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Congress, Evidence and Rulemaking

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The Supreme Court promulgated Federal Rules of Evidence on November 20, 1972,¹ and reported them to Congress February 5, 1973,² with an effective date of July 1 of that year. Had events run the rulemaking course established as early as the Permanent Process Act of 1792,³ the Rules of Evidence would have been governing federal trials by mid-1973. This was not to be.

Immediately after the transmittal, the Rules ran into congressional opposition. The first congressional proposal would have merely postponed the effective date.⁴ But final legislative action was quite drastic, requiring affirmative congressional approval of the Rules.⁵ In other words, rules of evidence, if any, would be statutory in lieu of the judicially formulated Rules that the Court had transmitted to Congress. Accordingly, the House drafted and eventually passed a bill significantly revising many rules or subdivisions, though it left "substantially unchanged"⁶ over half of the Court Rules and retained their basic concept, style and form.⁷ The Senate Judiciary Committee

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1. See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972) [hereinafter cited as Court Rules]. Justice Douglas dissented on the grounds: 1) that the rules do not involve practice and procedure and hence are not authorized by the Enabling Act, 28 U.S.C. § 2072 (1970); 2) that the Court functions solely as a conduit to Congress for Committee-drafted Rules. *Id.* at 185 (Douglas, J., dissenting).

2. H.R. REP. NO. 650, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as HOUSE COMM. REP.].

3. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276.

4. S. Res. 583, 93d Cong., 1st Sess. (1973).

5. Shortly after the Senate proposal, the House of Representatives approved an amended version of S. Res. 583, H.R. 4958, 93d Cong., 1st Sess. (1973), requiring affirmative congressional approval. On March 19, 1973, the Senate approved H.R. 4958, which was signed into law by the President, March 30, 1973. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

6. HOUSE COMM. REP., *supra* note 2, at 2.

7. H.R. 5463, 93d Cong., 2d Sess. (1974) [hereinafter cited as House Rules].

held hearings on the House bill,⁸ and has now reported a draft which returns to the Court Rules in some but not all areas.⁹

The ideal solution would be for Congress to change course and do nothing more than set a new effective date for the Supreme Court Rules. Politically, this is not likely to happen. Strange, though, the present course of action. For 40 years there had been a strong advocacy for uniform federal rules of evidence to be promulgated by the Supreme Court. Among the advocates were such legendary figures as Wigmore and Morgan¹⁰ as well as such great names of more recent times as Cleary, Estes, Green, Joiner, Ladd, McCormick.¹¹ The proponents of rules, though, were not limited to experts. They were legion and included the rank-and-file of the profession.¹² The advisability and feasibility study of 1961-1962,¹³ which was authorized by

8. On February 7, 1973, H.R. 5463 was referred to the Senate Committee on the Judiciary and hearings were held on June 4-5, 1974.

9. Telephone Interview with a staff member of the Senate Judiciary Comm., Oct. 10, 1974.

10. In 1936, Colonel Wigmore characterized in the following manner the law applied in the federal courts prior to the *Federal Rules of Civil Procedure*:

The truth is—though some of you may regard this statement as an exaggeration—that the law of evidence in our Federal Courts is in a most deplorable condition. It is *inferior* to that of any of the fifty States and Territories—I say, inferior to *any* of them, and not only inferior but far inferior.

Wigmore, *A Critique of the Federal Court Rules Draft*, 22 A.B.A.J. 811, 813 (1936). See also Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725 (1961):

Thoughtful judges and lawyers have long recognized the need for a careful reexamination of the whole body of rules governing witnesses and the admissibility of evidence.

11. See C. MCCORMICK, EVIDENCE xi (1954); Prof. Cleary's statement, *Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 42 (1973) [hereinafter cited as *Hearings on H.R. 5463*]; Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1959); Green, *To What Extent May the Court Under the Rulemaking Power Prescribe Rules of Evidence*, 26 A.B.A.J. 482 (1940); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429 (1957); Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214 (1942). See also 5 MOORE'S FEDERAL PRACTICE ¶ 43.01 [7], at 1306 (2d ed. 1974); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS, 30 F.R.D. 737 (1962) [hereinafter cited as COMM. PRELIM. REP. ON ADVISABILITY & FEASIBILITY].

12. As early as 1958, the American Bar Association urged that uniform rules of evidence be promulgated by the Supreme Court. *Proceedings of the House of Delegates*, 44 A.B.A.J. 1062, 1113 (1958). At about the same time comparable judicial action was being taken in the Third and Sixth Circuits and then by the Judicial Conference. See, e.g., 1958 JUD. CONF. ANN. REP. 15; 1957 JUD. CONF. ANN. REP. 43.

13. See COMM. PRELIM. REP. ON ADVISABILITY & FEASIBILITY, *supra* note 11, at 48-54. Members of the Special Committee on Evidence were Professor James William Moore, Chairman, Honorable Dean Acheson, Judge Phillip Forman, Judge John C. Pickett, Judge Walter L. Pope, Judge E. Barrett Prettyman and Judge Albert B. Maris. The report was the product of extensive study by Professor Thomas F. Green, Jr., who served as the Reporter, and it reflected major input from the bench and bar.

In a very real sense, the whole bar, and whole bench, and whole citizenry, were brought into this project. Nothing was secret. As a matter of fact, I have to confess that at times we made nuisances of ourselves in urging bar association groups, bar committees, legal scholar groups, and legal scholar committees, ju-

Chief Justice Earl Warren, concluded that the formulation of uniform rules of evidence for the federal courts was both proper and desirable, a conclusion almost unanimously endorsed by the profession. The actual formulation of the Rules was begun in 1965 by a distinguished Advisory Committee and Reporter.¹⁴ Contributions from the profession were both solicited and studied.¹⁵ As finally promulgated by the Court, the Rules are well conceived and structured, neither radical nor conservative, and thoroughly professional. This is not a blessing of perfection. Every lawyer who ever appeared in court probably feels in his heart that he could "improve" the Rules, and so do we. But the profession cannot wait upon "perfection." Rules of evidence are sorely needed, for as the Court pointed out in *Michelson v. United States*, it cannot create a sound corpus of evidence on a case by case basis.¹⁶

Rules of evidence are clearly within the Supreme Court's rulemaking power. They are procedural, for they govern the presentation of facts to court or jury, enabling the trier to apply relevant principles

judicial conferences, to have discussions in depth of the proposed rules, and to report to the Advisory Committee. That committee, in turn, examined in great detail and at length, hour after hour, day after day, week after week . . . the wealth of material that came to it from the bench and bar.

Testimony of Albert E. Jenner, Jr., *Hearings on H.R. 5463*, *supra* note 11, at 22.

14. The members of the Advisory Committee on Rules of Evidence (the "Advisory Committee") were:

Albert E. Jenner, Jr., Esq., Chicago, Chairman; Judge Simon E. Sobeloff, Baltimore; Judge Joe Ewing Estes, Dallas; Judge Robert Van Pelt, Lincoln, Neb.; Professor Thomas F. Green, Athens, Ga.; Professor (now Judge) Charles W. Joiner, Ann Arbor, Mich.; Professor (now Judge) Jack B. Weinstein, Brooklyn; David Berger, Esq., Philadelphia; Hicks Epton, Esq., Wewoka, Okla.; Robert S. Erdahl, Esq., Washington; Egbert L. Haywood, Esq., Durham, N.C.; Frank G. Raichle, Esq., Buffalo; Herman F. Selvin, Esq., Los Angeles; Craig Spangenberg, Esq., Cleveland; Edward Bennett Williams, Esq., Washington; Professor Edward W. Cleary, Champaign, Ill., Reporter.

15. The drafts were the product of searching discussion at the various Circuit Judicial Conferences and seminars, of commentary in professional journals, and of circulation among the profession. In light of comments received from the bench and bar, the preliminary draft of March 1969, 46 F.R.D. 161 (1969), was reconsidered by the Evidence Committee in August 1970. Following its revision by the Committee, the Standing Committee on Practice and Procedure made a few changes in the Evidence Committee's August 1970 Draft, which, as thus revised, was approved by the Judicial Conference in October 1970. After being submitted to the Court, this draft was captioned, published and circulated as the Revised Draft of March 1971, 51 F.R.D. 315 (1971). In 1971 the Court returned the Draft for further consideration. In view of professional comment, the Draft was again revised by the Evidence Committee, further revised by the Standing Committee, approved by the Judicial Conference in October 1971, and again submitted to the Court. While this Draft was before the Court, the Standing Committee considered and adopted amendments to two rules and, following Judicial Conference approval in March 1972, these proposed amendments were also submitted to the Court. On November 20, 1972, the Court promulgated the Final Draft, as amended in 1972, as the Federal Rules of Evidence. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

16. 335 U.S. 469, 486 (1948). For a more extensive discussion of this case, see p. 21 *infra*. Moreover, once Federal Rules of Evidence are in effect, they may supply a valuable model for needed reform of state codes (as did the *Federal Rules of Civil Procedure*; see 1B MOORE'S FEDERAL PRACTICE ¶ 0.504, at 5041 (2d ed. 1974)).

of substantive law on the basis of the facts adduced.¹⁷ That many rules of evidence are important and have a substantial effect in reaching an adjudication¹⁸ does not take them outside rulemaking. Rulemaking is not confined to the picayune. The Supreme Court decided this, and decided it correctly, years ago in *Sibbach v. Wilson & Co.*¹⁹ Until recent congressional action, judicial rulemaking had been generally regarded as the right way to deal with the subject matter of evidence. It is still the right way. Congress should recognize as much and refrain from future intervention in the rulemaking process.

We now proceed to analyze and compare the versions of the Rules proposed by Congress and the Court.

A Critique of Congressional Amendments to the Court Rules

In general, the Federal Rules of Evidence should be interpreted with reference to the standard of construction and statement of purpose in Rule 102:

17. Procedure is an elusive word. Nevertheless, a core of meaning can be discovered from the various instances and purposes for which the word is used: It has been said that procedure "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product." *Poyser v. Minors*, 7 Q.B.D. 329, 333 (1881).

Rules of evidence should be treated within the domain of procedural law. *See Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 393 (5th Cir. 1961); *Monarch Ins. Co. v. Spach*, 282 F.2d 401, 409 (5th Cir. 1960); COMM. PRELIM. REP. ON ADVISABILITY & FEASIBILITY, *supra* note 11, at 32 n.125. Even before the commencement of modern rulemaking, the Court in *Dravo v. Fabel*, 132 U.S. 487 (1889), assumed that the rule against impeaching one's own witness fell within the Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, when the question arose on the law side of the Federal Court, and was therefore a case for the application of (albeit state) "practice, pleadings and form and modes of proceeding." 132 U.S. at 490; *cf. Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Thompson v. Missouri*, 171 U.S. 380 (1898). Evidence is also viewed as procedural by most of the states, *see* 3 J. BEALE, CONFLICT OF LAWS, § 597.1, at 1614 (1935); 5 MOORE'S FEDERAL PRACTICE ¶ 43.02 [2], at 1308-12 (2d ed. 1974); by the American Law Institute, *see* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 585, 595-98, at 702, 710-15 (1934); and by the overwhelming weight of published opinion and commentary. *See* COMM. PRELIM. REP. ON ADVISABILITY & FEASIBILITY, *supra* note 11, at 35 n.138.

This view of evidence as within the scope of procedure is also supported by the enactment of the *Federal Rules of Civil Procedure*. In promulgating them, *see* note 156 *infra*, the Supreme Court construed its rulemaking authority in civil cases under the Act of June 19, 1934, ch. 651, 48 Stat. 1064, *as amended*, 28 U.S.C. § 2072 (1970), as a grant of broad regulatory powers over the machinery of the administration of justice. Almost a quarter of the Civil Rules dealt with evidence, including Rules 26-37, 41(b), 43, 44, 45, 50, 59(a), 60(b), 61, 68, 80(c). Rules of evidence have thus been identified as procedural for almost 40 years.

Although the evidence rules in general may be considered procedural and thus within the rulemaking power, challenges to some rules in cases involving nonfederal issues have been made under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See* the discussion of such challenges with respect to rules of competency, at pp. 28-29 *infra*, and with respect to rules of privilege, at pp. 21-27 *infra*.

18. *See, e.g.*, the discussion of privileges and *Erie* at pp. 21-27 *infra*.

19. 312 U.S. 1, 13 (1941). For further discussion of this case, *see* pp. 23-24 *infra*.

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

The third element—"promotion of growth and development of the law of evidence"—deserves comment. This furnishes the necessary lubricant of growth without undermining the desirable objective of uniformity in the rules of evidence, or giving the judges applying the evidence rules too much personal, ad hoc power. Fears to the contrary are unjustified. First, all the elements emphasized in Rule 102 are subject to the end result that "the truth may be ascertained and proceedings justly determined." Second, the thrust of Evidence Rule 102 does not differ materially from that of Civil Rule 1 and Criminal Rule 2, which have neither destroyed uniformity nor encouraged abuse of judges' personal power.²⁰ Third, the Rules of Evidence, as a whole, are neither revolutionary nor novel and will be applied by a bench and bar whose professional training in this area tends toward caution and moderation.

The House has amended the Court's Rules of Evidence in ways that undermine the sound principles expressed in Rule 102. A discussion of these amendments follows.²¹

A. *Rule 105—Summing Up and Comment by Judge*

As promulgated by the Supreme Court, Rule 105 allows the judge to sum up and comment on the evidence to the jury.²² This follows

20. FED. R. CIV. P. 1 states:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FED. R. CRIM. P. 2 states:

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

The objectives and principles of construction should be read in conjunction with doctrines of harmless error and plain error; cf. 2 MOORE'S FEDERAL PRACTICE ¶ 1.13[1], at 281-82 (2d ed. 1974); 8 *id.* ¶ 2.02, at 281; Court Rule 103[2].

21. We comment only upon the most important changes made by the House, for most House amendments were relatively superficial. A complete survey of the House amendments and deletions can be found in HOUSE COMM. REP., *supra* note 2. For other discussions of the House amendments, see Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973); *Special Evidence Edition*, 27 ARK. L. REV. 171-409 (1973).

22. Court Rule 105 reads:

After the close of the evidence and the arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

both standard federal practice and the common law as embodied in the Seventh Amendment.²³ The House entirely deleted this rule in deference to state law to the contrary, though it recognized federal practice supported such a rule.²⁴ This omission not only goes against the grain of well-established common law and federal practice,²⁵ but also inhibits the proper functioning of the jury.²⁶

Juries need help. Most jurors have no courtroom experience and little familiarity with the language of the law. Often the cases are complicated, confronting jurors with masses of evidence and difficult, abstract concepts molded by necessarily partial counsel. In these cases, the issues may be complicated and convoluted beyond even a lawyer's clarifying ability. A judge must be free to aid the jury in sorting out what it hears and in applying abstract principles of law to the relevant facts adduced at trial.

Admittedly, the judge's summation and comment may be unfair because of bias or honest mistake, and this possibility must be weighed against the need for a judge's clarification of the relationship between the law and the facts. Rule 105 continues counsel's right to object

23. See *Patton v. United States*, 281 U.S. 276 (1930); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

24. H.R. 5463, 93d Cong., 2d Sess. (1974).

25. See *Quercia v. United States*, 289 U.S. 466 (1933); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); Advisory Committee's Note to Court Rule 105, 56 F.R.D. 183, 199-200 (1972). Such practice is inherent in the classic definition of a jury trial:

'Trial by jury' . . . is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899). Even before promulgation of the *Federal Rules of Civil Procedure*, when federal district courts generally followed state practice under the Conformity Act, federal courts did not conform to divergent state practice in this area. See 2 MOORE'S FEDERAL PRACTICE ¶ 2.04, at 320 (2d ed. 1974). See also *Vicksburg and Meridian R.R. Co. v. Putnam*, 118 U.S. 545, 553 (1886):

[T]he judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. [Citations omitted.] The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts.

26. Rules of evidence are the stepchild of the jury system. See *Stevens v. Vowell*, 343 F.2d 374, 380 (10th Cir. 1965); A. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 180-81 (1898); Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723, 726 (1964); Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407, 409, 412, 414, 415 (1905). Of course, the strictness with which a judge will apply many of the rules will depend on whether the case is tried to the court or to a jury.

if he feels that there is unfairness or error, and this provides at least some safeguard against such prejudice. Further, the Rule provides a standard for the summation and comment: It must proceed "fairly and impartially." Additionally, and perhaps most important of all, general rules of procedure must proceed upon the basis that the judges who will apply them are fair and impartial, an assumption eminently justified by the federal judiciary. Though prior federal practice might continue unchanged even with Rule 105 deleted, the benefits of judicial summation and comment would be far better preserved were the Rule reinstated.²⁷

B. Rule 201—Judicial Notice of Adjudicative Facts

Rule 201 allows judicial notice to be taken of adjudicative facts—those which have a tendency to prove or disprove some material element in the case.²⁸ The only controverted element of the Rule is section (g), for which the Court provides:

Instructing jury. The judge shall instruct the jury to accept as established any facts judicially noticed.

The House amended Rule 201(g) to distinguish between civil and criminal cases, even though a similar distinction had been made in the Preliminary Draft of 1969 but deleted in a subsequent revision.²⁹ The House version reads:

Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

27. The American Law Institute supports the practice, as do the Commissioners on Uniform State Laws. ALI CODE OF CRIMINAL PROCEDURE § 325 (1930); MODEL CODE OF EVIDENCE rule 8 (1942); UNIFORM RULES OF CRIMINAL PROCEDURE rule 39 (1952). See generally 5A MOORE'S FEDERAL PRACTICE ¶ 51.07, at 2534 (2d ed. 1974); 9 J. WIGMORE, EVIDENCE §§ 2551, 2551a, at 503, 509 (3d ed. 1940); Parker, *The Federal Judiciary*, 24 A.B.A.J. 239 (1938).

28. Rule 201 does not deal with what Professor Davis calls "legislative" facts, which lie outside the factual domain of the *inter partes* litigation and pertain to generalized propositions which any juror, judge, legislator, teacher, or layman must consider if he is to think intelligently. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). See generally Advisory Committee Note to Court Rule 201(a), 56 F.R.D. 183, 201-04 (1972). For use of such facts, see, e.g., *Turner v. United States*, 396 U.S. 398, 408-19 (1970); *Brown v. Board of Educ.*, 347 U.S. 483, 492-95 (1954). Such facts are more a matter of common sense than of evidence law, however, and were accordingly (and wisely) omitted from the Court Rules. However, the use of legislative facts is in no way restricted by Rule 201.

29. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 330 (1971).

We find this unwise.

Actual application of the House version would make fools of the judge, the law and the jury. If, for example, the facts warrant a finding that a woman was taken by the defendant for immoral purposes from Newark, New Jersey, to New York City, New York, the judge under the Court Rule would by a proper instruction leave the issue to the jury, while further instructing them that such a journey would constitute a crossing of state lines. The House rule, intended to preserve the power of the jury, would require him to instruct the jury that it "may, but is not required to accept" the proposition that to go from Newark to New York is to cross state lines. Under the final Court revision the jury would still have the power to acquit the defendant though the evidence warranted a judgment of conviction—but on the ground of mercy and not under an instruction permitting it to find that Newark is not really in New Jersey but is a New York suburb of "fun city," and that, after all, state lines were not crossed.

Under the House rule, in the morning when the judge tries a civil case the world is round. That afternoon when he tries a criminal case the world is flat.

C. *Rule 301—Presumptions in General*

The effect of a presumption has long been a matter of scholarly controversy. Under one theory, a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed³⁰—"like the bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts."³¹ Such an approach was rejected by the Advisory Committee as giving presumptions too little force.³² Instead, Court Rule 301 adopted Professor Morgan's theory:³³

In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

30. See UNIFORM RULES OF EVIDENCE rule 14(b) (1953); MODEL CODE OF EVIDENCE rule 704, Comment (1942); C. MCCORMICK, EVIDENCE § 345, at 821 (E. Cleary ed. 1972); A. THAYER, *supra* note 26, at 352; 9 J. WIGMORE, *supra* note 27, § 2491, at 288.

31. *Mockowik v. Kansas City, St. Joseph & Council Bluffs R.R. Co.*, 196 Mo. 550, 571, 94 S.W. 256, 262 (1906) (Lamm, J.).

32. Advisory Committee Note to Court Rule 301, 56 F.R.D. 183, 208-11 (1972).

33. See Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

The House thought this approach gave presumptions too great an effect³⁴ and amended Rule 301 to reach a more intermediate position:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts.³⁵

In this attempt, the House has not only made unclear what was previously clear but also invaded the judicial function.

The amended Rule in its attempt at compromise does not rest on any clear or consistent theory as to the effect of a presumption. More importantly, the amended Rule attempts to turn presumptions into evidence. The wording of the last clause, "even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed, to be considered by the trier of the facts," can only lead to that conclusion.

Presumptions are not evidence³⁶ but a way to deal with it—a technique to handle facts. Consequently, the House treatment of presumptions defies common sense. How can one "weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or nonexistence of a fact"?³⁷ Significantly, California's experience with a rule of law treating presumptions as evidence was so unsuccessful that the *California Evidence Code* expressly states "a presumption is not evidence."³⁸

Further, the House Rule seems to imply that a judge does not have the power to find contrary to the presumed fact although the weight of the contradicting evidence is such as would warrant directing a verdict, because "even though met with contradicting evidence, a presumption is sufficient evidence . . . to be considered by the trier

34. HOUSE COMM. REP., *supra* note 2, at 7.

35. Under the Rules promulgated by the Supreme Court, provision was made for presumptions in criminal cases. See Court Rule 303. This provision was deleted by the House Subcommittee and consideration thereof deferred pending revision of the Criminal Code. See S.1, 93d Cong., 1st Sess. (1973); S.1400, 93d Cong., 1st Sess. (1973); NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) (Brown Comm'n).

36. C. McCORMICK, *supra* note 30, § 345, at 825.

37. *Speck v. Sarver*, 20 Colo. 2d 585, 594, 128 P.2d 16, 21 (1942); cf. Morgan, *supra* note 33, at 73.

38. CAL. EVID. CODE § 600 (West 1965).

of fact." Such a provision unduly intrudes upon the judicial prerogative and seems clearly counter to *United States v. Gainey*:

Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction.³⁹

The House's sally into resolving the problems of presumptions only serves to confuse and stultify. The Rule as promulgated by the Supreme Court should be reinstated to avoid further misunderstanding in a difficult area of law.

D. Rule 408—Compromise and Offers to Compromise

Court Rule 408 states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Advisory Committee justified the Rule's evidentiary stance on the grounds that public policy favors compromise and settlement of disputes⁴⁰ and, somewhat more dubiously, that such evidence "is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position."⁴¹

The House version of Rule 408 would thwart the sound policy underlying the Court Rule. It reads in pertinent part:

39. 380 U.S. 63, 68 (1965).

40. See Advisory Committee Note to Court Rule 408, 56 F.R.D. 183, 227 (1972); C. McCORMICK, *supra* note 11, §§ 76, 251, at 157, 539. For other rules of similar import, see UNIFORM RULES OF EVIDENCE rules 52 and 53 (1953); CAL. EVID. CODE §§ 1152, 1154 (West 1966); KAN. CODE OF CIVIL PROCEDURE, KAN. STAT. ANN. §§ 60-452, 60-453 (1964); N.J. EVID. RULES 52, 53 (1967). See also Advisory Committee Note to Court Rule 301, 56 F.R.D. 183, 208 (1972).

41. See Advisory Committee Note to Court Rule 408, 56 F.R.D. 183, 227 (1972) (Committee acknowledges that the validity of the second justification will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances); C. McCORMICK, *supra* note 11, § 276, at 157.

Evidence of admissions of liability or opinions given during compromise negotiations is likewise not admissible. Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations

The House Subcommittee note to Rule 408⁴² states that this change was based largely on testimony from various government agencies suggesting among other things that the Court rule would lead to greater expense in preparing for trial.⁴³ Yet the House rule regresses to the obscure technicalities of the common law,⁴⁴ which allowed evidence of *factual* admissions to be introduced *unless* such admissions were made hypothetically or without prejudice.⁴⁵ The affirmative part of this factual admission rule hampered discussion between the parties, while the “unless” qualification provided an undue advantage to the sophisticated and a snare for the unwary. This rule, in essence now adopted by the House, is unjust. As a matter of elementary fairness, what people say in the course of settlement discussions should not be used against them. As a matter of policy, the rule should favor the free exchange of ideas,⁴⁶ for this is best calculated to settle problems without the necessity for costly judicial intervention. The Court Rule would better promote these goals, and therefore should be reinstated.

E. Article V—Privileges

The basic premise of the Advisory Committee in drafting Article V was that justice in the federal courts would be enhanced by reducing the number and scope of privileges. Accordingly, although

42. See SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, H.R. 5463 AS AMENDED, 93d Cong., 1st Sess. at 12 (Comm. Print, Oct. 10, 1973).

43. See Letters from Acting Gen. Counsel of the Treasury, Gen. Counsel of the Equal Employment Opportunity Comm’n, and Acting Deputy Att’y Gen., *Hearings (Supplement) on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 301, 311, 345 (1973) [hereinafter cited as *House Hearings Supp.*].

44. Cf. FED. R. CIV. P. 68 (makes evidence of an unaccepted offer of judgment inadmissible except in a proceeding to determine cost).

45. Note that, like the Court and House revisions, the common law did not admit evidence of the making of an offer to compromise on the issue of fault or liability.

46. See, e.g., 42 U.S.C. § 2000e-5(b) (1970), regarding the Equal Employment Opportunity Commission:

If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding* (Emphasis added.)

the Committee broadened some of the rules set forth in its Preliminary Draft to meet demands for more protective privileges,⁴⁷ the Article provides privileges only where most strongly justified by logic and experience: for the lawyer-client,⁴⁸ psychotherapist-patient,⁴⁹ husband-wife relationships,⁵⁰ for communications to clergymen,⁵¹ for political votes,⁵² for trade secrets,⁵³ for required reports,⁵⁴ for secrets of state,⁵⁵ and for informers.⁵⁶ Privileges such as the general doctor-patient privilege and the privilege for accountants have been eliminated because of their unwarranted limitations on truth seeking. As Chief Justice Burger recently observed:

Whatever their [the privileges'] origin, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.⁵⁷

This approach is also in line with the position of Wigmore and McCormick.⁵⁸

While hardly revolutionary, Article V as promulgated by the Court sets forth a more sensible approach to privileges than is found in the evidence law of many states. It rejects the unfortunate tendency toward the proliferation of privileges as professional status symbols.⁵⁹

After much testimony and controversy,⁶⁰ the House rejected the Advisory Committee's approach and amended Article V to provide for one general Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in

47. Compare Preliminary Draft of 1969, Rule 5.09, 46 F.R.D. 161 (1969), with Court Rule 509.

48. Court Rule 503.

49. Court Rule 504.

50. Court Rule 505.

51. Court Rule 506.

52. Court Rule 507.

53. Court Rule 508.

54. Court Rule 502.

55. Court Rule 509.

56. Court Rule 510. See Court Rules 511-13.

57. *United States v. Nixon*, 94 S. Ct. 3090, 3108 (1974).

58. See C. McCORMICK, *supra* note 11, § 81, at 165; 8 J. WIGMORE, *supra* note 27, § 2192, at 67.

59. See Ladd, *Privileges*, 1969 LAW AND THE SOCIAL ORDER 555, 556.

60. See *Hearings on H.R. 5463*, *supra* note 11; *House Hearings Supp.*, *supra* note 43.

the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Thus, as to federal issues, the House Rule has adopted a stopgap, incremental, common law development approach, to evidence law. This approach, like that of Criminal Rule 26,⁶¹ relies too heavily on the evolution of privileges through case by case decisions. Judged by the experience under Criminal Rule 26,⁶² federal rules of privilege will emerge slowly. As the Court observed in *Michelson v. United States* (on a different evidence issue):

[I]t is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be

[T]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.⁶³

Ironically, House deferral to future court decisions on federal issues may result in the adoption of most of the Court Rules on privileges. When, for example, a district judge is faced with a complex and confusing question of a privilege for state secrets, he may reasonably turn to the Court draft for guidance.⁶⁴

As to nonfederal issues,⁶⁵ the House has constructed its amendment to the Court Rules on principles supposedly underlying *Erie Railroad Co. v. Tompkins*.⁶⁶ It supported its position by these contentions:

61. FED. R. CRIM. P. 26 provides:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.

62. See generally 8 MOORE'S FEDERAL PRACTICE ¶¶ 26.01[2]-26.02, at 26-1, 26-2 (2d ed. 1974).

63. 335 U.S. 469, 486 (1948).

64. Analogously, New Mexico and Wisconsin have followed the guidance of the Court Rules by adopting them into their state law. N.M. STAT. ANN. §§ 20-4-101 to -1103 (Supp. 1973); WIS. STAT. ANN. §§ 901.01-911.02 (West Supp. 1973).

65. While these issues will more commonly appear in diversity cases, a case in federal court on some federal ground may have pendent to it nonfederal issues; and a case that is in federal court solely on diversity may turn on a federal issue, such as full faith and credit.

66. 304 U.S. 64 (1938). *Erie* requires a federal court to determine State-created rights by following State substantive law whether statutory or decisional. See *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940). Federal courts are

(1) Privileges are substantive for *Erie* purposes and there is no federal interest strong enough to justify departure from state policy; (2) a rule of privilege is outcome-determinative; (3) state policy should not be frustrated by the accident of diversity jurisdiction; (4) a contrary position would encourage forum shopping.⁶⁷ This theory of the *Erie* doctrine is unfortunate.

It is now beyond question that the rulemaking power of the Supreme Court includes the power to make rules of evidence.⁶⁸ This power includes the power to promulgate rules of privilege which supplant conflicting state rules of privilege, even in diversity or other cases involving enforcement of state-created rights.⁶⁹ Such rules do not violate the principles embodied in *Erie* or its progeny.⁷⁰ Their adoption is both desirable and necessary, in diversity as in other cases, for the efficient and just determination of cases in the federal courts.

Without embarking on a detailed analysis of the meaning of "substance" and "procedure" in the context of the Rules of Evidence, it is clear that rules of privilege are subject to rational classification as procedural. The basic rule of evidence is relevancy.⁷¹ A privilege works to keep relevant and otherwise admissible evidence from the trier of facts. It alters the normal mode of proof in a trial by denying the trier information he would otherwise have before him in determining the facts. What is needed to establish a right and impose liability—a matter of substantive law—is naturally distinguishable from how those substantive requirements may be proved—a matter of procedure. Although a privilege may embody state social policies and may regulate persons' conduct outside of the courtroom, its effect in

therefore free to apply their own procedure; see SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, H.R. 5463 AS AMENDED, 93d Cong., 1st Sess., at 12 (Comm. Print June 28, 1973); cf. the discussion of *Erie* problems and Article V in Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). See generally Chayes, *Further Last Words on Erie: The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

67. Advisory Committee Note to Court Rule 501, 56 F.R.D. 183, 233-34 (1972).

68. See pp. 11-12 & note 17 *supra*.

69. Many courts have applied federal evidence law even where state law was to the contrary, thereby indicating that the *Erie* doctrine did not require them to follow state law, see *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960); *Joiner*, *supra* note 11, at 437-39; COMM. PRELIM. REP. ON ADVISABILITY & FEASIBILITY, *supra* note 11, at 37-38 n.145.

70. Cf. 1A MOORE'S FEDERAL PRACTICE ¶ 0.306, at 3201 (2d ed. 1974).

71. The provision that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible is "a presupposition involved in the very conception of a rational system of evidence." A. THAYER, *supra* note 26, at 265; cf. 5 MOORE'S FEDERAL PRACTICE ¶ 43.02[3], at 1312-17 (2d ed. 1974).

the courtroom is to alter the normal procedural functions of the system:

The reality of the matter is that privilege is called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege. *The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information.* Thus, its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous.⁷²

A sound precedent for considering privileges as procedural is provided by the promulgation of Civil Rule 35(b)(2). This rule provides that a party physically examined pursuant to a court order, by requesting and obtaining a copy of the report or by taking the deposition of the examiner, waives any privilege regarding the testimony of every other person who has examined him with respect to the same condition. Because plaintiff's lawyer must as a practical matter know what is in the report, the effect of the rule where the examination issue arises in diversity cases is to eliminate the physician-patient privilege despite provision for this privilege in most state codes.⁷³

Though the privilege provision of Rule 35(b)(2) was not specifically controverted, a 1941 challenge to Rule 35(a) provides the Court's basic statement on the extent of the Court's power under the Rules Enabling Act. In *Sibbach v. Wilson & Co.*,⁷⁴ a suit based on diversity jurisdiction, plaintiff challenged a district court order that she submit to a physical examination by a court-appointed physician. She argued that the right to be free from physical invasion was too important to be overridden just by a Court Rule and that therefore the Rule authorizing the examination was beyond the scope of the authority conferred upon the Court by the Enabling Act. The Court disagreed. Identifying the powers delegated in the Enabling Act with Congress's plenary "[p]ower to regulate the practice and procedure of federal courts,"⁷⁵ the Court stated that "[t]he test must be whether a rule

72. Advisory Committee Note to Court Rule 501, 56 F.R.D. 183, 230, 232 (1972) (emphasis added). For a more detailed analysis of this position, see Ladd, *supra* note 59, at 569.

73. Note that FED. R. Civ. P. 35(b)(2) also supports the limitation, in Court Rule 504, of the physician-patient privilege to a psychotherapist-patient relationship; cf. Advisory Committee Note to Court Rule 504, 56 F.R.D. 183, 240, 241 (1972).

74. 312 U.S. 1 (1941).

75. See generally *id.* at 9-10.

really regulates procedure.”⁷⁶ It held that Civil Rule 35(a) was clearly procedural and “within the authority granted.”⁷⁷

Sibbach thus provides a clear precedent for the validity of the privilege Rules which, though perhaps difficult to classify precisely, are more procedural than substantive—albeit, as in *Sibbach*, regulating very important matters.

The validity of the Court’s privilege Rules is also confirmed by the decision in *Hanna v. Plumer*.⁷⁸ This case, also a diversity suit, involved service of process under Civil Rule 4(d)(1). The Court, citing *Sibbach* as the controlling authority on the interpretation of the Enabling Act, upheld the Rule and concluded that

[R]ule 4(d)(1) . . . neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds⁷⁹

. . . .
[B]oth the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state ‘substantive law,’ and federal ‘procedural law,’ but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions. . . .

. . . .
[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.⁸⁰

In addition to the reasoning of the Court, *Hanna v. Plumer* is also important because of the timing of the decision: Chief Justice Warren’s opinion for the Court followed by only a short time his ap-

76. *Id.* at 14.

77. *Id.* at 16.

78. 380 U.S. 460 (1965).

79. *Id.* at 463-64.

80. *Id.* at 471-72.

pointment of the Advisory Committee for the Rules of Evidence,⁸¹ thereby implying his acceptance of the view that the Court's authority under the Enabling Act extended to a code of evidence, a code which foreseeably would include rules of privilege.

Finally, the Supreme Court's position in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,⁸² also strongly supports adoption of federal rules of privilege. In *Byrd*, the Court upheld the federal policy favoring jury hearings for disputed fact questions over contrary state procedural law—regardless of the effect on outcome.⁸³ As Justice Brennan pointed out, “the federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.”⁸⁴ And he further noted that the federal courts have interests which outweigh the need to follow conflicting state law, quoting *Herron v. Southern Pacific Co.*,⁸⁵ a leading pre-*Erie* case.⁸⁶

Promulgation and application of rules of procedure and evidence, and, a fortiori, rules of privilege, aid in the just and efficient administration of cases brought into the federal courts⁸⁷ and embody an important federal interest that should not be altered by deference to conflicting state rules. Privileges, because of their important impact on modes of proof in the federal courts, represent a type of state law which does “interfere with the appropriate performance” of the federal

81. The Advisory Committee was appointed March 8, 1965. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 178 (1969). *Hanna* was decided April 26, 1965, just before the Committee's first meeting in June 1965. *Id.* at 173.

82. 356 U.S. 525 (1958).

83. This holding modified that in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945), where the Court had amplified the *Erie* doctrine, stating that a state law was substantive and therefore to be followed if it significantly affected the outcome of the case. The *Byrd* Court noted:

The policy on uniform enforcement of state-created rights and obligations, see, e.g., *Guaranty Trust Co. of New York v. York*, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury

356 U.S. at 537-38.

84. 356 U.S. at 537.

85. 283 U.S. 91 (1931).

86. State laws cannot alter the essential nature or function of a federal court because that function is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court either under the Conformity Act or the “Rules of Decision” Act.

356 U.S. at 539.

87. See, e.g., Statement of Donald E. Santarelli, Assoc. Deputy Att’y Gen. for the Administration of Criminal Justice, *Hearings on H.R. 5463*, *supra* note 11, at 287: Sound judicial administration requires that judges be assigned temporarily to other districts as special needs arise and as judicial business increases and declines. Different rules of evidence in districts of different states makes such assignment difficult. For the same reason, judges of the courts of appeal, to an even greater extent, find difficulty in reviewing the application of evidence rules in cases coming from districts in different states.

courts' functions, and which should therefore be inapplicable under the reasoning of *Byrd*.

Some commentators have argued that Article V's uniform rules of privilege are probably within the power of the Supreme Court to promulgate under *Hanna* and *Byrd*, but should not be applied to diversity cases or other cases involving adjudication of state-created rights.⁸⁸ Their view is that comity requires deference to the substantive state policies embodied in privileges, and that failure to apply state privileges in diversity cases or other cases adjudicating state created rights might lead to undesirable forum shopping.⁸⁹

We disagree. The obligations of comity cease when state law begins to alter the appropriate functioning of the federal courts.⁹⁰ And the use of a dual system of privileges, with state privileges governing proof of state law claims and federal privileges proof of federal claims, would generate unwarranted confusion in the many cases involving both federal and state issues. It is simply not feasible to employ two conflicting systems of privileges in a single trial.⁹¹ And whatever forum shopping might arise from the availability of Article V's privileges is no different from the forum shopping that results from the tactical advantages afforded by the *Federal Rules of Civil Procedure* or any other aspect of the federal courts or their procedure.⁹²

House reliance on *Erie* has its element of irony. It leaves state law privileges applicable in diversity cases but without effect in other federal cases,⁹³ such as criminal cases. Yet privileges have the greatest impact in criminal cases.

If a privilege is denied in the area of greatest sensitivity, it tends to become illusory as a significant aspect of the relationship out of

88. See Ladd, *supra* note 59, at 559 n.12.

89. See, e.g., Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969).

90. Cf. *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525 (1958).

91. From a practical viewpoint, the result would be utter chaos if, in such mixed issue cases, federal rules of evidence applied only to federal matters. Where federal and nonfederal issues are intertwined, as, for example, in cases involving pendent jurisdiction, see 3A MOORE'S FEDERAL PRACTICE ¶ 18.07[1-2], at 1921-32 (2d ed. 1974), or where a federal statute partially incorporates state law such as § 60 of the Bankruptcy Act on preferences, 1A *id.* ¶ 0.322[1], at 3724-28, judges and counsel would be forced to apply both federal and state rules on the trial of the same case. Sound judicial administration should preclude such a confusing result.

92. Ladd, *supra* note 59, at 564. For analysis strongly in agreement with our own position, see *id.* at 569; Advisory Committee Note to Court Rule 501, 56 F.R.D. 183, 230 (1972).

Note that the Court Rules do incorporate state-created privileges in two instances: Court Rule 502 makes all statutory privileges for required reports applicable in the federal courts; Court Rule 510 makes state rules protecting the identity of informers controlling in the federal courts, subject to the right of the federal government to override claims of privilege in criminal cases.

93. Advisory Committee Note to Court Rule 501, 56 F.R.D. 183, 230 (1972).

which it arises. For example, in a state having by statute an accountant's privilege, only the most imperceptible added force would be given the privilege by putting the accountant in a position to assure his client that, while he could not block disclosure in a federal criminal prosecution, he could do so in diversity cases as well as in state court proceedings. Thus viewed, state interest in privilege appears less substantial than at first glance might seem to be the case.⁹⁴

Nonetheless, the House Rule is temporarily palatable: The amendment at least continues federal control over some cases in federal courts. In the long run, however, the Court Rules of privilege are the most desirable.

F. Rule 601—General Rule of Competency of Witnesses

Court Rule 601 provides:

Every person is competent to be a witness except as otherwise provided in these rules.

It should be read in conjunction with Rule 611(a), which provides that the judge shall exercise discretion over the interrogation of witnesses and the presentation of evidence so as to "(1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."⁹⁵

Court Rule 601, with its emphasis on admissibility, enables the judge to achieve these goals without being strait-jacketed by medieval rules of incompetency.⁹⁶ As Judge Weinstein has pointed out:

The Rules of evidence can do little, by themselves, to prevent conscious distortions by the trier. They should, however, permit all possible relevant evidence and argument to be brought to bear on the trier so that he will at least be forced to bare his soul to himself and to consciously, though silently, justify his actions.⁹⁷

94. *Id.*

95. See Comment, *Witnesses Under Article VI of the Proposed Federal Rules of Evidence*, 15 WAYNE L. REV. 1236, 1237-39 (1969).

96. At common law, witnesses were deemed incompetent to testify for many reasons—mental incapacity, immaturity, lack of belief in a Divine Being, conviction of certain crimes, relation by marriage to a party. Parties and witnesses having an interest in the outcome of the litigation were also disqualified, as well as the judge and jurors hearing the case. See generally 2 J. WIGMORE, *supra* note 27, §§ 484-620, at 521-753.

97. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 238 (1966).

As with the amendments to Article V⁹⁸ the House was motivated to amend Rule 601 by a desire for partial deference to state law:

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 main effect of the House amendment is to make state Dead Man Acts applicable in the trial of nonfederal matters.⁹⁹ This step is regrettable.¹⁰⁰

While not technically a part of the common law, the Dead Man Acts are a purely American outgrowth of the long-deceased common law rule that parties and other interested persons are incompetent witnesses.¹⁰¹ These statutes have become so entrenched in American jurisprudence as to be found in many jurisdictions.¹⁰²

No sound policy is protected by this treatment. Commentators agree¹⁰³ that Dead Man statutes merely embody, in the words of Bentham, a "blind and brainless" technique.¹⁰⁴ They are unnecessary, for the risk of fabrication on the part of the surviving party can be pointed out by counsel. In a case of fraud, cross-examination will usually "reveal discrepancies inherent in the 'tangled web' of deception."¹⁰⁵ Further, "the survivor's disqualification is [only] more likely to balk the honest than the dishonest survivor. One who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story."¹⁰⁶ The original Rule 601 correctly discarded this jurisprudential albatross.

This action should not be undercut by *Erie* doubts or fears of forum shopping. Rules of competency are essentially legal formulations of credibility. As Professor James has noted, competency disqualifica-

98. See pp. 21-22 *supra*.

99. Note that this will most often differentiate diversity from other cases, and is a regression from FED. R. CIV. P. 43(a), which now governs competency of witnesses and does not distinguish between diversity and other federal cases. The Rule provides that whichever federal or state rule most favors competency shall be followed.

100. Like the Court, the Model Code and the Uniform Rules had eliminated the Dead Man's Act. See MODEL CODE OF EVIDENCE rule 1-01 (1942); UNIFORM RULES OF EVIDENCE rules 7, 63(4) (1953).

101. See C. McCORMICK, *supra* note 30, § 65, at 143-44.

102. See Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 91 (1963).

103. See, e.g., C. McCORMICK, *supra* note 30, § 65, at 143.

104. *Id.*

105. *Id.*

106. *Id.*

tions remain very much a part of the trial process in the guise of credibility: "As restrictions on competency have retreated, the old disqualifying items have come in on the question of credibility."¹⁰⁷ Credibility is undeniably a matter of procedure. Consequently *Erie* does not command that state rules on impeachment of a witness's credibility be applied by federal courts in diversity cases. Similarly, state Dead Man Acts should not be controlling. Of course, rules on credibility do affect the outcome of litigation. But the same criticism is true of procedural rules generally and has not been held to mandate the application of *Erie* principles.¹⁰⁸ In the same vein the elimination of the Dead Man Acts in diversity cases may result in some forum shopping, but forum shopping is inherent in the very notion of diversity jurisdiction.¹⁰⁹

One other provision regarding witnesses deserves a brief comment. Court Rule 611(b) adopted a "wide-open" provision for cross-examination,¹¹⁰ but the House returned¹¹¹ to the so-called federal or restrictive rule.¹¹² Arguments between proponents of the open and restrictive rules have raged for years.¹¹³ Inasmuch as experts disagree, and inasmuch as there should be a presumption in favor of the Court Rules,¹¹⁴ the Court Rule should be followed. Most important, however, is that the judge have discretion to handle the matter, something guaranteed in both proposals.

107. James, *Witnesses: A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference of the Second Circuit*, 48 F.R.D. 58, 59 (1969).

108. Cf. pp. 21-27 *supra*.

109. See Advisory Committee Note to Court Rule 501, 56 F.R.D. 183, 234 (1972).

110. Rule 611(b) reads:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

111. The House draft of 611(b) reads:

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination.

112. The federal rule had its genesis in the 19th century. Justice Story, speaking for the Court in *Philadelphia & Trenton R.R. v. Stimpson*, 39 U.S. 448, 461 (1840), stated, "[A] party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

113. See, e.g., M. LADD, *EVIDENCE* 73-82 (2d ed. 1955); C. McCORMICK, *supra* note 11, §§ 21-27, at 41-52; MODEL CODE OF EVIDENCE rule 105 (1942); 5 MOORE'S FEDERAL PRACTICE ¶ 43.10, at 1373-80 (2d ed. 1974); E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 65-68 (1962); 6 J. WIGMORE, *supra* note 27, §§ 1887-88, at 536-45; Carlson, *Cross-examination of the Accused*, 52 CORNELL L.Q. 705 (1967); *House Hearings Supp.*, *supra* note 43, at 203, 237, 250, 270; Letter from Mason Ladd to Honorable Roszel C. Thomsen, Feb. 19, 1974, on file with the *Yale Law Journal*.

114. See p. 38 *infra*.

G. *Article VIII—Hearsay*

The hearsay rule is designed to ensure that only reliable evidence is presented at trial. Factors to be considered in evaluating testimony are the witness's perception, honesty, memory and narration.¹¹⁵ The Anglo-American legal system has generally tried to ensure the accuracy of testimony by requiring (1) an oath, (2) the witness's personal presence at the trial, and (3) cross-examination.¹¹⁶ Of the three, the lack of cross-examination has been the main justification for the exclusion of hearsay testimony.¹¹⁷ "[C]ross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of the truth."¹¹⁸

Yet no one could defend a rule which rejected as worthless all statements untested by cross-examination:

[A]ll historical truth is based on uncross-examined assertions What the Hearsay Rule implies—and with profound verity—is that all testimonial assertions *ought to be* tested by cross-examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.¹¹⁹

This is especially true when the choice is between evidence which is less than the best and no evidence at all. In considering the desirability of admitting testimony given under imperfect conditions, the Advisory Committee followed the common law approach to hearsay and proposed a general rule excluding hearsay, subject to exceptions. These exceptions are made under circumstances which are thought to guarantee accuracy despite the lack of an oath, personal presence or cross-examination.¹²⁰ The exceptions in the Court Rules are not exclusive, for it was recognized that provision for the growth and development of the hearsay rule, as had occurred under the common law, must be incorporated into the Federal Rules of Evidence.¹²¹

115. C. McCORMICK, *supra* note 30, § 245, at 581.

116. See *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 & n.1 (1961); C. McCORMICK, *supra* note 30, § 244, at 579 (historical development of the Hearsay Rule); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484 (1937); Advisory Committee Note to Court Rule 801, 56 F.R.D. 183, 293 (1972).

117. C. McCORMICK, *supra* note 11, § 245, at 253.

118. 5 J. WIGMORE, *supra* note 27, § 1367, at 29.

119. 1 *id.* § 8c, at 278. See *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 391 (5th Cir. 1961) (Wisdom, J., observed that the lack of cross-examination argument is based on a misunderstanding of the origin and nature of the Hearsay Rule: "The rule is not an ancient principle of English law recognized at Runnymede. And gone is its odor of sanctity."); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954).

120. 5 J. WIGMORE, *supra* note 27, § 1422, at 205.

121. See pp. 35-36 *infra*.

1. *Rule 801(d)(1)(A)—Statements Which Are Not Hearsay—Prior Inconsistent Statement by Witness*

As originally submitted to Congress, Rule 801(d)(1)(A) read:

- (d) Statements which are not hearsay. A statement is not hearsay if
- (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony

The House added limiting language to provision (A). The amended rule reads in pertinent part:

and the statement is (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition

This amendment almost destroys the usefulness of the provision.

The House was influenced by the traditional and majority rule admitting prior inconsistent out-of-court statements to impeach but not as substantive evidence.¹²² The exclusion of these statements as substantive evidence is justified by the asserted necessity for the simultaneous satisfaction of oath, observation of demeanor, and cross-examination requirements when the testimony is given.¹²³

There are several problems with the House Rule. First, it asks the jury essentially to do the impossible by using a statement for impeachment but not for its substantive truth. Mr. Justice Cardozo long ago criticized such rules of law that require “discrimination so subtle” and “beyond the compass of ordinary minds.”¹²⁴

The requirement of a contemporaneous oath seems pedantic at best. Commentators have long recognized that the oath is no longer a principal safeguard of the truthworthiness of testimony.¹²⁵ Of all the established exceptions to the hearsay rule, only the one for former testimony¹²⁶ requires that the out-of-court statement have been made under oath. Further, whatever symbolic value or air of solemnity now

122. See HOUSE COMM. REP., *supra* note 2, at 13; Advisory Committee Note to Court Rule 801, 56 F.R.D. 183, 293 (1972).

123. See C. McCORMICK, *supra* note 30, § 251, at 601.

124. *Shepard v. United States*, 290 U.S. 96, 104 (1933). See also *United States v. Klein*, 488 F.2d 481 (2d Cir. 1973); C. McCORMICK, *supra* note 30, § 251, at 603-04.

125. See generally C. McCORMICK, *supra* note 30, § 251, at 601; 6 J. WIGMORE, *supra* note 27, § 1827, at 309; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

126. See generally C. McCORMICK, *supra* note 30, §§ 254-61, at 614-27.

remains in the oath is provided by the subsequent swearing of the witness who allegedly made the prior statement.

The lack of contemporaneous demeanor evidence has not been held fatal in most hearsay exceptions.¹²⁷ More to the point is Judge Learned Hand's comment:

If, from all that the jury sees of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court.¹²⁸

The primary objection to the Court's version of Rule 801(d)(1)(A) is the absence of simultaneous cross-examination.¹²⁹ Yet this objection seems relatively unimportant in light of the safeguards surrounding admission of prior inconsistent statements. As McCormick has noted:

[T]he witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror, or greed, and thus cast light on which is the true story and which the false. It is hard to escape the view that evidence of a previous inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.¹³⁰

It is therefore hard to see why the House committee called for "firm additional assurances of the reliability of the prior statement."¹³¹ These assurances are amply provided for in the Court Rule. Yet the House amendment seeks to double them. This is curious indeed when the hearsay exception for former testimony requires that each of the three criteria be satisfied only once, and no other hearsay exception demands any of them.

Nor does the House version succeed in its goal of avoiding "dispute[s] as to whether the prior statement was made."¹³² The risk of fabrication is present with many of the hearsay exceptions, *e.g.*, those for dying declarations or excited utterances. These exceptions are

127. *Id.* § 251, at 602-03.

128. *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925).

129. See *House Hearings Supp.*, *supra* note 43, at 287 (District of Columbia Bar Study Committee criticism of the Court Rule 801(d)(1)(A)).

130. C. MCCORMICK, *supra* note 30, § 251, at 603-04.

131. HOUSE COMM. REP., *supra* note 2, at 13.

132. *Id.*

based on the assumption that they contain sufficient guarantees of trustworthiness to minimize the risk of fabrication. Analogously, here, where the witness is before the trier of fact, under oath and subject to cross-examination, the risk of fabrication is diminished. Why prior inconsistent statements should require extraordinary assurances that the statement was indeed made is neither explained by the House nor consistent with the general hearsay exceptions included in Article VIII.

As far as the assurance itself is concerned, it seems to be assumed that it would take the form of a written transcript. But the amendment asks for none, and it is established¹³³ that former testimony may be proved by the testimony of any person who was present and heard it given. Moreover, the mere presence of a writing does not eliminate disputes over its accuracy, especially in the case of stenographic transcripts.¹³⁴

Court Rule 801(1)(d)(A) is eminently more practical than the House Rule. The situations covered by the latter will be few. It is rare that a witness will reject his former testimony given under oath and subject to cross-examination. The Court Rule, however, covers the far more frequent instance of prior statements not subject to the House criteria, and now abandoned on the stand. It provides a more realistic method for dealing with the turncoat witness by making his prior inconsistent statement substantive evidence.¹³⁵ This principle is consistent with Rule 607's provision that "the credibility of a witness may be attacked by any party calling him." The Court Rule also has the advantage of admitting statements made nearer in time to the relevant events, when memory is fresher.¹³⁶

The policies underlying the Court's Rule have met with overwhelming approval from courts, commentators and drafters of other codes of evidence,¹³⁷ and the constitutionality of such a Rule was upheld in *California v. Green*.¹³⁸ It should be reinstated.

133. See, e.g., *Myers v. United States*, 171 F.2d 800 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949).

134. *Id.* at 813. See also 4 J. WIGMORE, *supra* note 27, § 1330, at 774, quoting *McIver, C.J.*, in *Brice v. Miller*, 35 S.C. 537, 549, 15 S.E. 272, 277 (1892):

Stenographers are not more infallible than any other human beings, and while as a rule they may be accurate, intelligent, and honest, they are not always so; and therefore it will not do to lay down as a rule that the stenographer's notes when translated by him are the best evidence of what a witness has said
[footnotes omitted]

135. See CAL. EVID. CODE § 1235, Comment (West 1966); C. McCORMICK, *supra* note 30, § 38, at 75-78.

136. See Advisory Committee Note to Court Rule 801, 56 F.R.D. 183, 293-99 (1972).

137. C. McCORMICK, *supra* note 30, § 251, at 603; N.M. STAT. ANN. § 20-4-801(d)(1)(A) (Supp. 1973); WIS. STAT. ANN. § 908.01(4)(a)(1) (West Supp. June 1974).

138. 399 U.S. 149 (1970) (with respect to CAL. EVID. CODE § 1235 (West 1966)).

2. Rule 803(6)—Records of Regularly Conducted Activity

Court Rule 803(6) expands the "business records" exception to the hearsay rule.¹³⁹ The history of the "business records" exception is one of statutory relaxation of rigid common law rules. The Court Rule continues that trend: it broadens the range of records that are admissible to those of "any regularly conducted activity," including those that contain "opinions or diagnoses," and thus expands the exceptions beyond the limits set in such earlier statutes as the Commonwealth Fund Act,¹⁴⁰ the Uniform Business Records as Evidence Act,¹⁴¹ and the Uniform Rules of Evidence.¹⁴² The Court Rule, which is clearly not confined to "business records," was designed to retain the "element of unusual reliability . . . said . . . to be supplied by systematic checking, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation"¹⁴³ without the restrictive connotations implied by the term "business."

The House has frustrated this goal by inclusion of the word "business" in its amendment. The amended rule is titled "Records of Regularly Conducted Activity" yet speaks of records of a "business activity" and expressly defines "business" as including "business, profession, occupation, and calling of every kind." Such drafting is misleading. It uses the term "business" while defining it in a fashion that includes a variety of other forms of endeavor not ordinarily thought of as business.

Furthermore, such terminology puts in doubt the admissibility of many records that provide equivalent guarantees of trustworthiness and have been admitted under the existing "business records" exceptions.¹⁴⁴ Do schools, churches and hospitals fall within the purview of the House Rule? Certainly many individually kept financial records would not.

The deliberate and careful wording of Court Rule 803(6) avoids these definitional problems. It should be restored.¹⁴⁵

139. See Note, *Business Records Rule: Repeated Target of Legal Reform*, 36 BROOKLYN L. REV. 241 (1970); C. McCORMICK, *supra* note 30, § 306, at 719-20.

140. "The term business shall include business, profession, occupation and calling of every kind." The Commonwealth Act, 28 U.S.C. § 1732(a) (1970); see E. MORGAN, *THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM* 63 (1927).

141. "§ 1. Definition. The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." 9A U.L.A. 506 (1965).

142. "[E]very kind of business, profession, occupation, and calling, or operation of institutions, whether carried on for profit or not." UNIFORM RULES OF EVIDENCE rule 62(b) (1953).

143. Advisory Committee Note to Court Rule 803(6), 56 F.R.D. 329 (1972).

144. See C. McCORMICK, *supra* note 30, § 308, at 722-24.

145. For a general discussion of the exception for regularly conducted activity, see Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1960); Schwartz, *The*

3. *Rule 804(b)(3)—Statement Under Belief of Impending Death*

Court Rule 804(b)(3) provides for the admission of all statements “made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.” The House amended the rule to admit dying declarations only “in a prosecution for homicide or in a civil action or proceedings.”

Traditional doctrine has long held that the imminence of death places extreme pressures on the declarant to speak truthfully.¹⁴⁶ The House, however, viewed such evidence as unreliable and prejudicial.¹⁴⁷ Curiously, its response was to amend the bill to admit such “unreliable” testimony in the *most* serious (homicide) criminal cases, but not in lesser ones. This rule is illogical and arbitrary, and excludes reliable evidence. It should be abandoned in favor of the Court version.

4. *Rules 803(24), 804(b)(6)—Other Exceptions*

Hearsay has traditionally been a doctrine based on the judicial policy of ensuring that the best evidence available is presented at trial. Flexibility is necessary, and specific exceptions cannot be immutable. Historically, evidence codes have provided for adaptability and growth.¹⁴⁸

The Court Rules carry on the tradition of specific exceptions accompanied by a provision for residual exceptions. Court Rules 803(24) and 804(b)(6) would admit hearsay statements that have characteristics of trustworthiness and reliability comparable to the 28 specific exceptions but which are not within any of these particularized provisions.¹⁴⁹ These residual exceptions do not constitute a license to cast

Proposed Federal Rules of Evidence: An Introduction and Critique, 38 U. CIN. L. REV. 449 (1938); Note, *Revised Business Entry Statutes: Theory and Practice*, 48 COLUM. L. REV. 920 (1948).

146. Note that because of the deletion of Court Rule 804(b)(2) by the House, the House version of Court Rule 804(b)(3) is numbered 804(b)(2). See generally C. MCCORMICK, *supra* note 30, § 281, at 680.

147. HOUSE COMM. REP., *supra* note 2, at 15.

148. While the American Law Institute retained the traditional exceptions in Rules 504 and 529 in its *Model Code of Evidence*, the drafters also adopted an extremely expansive exception to its hearsay rule:

Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination.

MODEL CODE OF EVIDENCE rule 503 (1942). The Commissioners on Uniform State Laws took a more cautious position. See UNIFORM RULES OF EVIDENCE rule 63 (1953).

149. Court Rule 803(24) provides a hearsay exception for cases in which the declarant is available as a witness:

A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Court Rule 804(b)(6) reiterates this language with respect to situations where the declarant is unavailable.

aside the sound justifications of the hearsay rule but rather are designed to assure adequate flexibility in its application.¹⁵⁰ Courts "are loath to reduce the corpus of hearsay rules to a strait-jacketing, hypertechnical body of semantical slogans to be mechanically invoked" ¹⁵¹ Hearsay should be admitted where it is "necessary and trustworthy."¹⁵²

The House deleted Court Rules 803(24) and 804(b)(6) because they "injected too much uncertainty into the law."¹⁵³ Thus the House bill, while affirming the provision in Rule 102 for "growth and development," would create additional hearsay exceptions only through amendments to the Rules. This position is a step backward from the common law, for it fails to recognize the immediate requirements presented by a live case on trial. Instead, Rule 803(24) and Rule 804(b)(6) are necessary to make the mandate of Rule 102 applicable to the hearsay area.¹⁵⁴

Conclusion

As the previous account demonstrates, the House changes in the Court's Rules of Evidence are less desirable than the original version. Its revision is a substantial departure from a long tradition of congressional deference to Supreme Court rulemaking. The tradition should be followed.

The Supreme Court has had and exercised rulemaking power since 1792.¹⁵⁵ The modern rulemaking process dates from the early 1930's

150. See Advisory Committee Note to Court Rule 803(24), 56 F.R.D. 183, 320 (1972):

It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. . . . [R]oom is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.

151. *United States v. Castellana*, 349 F.2d 264, 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

152. *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 398 (5th Cir. 1961). See also *United States v. Barbati*, 284 F. Supp. 409, 482 (E.D.N.Y. 1968); *Hew v. Aruda*, 51 Hawaii 451, 456-57, 462 P.2d 476, 480 (1969); *Woll v. Dugas*, 104 N.J. Super. 586, 250 A.2d 775 (1969).

153. SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, *supra* note 42, at §1, 33.

154. See Rothstein, *supra* note 21, at 156-57 (supports these general exceptions).

155. The first Process Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, provided that in the circuit and district courts, which were the federal *nisi prius* courts, the procedure in suits at common law should conform to the state practice, but that the procedure in equity and admiralty should be according to the course of the civil law. (Speaking generally, under the first Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, the district courts were the nation's admiralty courts; and the circuit courts handled the diversity jurisdiction, with also a certain appellate jurisdiction over the district courts.) The Permanent Process Act of May 8, 1792, ch. 36, 1 Stat. 275, empowered the court to prescribe the procedure in common law, equity and admiralty cases which were heard in the circuit and district courts. This power was reaffirmed by the Act of August 23, 1842, ch. 188, 5 Stat. 516. Under this authority the Court promulgated

when the statutory foundations were laid for the Rules of Civil and Criminal Procedure.¹⁵⁶ Though these and subsequent rulemaking acts¹⁵⁷ provided for reporting such rules to Congress,¹⁵⁸ and though

equity and admiralty rules but did not exercise its statutory authority to make rules in common law cases. This authority was withdrawn by the Conformity Act of June 1, 1872, ch. 255, 17 Stat. 196, which substituted continuing, in lieu of static, conformity to state procedures in common law cases. Finally, the authority to promulgate "General Orders" bankruptcy practice (without the force of statute) was granted the Court in 1898. See 2 MOORE'S FEDERAL PRACTICE ¶ 1.03[2.-1], at 153 (2d ed. 1974).

156. The Act of June 19, 1934, ch. 651, 48 Stat. 1064, as amended, 28 U.S.C. § 2072 (1970), enabled the Court not only to prescribe rules of procedure for actions at law but also to unite the procedure in equity and at law so as to secure one form of civil action. The Act provided that if the Court should decide to unite law and equity practice the united rules should not take effect until after they had been reported to Congress at the beginning of a session and until after the close of the session.

Under this Rule Making Act the Federal Rules of Civil Procedure, combining the practice of law and equity, were promulgated on December 20, 1937, 302 U.S. 783 (1937), and became effective on September 16, 1938. 1B MOORE'S FEDERAL PRACTICE ¶ 0.523[5], at 5614 (2d ed. 1974). See generally 1B *id.* ¶ 0.522, at 5601-06. The Act of February 24, 1933, ch. 119, 47 Stat. 904, as amended by the Act of March 8, 1934, ch. 49, 48 Stat. 399, as amended, 18 U.S.C. § 3771-72 (1970), granted the Court authority to make procedural rules in criminal cases subsequent to a verdict, finding or plea of guilty. The Act of June 29, 1940, ch. 445, 54 Stat. 688, as amended, 18 U.S.C. § 3773 (1970), extended the power to the procedure in criminal cases prior to this point, subject to the requirement that any rules relating to the latter procedure should be reported to Congress before they took effect. Under it, the Federal Rules of Criminal Procedure were promulgated by the Court on December 26, 1944, 323 U.S. 821 (1944) and became effective on March 21, 1946. See generally 8A MOORE'S FEDERAL PRACTICE ¶ 59.02, at 59-1 (2d ed. 1974). The Judicial Code, Title 28 of the *United States Code*, and the Criminal Code, Title 18 of the *United States Code*, were enacted into positive law in 1948, largely, although not solely, to reflect the procedural changes made by the Civil and Criminal Rules. See 1B *id.* at ¶¶ 0.502, 0.501[4], at 5032.

157. Civil and admiralty procedures were merged in 1966, Amendments to Rules of Civil Procedure for the U.S. District Court, 383 U.S. 1031 (1966), while in 1968 the Federal Rules of Appellate Procedure gave the courts of appeals a modern, uniform set of appellate rules. See 9 MOORE'S FEDERAL PRACTICE ¶ 201.02[1], at 503 (2d ed. 1974). And since the Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356, 28 U.S.C. § 331 (1958), charged the Judicial Conference with the duty of carrying on a continuous study of the operation and effect of the general rules of practice and procedure, various amendments and revisions have been made of the civil, criminal, admiralty, and appellate rules for the courts of appeals.

It was not until 1964 that the Supreme Court was given the authority to prescribe rules in the bankruptcy area that could supersede conflicting statutory law. Act of Oct. 3, 1964, 28 U.S.C. § 2075 (1970). Rules for the bankruptcy courts were quick to follow, as the Supreme Court, with the help of an Advisory Committee, prescribed rules and forms governing the procedure in courts of bankruptcy in cases under Chapters I-VII and Chapter XIII of the Bankruptcy Act. Such rules and forms were reported to Congress by the Chief Justice on April 24, 1973, and became effective on October 1, 1973. Rules governing procedures in cases under the other Chapters of the Bankruptcy Act are presently in the process of being formulated.

158. The 1934 Act provided for reporting to Congress only if law and equity were merged. See Act of June 19, 1934, ch. 651, 48 Stat. 1064. The rules were to be reported to Congress at the beginning of a session and to become effective at its end. *Id.* Subsequently, the time period allotted for congressional consideration was shortened to 90 days. Act of May 10, 1950, ch. 174, 64 Stat. 158, as amended, 28 U.S.C. § 2072 (1970). The requirement that any rules promulgated by the Court should be reported to Congress at the beginning of a session, first included in the 1934 Act, was modified to permit them to be reported at any time from the beginning of a session to May 1. *Id.*

Of course, the Court may postpone the effective date of newly adopted rules beyond the minimum period specified in the statutes, thereby giving Congress additional time to consider them before they become operative. This is the practice which the Court has routinely followed in recent years, as it did in the case of the Rules of Evidence; these rules were issued by the Court on November 20, 1972, but were not to take

Congress has dutifully held hearings on various rules formulated under them,¹⁵⁹ Congress has never before revised any of the rules promulgated by the Court¹⁶⁰ even though some were far more innovative than the Rules of Evidence.¹⁶¹

There has thus been a policy of congressional deferral to Court rulemaking. This policy is wise. Court procedure can best be regulated by the judiciary, the governmental branch most familiar with it, and the Supreme Court's prestige and general supervisory role make it the logical rulemaking body. Furthermore, the advisory committee system worked out by the Court assures the best possible formulation and consideration of proposed rules, providing opportunity and time for scholarly examination of the relevant decisions and literature, and empirical studies of the rules in actual operation. Congress currently lacks a comparable staff; and though it is possible that a Congress bent on detailed statutory rule formulation could reproduce the Court's present committees, this is uncertain.¹⁶² Rulemaking by Congress might also be lost in the press of more urgent business or politics.

In short, the Court is best equipped to promulgate procedural rules for the federal courts. As demonstrated by the Rules of Evidence, the House effort at statutory rulemaking, though undertaken in a serious, objective and scholarly spirit, has shown the value of the previous congressional policy of according Court-promulgated rules a substantial presumption of wisdom. In the future, rulemaking should be left in the hands of the judiciary.

One final note. Despite our preference for judicial rulemaking and the Court Rules, the House Rules or any comparable formulation would be a great improvement upon the law of evidence as presently in force in the federal courts. If the Court's rules are not to become operative, enactment of statutory rules of evidence at this session of Congress is desirable and needed.

effect until July 1, 1973, more than seven months later. This practice also gives the bench and bar more time to familiarize themselves with new rules and a fixed calendar date on which all will know that the rules will go into effect.

159. See, e.g., *Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess., Ser. 17, at 117, 141 (1938). *Hearings on S.3676 Before a Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong., 3d Sess., pt. 5, at 36, 37, 39, 51 (1938) (debate on FED. R. CIV. P. 35 and FED. R. CIV. P. 37).

160. While subsequent congressional opposition did arise with respect to the mode of trial under FED. R. CIV. P. 71A on condemnation of property, the failure on the part of the House and Senate to agree on this rule, as well as the lack of any affirmative action prior to August 1, 1952 (90 days after the rules had been reported), rendered Rule 71A effective as of that date. 7 MOORE'S FEDERAL PRACTICE ¶ 71A.08, at 71A-227 (2d ed. 1974).

161. See, e.g., FED. R. CIV. P. 26-37 (dealing with discovery), 7-15 (liberal pleading), 16 (pretrial practice), 2 (union of law and equity).

162. With the exception of the Reporter, *all* advisory committee members have served without any remuneration beyond expenses. Whether these professional leaders would be as willing to donate their time for a congressional rulemaking program is unclear.