of two groups about a particular rule, it meant that the difference between the judgments of the two groups was due to factors other than chance. In other words, there was a genuine basis for the difference in rating between the two groups.

This can best be illustrated by presenting a sample of the results. Following are Rules 54 to 58 inclusive, all concerned with testimonial qualifications:

54 **Testimonial Qualifications:**
   **Organic Capacity:**
   **Mental Immaturity (Infancy):**
   A person under the age of fourteen is presumed to lack capacity.

55 **Testimonial Qualifications:**
   **Organic Capacity:**
   **Moral Capacity:**
   *Alienage, Race, Color, Sex, Religion.* A person is not disqualified by reason of birthplace, race, color, sex, or theological or religious profession or belief.

56 **Testimonial Qualifications:**
   **Experiential Capacity:**
   For *medical* topics (health, sanity, poison, blood, *etc.*):
   (1) General experience qualifies to testify to *apparent* conditions.
   (2) Where special medical experience is needed, a general practitioner in good standing suffices for all subjects included in ordinary medical training.

57 **Testimonial Qualifications:**
   **Experiential Capacity:**
   For *handwriting* in general, any person able to read and write is qualified.
58 Testimonial Qualifications:

Emotional Capacity:

Pecuniary Interest:

Criminal Cases. No person in a criminal case is disqualified by reason of being a party, or of having any other interest depending on the event of the trial or on the action of prosecuting officers.

As has previously been pointed out, the theoretical range of judgment scores of any one group on any one rule is from as high as $+68$ to as low as $-68$. The actual extremes were from $+68$ to $-40$. The judgment scores of the four groups on Rules 54 to 58 are shown in Table II.

How should we interpret the results shown in Table II?

The mere fact that the numerical judgments of a particular group differ considerably from the judgments of the Evidence Experts on a particular rule does not necessarily mean that the difference is statistically significant. Note, for example, that on Rule 57 the difference between $-7$ (Evidence Experts) and $-21$ (Psychologists) is 14 points. The difference is not statistically significant, however, for the critical ratio was only 1.2. On the other hand, in Rule 58 the difference between $+64$ (Evidence Experts) and $+50$ (Practicing Lawyers) is likewise 14 points. The difference here is of much greater statistical significance, for the critical ratio was 2.3.

Also, simply because a numerical judgment has a "+" sign before it does not prove that the rule is considered unusually good. Note that the mean judgment scores on all 154 rules are given at the top of the column for each group. The score of any particular group on any one rule should not only be compared (horizontally) with the judgments of the other three groups on that rule, but should also be compared (vertically) with the mean score for the entire 154 rules of that particular group.

For example, Rule 58 is rated $+64$ by the Evidence Experts, $+41$ by the Law Professors, $+50$ by the Practicing Lawyers, and $+10$ by the Psychologists. It is obvious that none of the other three groups thinks so well of the Rule as do the Evidence Experts. The single parentheses ( ) show that the slightly lower rating by the Practicing Lawyers than by the Evidence Experts is of some statistical significance, while the double parentheses (( )) indicate that the still lower judgments of the Law Professors and of the Psychologists (as compared with the judgments of the Evidence Experts) are of real statistical significance, *i.e.*, due to factors other than chance.

Now, when these scores of each group on Rule 58 are compared with the mean scores on all the rules, the following facts are also clear: the $+64$ rating of the Evidence Experts is very high. Although the $+50$ rating of the Practicing Lawyers is a bit lower than the rating of the Evidence Experts and probably because of factors other than chance, still this $+50$ is above the
<table>
<thead>
<tr>
<th>Corresponding Section No. in Wigmore's</th>
<th>Considered by</th>
<th>L. Evidence Experts (Mean for 154 rules)</th>
<th>II. Law Professors (Mean for 154 rules)</th>
<th>III. Practicing Lawyers (Mean for 154 rules)</th>
<th>IV. Psychologists (Mean for 154 rules)</th>
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<tr>
<td>Rule No. of Code of Law of Evidence10</td>
<td>in Wigmore's Treatise</td>
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<td>54</td>
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<td>(+41)</td>
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</table>

*An asterisk before the Rule No. indicates that the rating of the rule requires a psychological judgment on the part of the rater.

Single parentheses ( ) around a number indicate that the critical ratio between the mean judgment of that group on that rule and the mean judgment of the Evidence Experts on that rule is between 2.0 and 3.0 and, hence, of some statistical significance.

Double parentheses ( ) indicate that the critical ratio between the mean judgment of that group on that rule and the mean judgment of the Evidence Experts on that rule is 3.0 or above and, hence, of genuine statistical significance—this means that the difference in the judgments of the two groups concerned is due to factors other than chance.

102d ed. 1923.
mean score (+42.0) of Practicing Lawyers for all the rules; hence, the Practicing Lawyers think this to be a fairly good rule. Although the +41 rating of the Law Professors is still lower and is certainly statistically significant as compared with the +64 rating of the Evidence Experts, still this +41 is somewhat above the mean score (+35.9) of Law Professors for all the rules; hence, the Law Professors apparently think this rule to be fairly good. However, the +10 rating of the Psychologists is not only very low as compared with the ratings of any of the other three groups, and the difference between their rating and that of the Evidence Experts is of genuine statistical significance, but this +10 rating is also low as compared with the mean score (+25.0) of Psychologists for all the rules; hence, the Psychologists (despite the plus sign) think this rule is not very good.

The five rules can easily be summarized in terms of the judgments and a recommendation for each one:

RULE 54. That a person under the age of fourteen is presumed to lack capacity to testify was considered a bad rule by both Wigmore and the present investigator. Both the Evidence Experts and the Psychologists also believe this is a very bad rule. The Law Professors likewise regard it as a bad rule, but not to so great an extent, and the difference between their judgments and those of the Evidence Experts is of some significance statistically. The Practicing Lawyers, on the other hand, differ from the Evidence Experts for reasons not due to chance in not considering the rule nearly so bad as do the Evidence Experts; but the Practicing Lawyers, as compared with their mean score on all the rules, give this rule a very low rating. Recommendation: This rule should be carefully studied from the standpoint of the law practitioner, and should probably be discarded.

RULE 55. All groups agree that this is a good rule and give it practically a top rating. Only the Psychologists, apparently due to factors other than chance as compared with the Evidence Experts, give it a slightly lower rating than the other groups; but the Psychologists tend to rate all the rules lower than the other groups. Recommendation: This rule should be continued in use.

RULE 56. The writer believed this rule to be bad. The Evidence Experts rate this rule slightly above their mean judgment score. Both the Law Professors and the Practicing Lawyers rate it below their respective mean scores. The Psychologists, because of factors other than chance as compared with the Evidence Experts, consider the rule of very doubtful value. Recommendation: This rule should be studied psychologically. The fact that it receives only a reasonably high rating by the Evidence Experts, and a rather low rating by Law Professors and Practicing Lawyers, coupled with the
fact that the Psychologists see reasons for questioning it, suggest that the rule might well be submitted to psychologists for reasons for their much lower judgments than the other groups.

**Rule 57.** The writer believed this rule to be a bad one. All the four groups agree with him that it is. Since there are no statistically reliable differences between the groups, the rule should not be used. **Recommendation:** The rule should be definitely discarded.

**Rule 58.** Here there is considerable disagreement. The Evidence Experts consider this rule very good, the Practicing Lawyers rather good, the Law Professors probably good, and the Psychologists of doubtful value. The critical ratios of all three of these last groups, as compared with the Evidence Experts, indicate that there are reasons other than chance for their not liking the rule in its present form as much as do the Evidence Experts: **Recommendation:** This rule should be carefully analyzed, with a view to revision.

A similar analysis could be presented here for each one of the 154 rules studied. This sample should be sufficient, however, to indicate the value of the method to everyone concerned with the law of Evidence.10

X

As was indicated above, 43 of the 154 rules were selected by the writer because some type of psychological judgment is required in order to make an adequate analysis. The judgments, especially of the Psychologists, on certain of these deserve special comment:

15 In an action involving the conduct of an animal, the animal's character as to the appropriate trait is admissible as evidence of its probable conduct.

It would seem reasonable to suppose that psychologists, who have worked with animals in the laboratory, might have additional information on this problem not possessed by lawyers. Although the score of the Psychologists on this rule is higher than their mean score on the entire 154 rules, yet their score on this rule is much lower than the high judgment score of the Evidence Experts, and because of factors other than chance.

16 Whenever the doing or not doing of a human act by a person is material to be proved, his possession or lack of suitable corporal or mental capacity, or technical skill, or mechanical means or tools, is relevant and admissible.

10 The writer has prepared an Appendix of the 154 rules, showing the mean judgment scores of the four groups and the statistical significance of the scores of each of the other three groups as compared with the scores of the Evidence Experts.
This is quite sound psychologically. Interestingly enough, the highest rating on this rule is by the Psychologists, the difference between their ratings and those of the Evidence Experts being of some statistical significance.

20 In no case is it essential that a person's motive for an act shall be ascertained or evidenced; but the apparent absence of the specific appropriate motive may be treated as evidence to negative the doing of the act.

Psychologically, this seemed to the writer to be an unsound rule. It is certainly considered questionable not only by the Psychologists but also by the Practicing Lawyers, and in both instances (as compared with the judgments of the Evidence Experts) probably because of non-chance factors.

29 On an issue involving parentage, the corporal features of the child, if sufficiently developed, are evidence.

The writer believed this rule was unsound. This view is most certainly borne out by the Psychologists, their judgments differing from those of the Evidence Experts because of other than chance factors. Also, the Law Professors and the Practicing Lawyers, probably because of non-chance factors as compared with the Evidence Experts, consider the rule of doubtful value.

30 On an issue involving a person's descent from a particular race-stock or nationality, the corporal features of the person are evidence.

Again, the writer believed this unsound. His belief is corroborated by the Psychologists, the difference between their judgments and those of the Evidence Experts being of genuine statistical significance.

32 Where, in a trial involving homicide or other violence, and on an issue of self-defence, the deceased's character for violence or turbulence or the opposite is admissible . . ., particular instances of his conduct exhibiting this trait are not admissible to evidence such character.

The writer judged this rule as unsound. So do the Psychologists (the critical ratio being fairly high as compared with the Evidence Experts). The rule also receives low ratings by the Law Professors and the Evidence Experts.

34 In an issue involving the competence of an employee, particular instances of conduct exhibiting such competence or the opposite are admissible.

This seems psychologically sound; and the rule is judged sound both by the Psychologists and by the Law Professors, their judgments as compared with those of the Evidence Experts being statistically significant.
The presence of insanity in members of the person's family indicating an ancestral stock from whom it might be inherited is admissible, provided there is other evidence ... of its existence in the person in question.

Apparently the Psychologists are not quite so sure of the "goodness" of this rule as are the other three groups, although none of the other groups gives the rule an extremely high rating.

Intent is a person's state of mind, at the time of doing an act, with reference to his volition of the act and its external consequences. The intent may thus be evidenced circumstantially

(a) by his conduct or utterances,
(b) or, by his prior or subsequent state of mind.

The writer thought this rule was psychologically unsound. With a difference in judgment as compared with the Evidence Experts due to other than chance factors, the Psychologists do not give this rule a very high rating.

A person's knowledge, belief, or consciousness of a matter may be evidenced circumstantially

(a) by external circumstances likely to produce such a state of mind;
(b) or, by his conduct or utterances indicating it;
(c) or, by the prior or subsequent existence of such a state of mind.

The writer also thought this rule was psychologically unsound. Again, with a difference in judgment as compared with the Evidence Experts due to other than chance factors, the Psychologists do not give this rule a very high rating.

The possession of a document is evidence of the possessor's knowledge of its contents.

The writer judged this rule as psychologically unsound. The only group to give this rule a numerical rating higher than its mean score for the 154 rules is the group of Practicing Lawyers. Both the Evidence Experts and the Law Professors rate it lower than their respective means; and the Psychologists (differing for statistically significant reasons from the Evidence Experts) judge the rule as bad.

The conduct and utterances of an accused person, indicating circumstantially a consciousness of his innocence of the crime charged, are not admissible in his favor. For example, the accused's refusal to escape when it is in his power.

The rule has been stated in the negative by the writer, in accordance with the majority view.
Both Wigmore and the present investigator believe this to be a bad rule, and so apparently do all four of the experimental groups.

52 No person is disqualified as a witness by reason of insanity, imbecility, disease, intoxication, or any other form of mental derangement or defect, except insofar as his condition precludes substantially all trustworthiness in his powers of observation, recollection, or narration, on the specific matter to be testified.

All the judges except the Evidence Experts question the advisability of this rule, and the difference between the judgments of each group and those of the Evidence Experts is of genuine statistical significance. All three of these other groups rate the rule considerably below their mean judgments for the entire 154 rules, the psychologists rating the rule particularly low.

54, 55, 56, and 57 These four rules have been discussed supra Sec. VIII.

61 A witness to sanity or the reverse is qualified who has had sufficient observation of the person to form a belief as to his mental condition.

The writer judged this rule as psychologically unsound. So do the Psychologists judge it as unsound, the difference between their judgments and the favorable judgments of the Evidence Experts being of real statistical significance. With non-chance factors apparently operating, the Law Professors differ from the favorable judgments of the Evidence Experts. Also the Practicing Lawyers give the rule a rating below the mean for their group.

75 The testimonial character of a witness, whether in general or only for the particular trait of veracity, may not be evidenced by the inference or opinion of a witness qualified by personal observation.

Both Wigmore and the writer believe this rule to be definitely bad. So do the Evidence Experts, the Law Professors, and the Psychologists. The only exception is the Practicing Lawyers who do, however, rate the rule somewhat below the mean for their group.

78 The demeanor of the witness while testifying may furnish evidence as to his testimonial qualities.

The other three groups believe this to be a good rule, but the Psychologists have little faith in it. The difference between their judgments and those of the Evidence Experts is statistically significant.
84 In a criminal trial, the accused, to rebut the inference that might possibly be drawn from his supposed conduct in failing to deny or otherwise, may not introduce his conduct and utterances, after the act charged, tending to evidence his consciousness of innocence.

Neither Wigmore, the present investigator, nor any of the four groups has very much faith in the soundness of this rule. The Psychologists give it the poorest rating of all.

103 A child, deficient in knowledge when examined, may be instructed so as to become capable.

Wigmore thinks this rule is bad, the writer thinks it bad, and the Psychologists think it bad. The remaining three groups give it a rather low rating. Incidentally, the Psychologists differ in their judgments from the Evidence Experts probably because of non-chance factors.

110 In a criminal or civil case involving a wrong by a man to a woman's chastity, or analogous thereto, the complainant woman's testimony alone, uncorroborated by other evidence, is not sufficient.

Although the other three groups do not judge this rule very favorably, the Psychologists give it a very high rating. The difference between their views and those of the Evidence Experts is statistically significant.

111 In patent causes, where a patent is disputed because of priority of invention ("anticipation"), the claimant's testimony to priority of conception and use is not sufficient without corroboration by other evidence.

Again, although the other three groups do not rate this rule very high, the Psychologists give it an extremely high rating; and again, the difference between their views and those of the Evidence Experts is statistically significant.

140 Where one party has so expressed himself that the reasonable purport is a specific jural transaction, it has that jural effect, and his actual intention not to have that jural effect is immaterial.

The Psychologists give this rule a poor rating, statistically significant from the rating of the Evidence Experts. Even the other three groups, however, in comparison with the means for each of these groups, do not give the rule too favorable a judgment.

XI

The question is, to what extent should rules of evidence be continued in use? The answer is, rules of evidence should be continued in use only to the extent that particular rules are considered "good" by intelligent persons
with special knowledge of the problems involved. Rules of evidence should be rechecked empirically, and then be affirmed, modified, or discarded.

The method employed here is only one of many which could be used to attack the problem. Instead of a statistical approach, an experimental or an observational approach could be devised which would also present answers as to the value of certain questionable rules. The point is that a truly empirical attack is needed.

We should be done with mere theorizing. Let us not follow the rules blindly simply because they exist. Instead, let us examine each of the rules empirically to determine which ones merit continuation. Let us behave as lawyers, and not merely as "lawmen."

Dean Wigmore has recently pointed out that "a heavy body of public opinion" is accumulating which blindly aims to discard much or all of the rules of evidence. He says: "There is a real danger here, which we ought to appreciate. I, for one, am ready to affirm my entire conviction in the solid merit of our system of evidence as a whole. We cannot afford to abandon its fundamentals. But we must at least try to eliminate, as far as possible, the many excrescences of sheer technicality which have grown up around it, and which excite the criticism of the lay public and of other professions."

In accordance with such a belief, Dean Wigmore has been chairman of a Committee on Improvements in the Law of Evidence, composed of five members (including three judges). This Committee has in turn worked with an advisory committee of sixty-five practicing lawyers, judges, and professors of Evidence, representing all states. The seventy lawyers made suggestions as to topics, these were published and voted on by the entire group, and thirty-two proposals were thus selected for intensive study. Of these thirty-two proposals, fifteen were officially approved at the 1938 meeting of the House of Delegates of the American Bar Association, and ten were recommended by the same body for reference and further study. This most

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21 An outstanding study of five proposed uniform statutes in Evidence was reported by Morgan, Chafee, Gifford, Hinton, Hough, Johnston, Sunderland, and Wigmore in THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM (1927).
2Dean Wigmore says: "What is needed is a body of expert trial practitioners (like the British barristers), who shall be masters of the rules and shall thus ensure for the rules that perfect working by which alone they can serve the ends of justice." Wigmore, op. cit. supra note 6, at xii.
2Quoted in Plan to Rid Evidence Rules of Their Fleas (1938) 22 J. AM. JUD. SOC. 136.
2Ibid.
2See Report of the Committee on Improvements in the Law of Evidence in REPORTS OF THE SECTION OF JUDICIAL ADMINISTRATION presented at the annual meeting of the American Bar Association, Cleveland, Ohio, July 25-27, 1938, at 62; the list of recommendations approved by the Section of Judicial Administration and by the House of Delegates in Standards of Judicial Administration Adopted (1938) 22 J. AM. JUD.
certainly represents a noteworthy attempt to bring the law of Evidence into line with what intelligent lawyers consider desirable. It represents another type of empirical investigation in that it uses the method of referendum for the legal profession as a whole.

Both that type of investigation and the kind of research carried out in the present study represent a nearer approach to the determination of what is desirable and what is undesirable in the law of Evidence than does mere arm-chair philosophizing. The principal advantages of the present study lie in the use of statistical methods, and in the collection of judgments of three different types of lawyers, Evidence Experts, Law Professors (who do not teach Evidence), and Practicing Lawyers, plus the judgments of Psychologists, representing a group of intelligent persons with a psychological background and non-legal training.

That there were differences in viewpoint as to the value of the present method was indicated, however, in various letters of reply which accompanied the return of the sets of rules. The following statements, both made by Deans of Law Schools, represent the extremes of opinion:

(1) "I must confess that I fail to see the value of the questions from either a legal or psychological viewpoint. . . . If I were to give voice to what is actually in my mind, I would say, with all regard to your feeling, . . . that there are two very useless professions; one the psychiatrist and the other the psychologist, and I am in equally grave doubt as to which is the worse."

(2) "I look forward with a great deal of interest to the publication of your findings soon and hope that you will inform me where I may find them."

Fortunately for the completion of the study, statements similar in tone to quotation (1) above were extremely rare. The great majority from all four groups of judges expressed views favorable to the study, as in quotation (2).


The only practical difficulty with either type of study is that there may be a disparity between the rules of evidence as stated in the books and the rules of evidence as actually applied in the court rooms. Thus, Professor McCormick says: "The lush exuberance of doctrines which bloom in the digests and the six-volume treatises on evidence, and the sharp quiddities of the class room, though they were fairly well known to the advocate of a generation ago, are not familiar ground to the average successful trial lawyer of today. To master these rules so that they could actually be used, to retain them, and to keep abreast of their changing current, would be a mammoth task, and one which as a practical man he believes is not worth the cost. Of what use to learn Culbertson's canons of bidding at bridge, unless your partner knows them also? For even the trial judges today, with notable exceptions, have only a discreet bowing acquaintance with the evidence rules." McCormick, Tomorrow's Law of Evidence (1938) 24 A. B. A. J. 507, 508.
(1) In summary, it may be said that the present investigation represents an empirical study, in the field of psychology and law, of certain rules of evidence.

(2) One hundred and fifty-four rules of evidence were selected from Wigmore's *Code of Evidence* as a sampling of all sorts of categories in the law of Evidence, most of the rules chosen apparently being the law in the majority of jurisdictions. Forty-three were selected because an evaluation of them requires a psychological judgment. Forty-three (but not exactly the same forty-three) of the 154 were considered to be of questionable value; this judgment, however, needed to be checked empirically. Accordingly, the 154 rules were submitted to four different groups for their judgments: 34 Evidence Experts (professors of Evidence teaching in law schools which belong to the Association of American Law Schools, who had taught Evidence for over five years); 34 Law Professors who do not teach Evidence; 34 Practicing Lawyers; and 34 Psychologists.

(3) One of the most interesting results is the high degree of consistency between the judgments of the members of any one group and other members of the same group. Most people would probably suspect not only that the four groups would differ widely in their opinions concerning rules of evidence, but that members of the same group would also differ considerably in their ideas. Yet this study demonstrates that this is not true.

For example, there is a popular notion among non-lawyers that lawyers cannot agree among themselves. However, the coefficients of correlation indicate close agreement between the members of each of the three groups of lawyers and the other members of the *same* group. Each group is in close agreement among its own members. Also, statistical analysis of the judgments by the Evidence Experts on each of the rules confirms the idea that the Evidence Experts agree remarkably well among themselves [cf. (8) *infra*]. Contrary to "common sense" notions, lawyers agree with each other to a surprising degree in the present case.

Similarly, there is a notion among non-psychologists that psychologists never agree with each other. Yet, contrary to popular expectation, the amount of agreement between the Psychologists is remarkably high, being equalled only by the agreement of the Evidence Experts with each other. Here were a group of Psychologists of diversified training and naive as to the law, and yet approaching the same problems with a point of view which apparently resulted in essentially similar judgments.

(4) There is also a remarkably high degree of consistency between the
judgments of the Evidence Experts and of the Law Professors. The amount of agreement between the Evidence Experts and the Practicing Lawyers, and between the Law Professors and the Practicing Lawyers, is also fairly high, certainly much higher than arm-chair philosophizing might lead one to suppose.

The amount of agreement between the Psychologists and each of the three groups of lawyers was also quite high. This is of particular interest because this group, being without legal training, were probably making their judgments on a different basis from the three groups of lawyers. Here were lawyers and psychologists concerned with the same problems, but with different types of training, and yet arriving at similar conclusions on a great many of the individual rules.

(5) That the four different groups were not judging the rules on the same basis is indicated by the critical ratios for the coefficients of correlation. Since the differences in their judgments were very reliable statistically, probably because of the difference in the psychological "set" of each group, the use of these four diverse groups in order to secure differences in points of view certainly seems justified.

(6) All four groups tended to judge the rules of evidence fairly high. Many judges, especially the Psychologists, even made comments about the soundness of most of the rules.

(7) Critical ratios for the arithmetic mean of each of the other three groups as compared with the arithmetic mean of the group of Evidence Experts show that the difference in the total judgments of the Evidence Experts and of the Law Professors is not statistically significant, nor between the total judgments of the Evidence Experts and of the Practicing Lawyers. However, the difference between the total judgments of the Evidence Experts and of the Psychologists is of genuine statistical significance; the non-legal training of the Psychologists probably accounts for this.

Coefficients of variability show that Practicing Lawyers as a group tended to concentrate their numerical judgments at about the same level of "goodness"; Evidence Experts and Law Professors distributed their judgments a bit more, and about equally to each other; and Psychologists were the most variable of all. These results are what might be expected in terms of the so-called "practical" views of practicing lawyers, the more "theoretical" views of professors of Evidence and of other subjects, and the psychological views of psychologists with no legal training. It should be understood, however, that these results in no way suggest that the judgments of any one group are superior to those of another; they simply give some idea of the relative dispersion of the judgments of the four groups.
(8) A statistical analysis of the judgments by the 34 Evidence Experts on each of the 154 rules gives additional confirmation to the idea that the Evidence Experts agreed remarkably well among themselves. The extremely high coefficient of correlation for this group had already indicated a very high degree of consistency in their judgments; this additional analysis of every item reveals only slight differences of opinion which are not statistically significant.

Such a finding seems extremely important because of the suspicion which often attaches to "experts," the view often being that they cannot agree among themselves. The results of this study suggest that on questions of Evidence, the Evidence Experts (using the criteria of the present investigation) can be relied on to have a good deal of unanimity of opinion among themselves as to what is desirable and what is undesirable in the field of Evidence.

(9) An item by item analysis shows the differences in judgment of the four groups. Critical ratios for each of the 154 rules separately (comparing the mean judgments of the Evidence Experts on each rule with those of the Law Professors, with those of the Practicing Lawyers, and with those of the Psychologists) indicate to what extent these differences in judgments on each rule are of statistical significance. Rules 54 to 58 are discussed supra Sec. IX to illustrate the method of interpretation of the results.

(10) Several of the 43 rules which required some type of psychological judgment are discussed supra Sec. X. The desirability of securing the judgments of the Psychologists on legal matters of this sort is demonstrated.

(11) Rules of evidence should be continued in use only to the extent that particular rules are considered "good" by intelligent persons with special knowledge of the problems involved. The rules should be examined empirically, especially by Evidence Experts, to determine which ones should probably be continued in use. Particular rules should also be examined by experts in other fields; e.g., those which involve matters of trial technique should be examined by Practicing Lawyers, those which involve psychological matters should be examined by Psychologists. The rules of evidence should accordingly be affirmed, modified, or discarded.