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THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

PAUL F. ROTHSTEIN*

The Supreme Court has approved a uniform code of evidence for all federal courts. Amendments to the Supreme Court's rules are now pending in the House of Representatives. From the point of view of a specialist in the law of evidence, Professor Rothstein analyzes the differences between the Supreme Court's proposals and the House amendments and suggests solutions to these conflicts.

On November 20, 1972, the Supreme Court of the United States approved for use in virtually all federal court proceedings a uniform set of evidence rules¹ to take effect July 1, 1973, unless vetoed within 90 days of transmittal to Congress.² The rules were the product of seven years of drafting by a distinguished, Supreme Court-appointed Advisory Committee,³ which in the course of its work produced two well-circulated drafts⁴ and received and considered numerous comments from persons involved in nearly every area of court-related law.

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¹ Order, 56 F.R.D. 183 (1972); see RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183 (1972) [hereinafter cited as PROPOSED FED. R. EVID. (Supreme Court Draft Nov. 1972)].

² The rules were transmitted to Congress on February 5, 1973, and some authorities believed that, pursuant to the 90-day provisions of the enabling statutes, congressional power to veto the rules would expire on May 6, 1973, although the rules would be implemented only as of July 1, 1973. H.R. REP. NO. 52, 93d Cong., 1st Sess. 2-3 (1973); see 18 U.S.C. § 3771 (1970) (rules governing district court criminal proceedings); 28 *id.* § 2072 (rules governing civil actions); *id.* § 2075 (rules governing bankruptcy proceedings); *cf.* 18 *id.* § 3402 (rules governing criminal proceedings before magistrates and appeals therefrom; no provision for congressional consideration).

³ The panel was the Advisory Committee on Rules of Evidence appointed by the Chief Justice in March 1965 at the direction of the Judicial Conference. See 28 U.S.C. § 331 (1970). The committee chairman was the well-known Illinois trial attorney and Warren Commission counsel Albert Jenner, who had participated in drafting the *Uniform Rules of Evidence* as a longtime Commissioner on Uniform State Laws. The panel also included Judges Simon Sobeloff, Joe Estes, and Robert Van Pelt; Professors (now federal judges) Jack Weinstein and Charles Joiner; Professor Thomas Green; Herman Selvin, father of the pioneering *California Evidence Code*; former chief of the Justice Department's Criminal Appeals Division, Robert Erdahl; and famed litigators David Berger, Egbert Haywood, Frank Raichle, Craig Spangenberg, Edward Bennett Williams, and the late Hicks Epton. The reporter was Professor Edward Cleary.

⁴ PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161 (1969) [hereinafter cited as PROPOSED FED. R. EVID. (Prelim. Draft Mar. 1969)]; REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE

Believing 90 days was too short a period in which to consider this complex and far-reaching body of evidence rules,⁵ Congress passed legislation in March 1973 requiring express congressional approval before the *Rules* could have any force or effect.⁶ Congress believed that an evidence code would affect fundamental matters of civil and criminal justice that reach beyond technical courtroom conduct and into the lives of citizens.⁷ In addition, many lawyers, preferring case-by-case development of the law, questioned the desirability of any evidence code.⁸

On June 28, 1973, after conducting hearings,⁹ the House Judiciary Committee's Subcommittee on Criminal Justice proposed amendments to the Supreme Court Draft.¹⁰ While leaving most provisions of the *Rules*

UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315 (1971) [hereinafter cited as PROPOSED FED. R. EVID. (Rev. Draft Mar. 1971)]. A less-publicized draft was published informally by the Judicial Conference in October 1971. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED RULES OF EVIDENCE (Rev. Draft Oct. 1971) [hereinafter cited as PROPOSED FED. R. EVID. (Rev. Draft Oct. 1971)].

⁵ See H.R. REP. NO. 52, 93d Cong., 1st Sess. 3 (1973).

⁶ Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

⁷ See *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 2 (1973) (remarks of Rep. Hungate) [hereinafter cited as *Hearings on Proposed Rules*]; *id.* at 5 (remarks of Rep. Holtzman); *id.* at 6-8 (testimony of Rep. Podell); N.Y. Times, Jan. 6, 1973, at 14, col. 2-4. The congressional action no doubt was influenced by heightened sensitivity in Congress to infringement of its prerogatives by the other branches of government. Justice Douglas believes, *inter alia*, that the rules go beyond mere "procedure" authorized by the enabling legislation. Order, 56 F.R.D. 183, 185 (1972) (Douglas, J., dissenting).

⁸ See, e.g., *Hearings on Proposed Rules*, *supra* note 7, at 144 (testimony of Justice Arthur Goldberg); *id.* at 200-02, 208-10 (testimony of Robert Clare, Jr.); *id.* at 214-16 (statement of a committee of New York trial lawyers); *id.* at 246-65 (testimony and statement of former Chief Judge Henry Friendly of the United States Court of Appeals for the Second Circuit); *id.* at 219-20 (letter from former Chief Judge Henry Friendly to the Committee on Rules of Practice and Procedure of the United States Judicial Conference, Mar. 31, 1970). Prior to appointment of the Advisory Committee, the desirability of a unified body of evidence rules for federal courts was indicated by a study performed for the Judicial Conference. Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79 (1961).

⁹ *Hearings on Proposed Rules*, *supra* note 7.

¹⁰ SUBCOMM. ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., PROPOSED CHANGES TO THE RULES OF EVIDENCE (Comm. Print June 28, 1973) [hereinafter cited as PROPOSED CHANGES]. The committee amendments, without the notes, have been published in the *Congressional Record*. 119 CONG. REC. H5452 (daily ed. June 26, 1973). The Subcommittee formerly was known as the Special Subcommittee on Reform of Federal Criminal Laws. Despite its name, the Subcommittee's jurisdiction comprises both civil and criminal aspects of the rules.

intact, the amendments contemplate a major change respecting privileges and less extensive revisions in several other areas. The amendments also propose a few minor language changes, primarily intended to produce greater clarity or consistency.¹¹ In many instances the Subcommittee substantially reverted to positions which had been adopted by the Advisory Committee in earlier drafts but dropped under pressure from influential "law and order" proponents.¹² Although the Subcommittee should have made several additional changes and clarifications not requiring major policy reconsideration,¹³ this article discusses only those rules substantially affected by the proposed amendments.

¹¹ See, e.g., PROPOSED CHANGES rule 104, *supra* note 10, at 6 (absolute right of accused to have preliminary matters heard out of hearing of jury; not merely "where justice demands"); *id.* rule 902(8), at 35 (acknowledgment by a notary, making a document self-authenticating, must be in "manner provided by law" rather than "under hand and seal"); *id.* rule 1001, at 36 ("photographs" broadened expressly to include videotapes).

In addition, several comments of the Subcommittee are significant although no textual changes would be made. See, e.g., PROPOSED CHANGES rule 405(b), Subcomm. Note, *supra* note 10, at 10 (cases will be rare when character truly in issue so as to make evidence of specific conduct admissible); *id.* rule 902(9), Subcomm. Note, at 35 (specifies what is meant by "the general commercial law" making commercial paper self-authenticating); *id.* rule 1003, Subcomm. Note, at 36 (courts should be persuaded easily that a "genuine issue" concerning authenticity exists so that duplicates may not come in easily); *id.* rule 1004, Subcomm. Note, at 37 (for purposes of best evidence rule, documents lost or destroyed by proponent include those lost or destroyed at his direction).

¹² See *Hearings on Proposed Rules*, *supra* note 7, at 312-17 (letter from Sen. John McClellan to Rep. William Hungate, Feb. 16, 1973). Changes in the rule regarding impeachment by prior conviction particularly reflect such pressure. See *id.* at 316-17. Compare PROPOSED FED. R. EVID. 609 (Supreme Court Draft Nov. 1972) with PROPOSED CHANGES rule 609, *supra* note 10, at 21-22.

¹³ For example, rule 103(d) defines plain error using the same term, "substantial rights," as is used in the definition of harmless error in the federal procedural rules. This invites the confusion that error is both prejudicial and plain if it affects substantial rights, and harmless if it does not, and thus that there is no prejudicial error that is not also plain error. Compare PROPOSED FED. R. EVID. 103(d) (Supreme Court Draft Nov. 1972) with FED. R. CIV. P. 61 and FED. R. CRIM. P. 52(a)-(b).

Rule 613, prescribing the foundation for former statements of witnesses, is ambiguous as to whether the opportunity to explain, deny, or challenge the statement must be accorded prior to the introduction of the statement. See PROPOSED FED. R. EVID. 613 (Supreme Court Draft Nov. 1972). Furthermore, clarification is needed in the related area of the foundation required for bias impeachment. Schmertz & Czapanskiy, *Bias Impeachment and the Proposed Federal Rules of Evidence*, 61 Geo. L.J. 257, 265-70 (1972).

An additional change in the *Rules* is needed in Article VII which relates to expert testimony. Article VII dispenses with the requirement of showing the basis of an expert's testimony in direct examination and dispenses with the necessity for the hypothetical question. The cross-examiner may bring out the basis on cross-examination but rarely will attempt to do so without the advance preparation which formerly was afforded, in part, by the direct examination. Because the onus of investigation is thus on the opponent of the expert and because in criminal procedure discovery is minimal, provision should be made for discovery and notice respecting the expert. Civil discovery also may be inadequate to prepare a challenge. See PROPOSED FED. R. EVID. 701-06 (Supreme

PRIVILEGE

The *Rules* as approved by the Supreme Court prescribe an exclusive list of carefully defined privileges for all federal court proceedings, civil and criminal, diversity and federal question.¹⁴ The Subcommittee's proposed amendments, however, would eliminate this list of privileges and, depending on the claim or defense involved, instead would apply either state law or a federal law of privileges to be developed on a case-by-case basis.¹⁵ Because the Supreme Court Draft provides more affirmative guidance on difficult policy questions and unifies federal evidence law, its approach is more useful than that of the proposed amendments.¹⁶

Court Draft Nov. 1972); FED. R. CIV. P. 26(b)(4)(A)(ii); FED. R. CIV. P. 26(b)(4)(A)(i). See also P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 82-88 (Law Journal Press 1973) [hereinafter cited as UNDERSTANDING THE RULES] (need for clarification of relation of best evidence and hearsay rules to expert testimony).

Several ambiguities exist in the *Rules* at present. See, e.g., PROPOSED FED. R. EVID. 407, 408, 411 (Supreme Court Draft Nov. 1972) (varying terms for similar thoughts); *id.* 801(d)(2) (applicability of predecessor-in-interest rule); *id.* 801(d), 803, 804 (applicability of opinion rule to out-of-court statements); *id.* 602, 801(d), 803, 804 (relation of personal knowledge rule to out-of-court declarants); *id.* 801(d), 803, 804, 901-03, 1001-08 (applicability to out-of-court statements of authentication and best evidence requirements); *id.* 803(6)-(7), 901-03, 1001-08 (relation among authentication and best evidence rules, the business records exception to hearsay rule, and the Federal Business Records Acts); *id.* 403, 801(d), 803, 804 (relation of probative-prejudice balancing rule to out-of-court statements). See UNDERSTANDING THE RULES, *supra* at 28-29, 77, 108, 114-16, 121-22.

¹⁴ PROPOSED FED. R. EVID. art. V (Supreme Court Draft Nov. 1972); see Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) (discussion of Supreme Court Draft privilege rules).

¹⁵ PROPOSED CHANGES art. V, *supra* note 10, at 12-18.

¹⁶ Because as complete a definition as practicable of the scope of federal privileges ought to be provided, the general provision in the Supreme Court Draft defining the word "privilege" in the evidentiary context should be retained. See PROPOSED FED. R. EVID. 501 (Supreme Court Draft Nov. 1972). The provisions dealing with disclosures under compulsion and with jury instructions and comments upon invocation also should remain. See *id.* 512, 513.

Further, rule 511 concerning waiver of privileges also should be retained, but one flaw must be corrected. See *id.* 511. The rule presently provides that a privilege is waived if a voluntary non-privileged disclosure of otherwise privileged information is made. Thus, if the privilege holder tells the secret not only to his psychotherapist or clergyman, but also to his mother, father, or spouse, the privilege can be waived. Communications to the mother, father, or spouse ought to be regarded as facilitative of the communication to the psychotherapist or clergyman and should not constitute waiver. Either rule 511 or the privilege rules themselves should be altered to protect such facilitative communications. See generally Krattenmaker, *supra* note 14, at 70-71.

Another criticism of rule 511 is unfounded. A state secret leaked to the press would not still remain privileged. Although voluntary disclosure is provided as one kind of waiver, the converse, that the privilege remains if disclosure is involuntary, does not follow. Further, rule 509, the state secrets privilege, states that only a "secret" is privileged.

Consequently, although certain changes should be made in the Supreme Court Draft before final adoption, its general format should be retained.

Evidentiary privileges clearly affect conduct outside the courtroom and touch matters of state policy. Nonetheless, relying on the Supreme Court's decision in *Hanna v. Plumer*,¹⁷ the Advisory Committee did not feel compelled to provide for deference to state law, even in diversity cases.¹⁸ The Advisory Committee, while recognizing that some forum shopping and infringement of state policies might result from a divergence between federal and state privilege law, concluded that adverse effects in these areas would be minimal and more than compensated by the value of having uniform rules in federal courts.¹⁹

The Supreme Court Draft recognizes only nine specifically defined privileges.²⁰ Conspicuous by their absence are several well-known privileges. The Supreme Court Draft does not contain a general physician-patient privilege, but only a psychotherapist-patient privilege. There is no spousal communications privilege in any kind of case, and the privilege against adverse spousal testimony is confined to criminal cases. In addition, the Supreme Court Draft lacks any provision for a journalist's privilege. Some critics contend that these privileges are desirable or at least ought to be recognized in federal courts where recognized by state law.²¹ Others, raising a broader question, urge that greater deference be accorded state privilege law across-the-board.²²

The Subcommittee's proposed amendments, which were intended to eliminate the problems detected in the Supreme Court Draft, actually sidestep many of them. Rather than a list of specific privileges prescribed for all federal court proceedings, the amendments would provide that

¹⁷ 380 U.S. 460 (1965).

¹⁸ See PROPOSED FED. R. EVID. 501, Advisory Comm. Note (Supreme Court Draft Nov. 1972).

¹⁹ *Id.* But see Krattenmaker, *supra* note 14, at 101-17.

²⁰ Article V consists of a privilege for those reports required under state or federal statute, when that statute grants a privilege (rule 502); a lawyer-client communications privilege (rule 503); a psychotherapist-patient communications privilege (rule 504); a privilege of an accused to prevent his spouse from testifying against him in a criminal proceeding (rule 505); a privilege covering communications to clergymen (rule 506); a privilege to refuse to disclose the tenor of one's lawful vote (rule 507); a trade secrets privilege (rule 508); a privilege covering secrets of state and other official information (rule 509); and a privilege covering the identity of an informer (rule 510). PROPOSED FED. R. EVID. art. V (Supreme Court Draft Nov. 1972). Article V also provides for additional privileges if required by the Constitution, an act of Congress, or other rules adopted by the Supreme Court. *Id.* 501.

²¹ See Krattenmaker, *supra* note 14, at 101-17.

²² See Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 361-73 (1969); Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 571-74 (1967).

state privilege law govern in civil cases "with respect to a claim or defense as to which state law supplies the rule of decision"²³ and that common law principles "interpreted in the light of reason and experience" govern privileges in all other federal actions.²⁴ In addition to requiring, unwisely, that both state and federal evidence law be applied in a single case,²⁵ the amendments could introduce an unfortunate distinction between ultimate and mediate facts.²⁶

The Supreme Court Draft's list of carefully defined privileges clearly is the better approach. Whatever its flaws, the Supreme Court Draft at least attempts to grapple with the issues and provide clear-cut answers regarding difficult policy questions. Sufficient experience has been accumulated concerning evidence questions to permit definite choices in most areas, including privilege. Having a clear and easily located body of law for uniform use in all federal courts is necessary if evidentiary questions in the hurly-burly of daily litigation are to be handled soundly, expeditiously, and without protracted appeals.²⁷ Infringement of state policies, difficulties encountered by lawyers practicing in both state and federal courts, and forum shopping, can be minimized if the federal privilege rules are drawn in general accord with the policies behind pre-

²³ PROPOSED CHANGES rule 501, *supra* note 10, at 12. Some federal courts have felt compelled, for reasons often related to *Erie* considerations, to apply the state law of privileges. See, e.g., *Palmer v. Fisher*, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); *Application of Cepeda*, 233 F. Supp. 465, 467 (S.D.N.Y. 1964); *Berdon v. McDuff*, 15 F.R.D. 29, 31-32 (E.D. Mich. 1953). See also Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956). This practice often seems at variance with the *Federal Rules of Civil Procedure* which provide that state law should be rejected on evidence questions if it is more restrictive respecting admissibility than federal statute or former federal equity practice. See FED. R. CIV. P. 43(a).

²⁴ PROPOSED CHANGES rule 501, *supra* note 10, at 12. The "common law . . . reason . . . experience" standard is, under present rule 26 of the *Federal Rules of Criminal Procedure*, applicable to all evidentiary questions in federal criminal cases. FED. R. CRIM. P. 26. The proposed amendments would limit this standard to questions of privilege but extend it beyond criminal cases to federal claims or defenses in civil cases.

²⁵ Similar difficulties are presented by identical language in the proposed amendment to rule 601 regarding incompetencies. See notes 70-74 *infra* and accompanying text.

²⁶ See note 72 *infra*. Ambiguity inherent in the language "supplies the rule of decision" also may create difficulties. See note 73 *infra*.

²⁷ The present sources of evidence law are cumbersome, unlikely to produce uniformity, often fail to provide an answer, and place a premium on a lawyer's experience in practice in the particular locale of the trial. Moreover, federal appeals judges should not be required to achieve expertise in the law of each state comprising their circuit. Disuniformity among federal courts also hinders the practice of assigning federal judges to sit away from their home jurisdiction. See generally Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962); Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177 (1967); Orfield, *Uniform Federal Rules of Evidence*, 67 DICK. L. REV. 381 (1963); Weinstein, *supra* note 22.

vailing state privileges where such policies seem at all justifiable. Moreover, divergence between state and federal law will diminish as states imitate the federal rules.²⁸

The Supreme Court Draft should be revised in several respects to conform more closely to privilege policies prevailing in the states. The spousal communications privilege,²⁹ found in nearly every state, should be reinstated. While this privilege actually may not encourage communication between husband and wife, it probably is reflective of another justifiable policy concern—popular revulsion at the disclosure of such confidences.³⁰ The adverse spousal testimony privilege,³¹ which does appear in the Supreme Court Draft,³² should be retained in modified form.

²⁸ It is reasonable to expect that federal evidence rules will be widely copied by the states, as were the *Federal Rules of Civil Procedure*. See 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.504, at 5041 & n.10 (2d ed. 1965); cf. Krattenmaker, *supra* note 14, at 64-65 (Supreme Court Draft privilege rules so inconsistent and without underlying rationale that they will not provide model that states will copy). Three states already have adopted evidence rules patterned after drafts of the proposed federal rules. See NEV. REV. STAT. tit. 4, ch. 47-52 (1971); NEW MEXICO RULES OF EVIDENCE, 84 N.M. xi, xi-cxxxix (1973); WISCONSIN RULES OF EVIDENCE, WEST 1973 WIS. LEGISLATIVE SERV. 131.

²⁹ This privilege covers communications of a confidential nature between husband and wife. It covers communications whether introduced for or against a spouse and can be applied to any form of evidence of the spousal communication, whether or not either spouse is a party to the litigation or is asked to testify. The privilege, applicable in both civil and criminal cases, usually is limited to communications made during the marriage but continues even after the marriage has ended. See *Pereira v. United States*, 347 U.S. 1, 6 (1954) (dictum). See generally *Fraser v. United States*, 145 F.2d 139, 143-45 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945); *United States v. Mitchell*, 137 F.2d 1006, 1009 (2d Cir.), *cert. denied*, 321 U.S. 794 (1943); 8 J. WIGMORE, EVIDENCE ch. 83 (3d ed. 1940); Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, in *Symposium—Evidentiary Privileges*, 56 NW. U.L. REV. 208 (1961).

³⁰ See 8 J. WIGMORE, EVIDENCE § 2228, at 227 (3d ed. 1940); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 86, at 173 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

³¹ This privilege covers testimony given by one spouse against the other, regardless of whether the subject matter of the testimony is a communication. This privilege generally is applied only in criminal cases and only when the spouse is a party in the litigation and the testimony is adverse to the spouse. See, e.g., *Wyatt v. United States*, 362 U.S. 525, 526-31 (1960); *Hawkins v. United States*, 358 U.S. 74, 75-79 (1958); *United States v. Walker*, 176 F.2d 564, 568 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949). See generally 8 J. WIGMORE, EVIDENCE ch. 79 (3d ed. 1940); Comment, *supra* note 29.

Spousal privilege is today generally a matter of statute. Virtually every state has a spousal communications privilege, and approximately two-thirds of the states have an adverse spousal testimony privilege of some form, the large majority confining it to criminal cases. See, e.g., MASS. GEN. LAWS ANN. ch. 233, § 20 (1959) (spousal communications and adverse spousal testimony); PA. STAT. ANN. tit. 19, § 683 (1964) (adverse spousal testimony); WIS. STAT. ANN. § 325.18 (1958) (spousal communications); cf. WISCONSIN RULES OF EVIDENCE, WEST 1973 WIS. LEGISLATIVE SERV. 131. See generally 2 J. WIGMORE, EVIDENCE § 488 (3d ed. 1940 & Supp. 1972).

³² PROPOSED FED. R. EVID. 505 (Supreme Court Draft Nov. 1972).

If properly drawn, it will serve a valid function in preserving marital harmony and in according respect to the popular aversion to testimony by one spouse against the other. The Supreme Court Draft, however, in assigning the privilege to the defendant spouse rather than the testifying spouse, permits a defendant to prevent his spouse, who may wish to testify, from so doing. Normally a spouse's willingness to testify bespeaks an absence of the marital harmony the privilege seeks to protect. Moreover, the community's sense of justice is unlikely to be offended if such testimony is admitted, provided the testimony does not concern a marital confidence protected by the marital communications privilege. Consequently, there is little reason to suppress this testimony and deprive the court of relevant evidence.³³

The Supreme Court Draft also should be amended to include a general physician-patient privilege.³⁴ This privilege, some form of which exists in 43 states and the District of Columbia,³⁵ probably does aid the flow of complete and accurate information from patient to doctor. Although the Advisory Committee was unreceptive to a privilege so extensively riddled with exceptions,³⁶ protection of the physician-patient relationship is sufficiently widespread to warrant inclusion in the *Rules*.

³³ Rule 505 provides several exceptions to the adverse spousal testimony privilege. *Id.* 505(c). These exceptions are not drawn in accord with any rational policy objective of the privilege. See generally Rothstein, *A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose*, 12 INT'L & COMP. L.Q. 1189 (1963).

³⁴ Rule 504 of the Supreme Court Draft provides only a psychotherapist-patient privilege, but defines psychotherapist broadly so as to include not only psychiatrists and psychologists, but also ordinary physicians while treating mental or emotional conditions. See PROPOSED FED. R. EVID. 504(a)(2) (Supreme Court Draft Nov. 1972). The drafters do not consider the possibility that there is a mental or emotional aspect or sequela to all illnesses.

³⁵ See 1 ROTHSTEIN, HELFMAN, JARRETT, LUTZKER, SCHNEIDER & STEIN, ACCESS TO MEDICAL RECORDS 8 (Dep't of Health, Education & Welfare 1972) (study for the Secretary's Commission on Medical Malpractice) (law of each state treated in detail in volumes 2-5). See also DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, MEDICAL MALPRACTICE app. 177, 179 (Dep't H.E.W. Pub. No. (OS)73-88 & (OS)73-89) (summary of Access to Medical Records Report); 8 J. WIGMORE, EVIDENCE § 2380 (3d ed. 1940 & Supp. 1972).

³⁶ PROPOSED FED. R. EVID. 504, Advisory Comm. Note (Supreme Court Draft Nov. 1972). An additional reason advanced for retention of only a psychotherapist-patient privilege was the greater need for protection of the psychotherapist-patient relationship. A man would be foolish not to communicate freely with the person who is going to prescribe medication or operate, but a privilege may be necessary to encourage the free communication required for successful psychiatric treatment. *Id.* A privilege also may be required to get a person to seek psychiatric treatment in the first place. See also Louisell & Sinclair, *Reflection on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30, 51-53 (1971).

Forum shopping, conflict with state policy, and other difficulties engendered by divergence between state and federal law, can be minimized if an effort is made to identify and codify the most frequent exceptions to the privilege.

Although not related to conformity with state policy, several changes should be made in the attorney-client privilege of the Supreme Court Draft. First, rule 503(b) should be revised to provide clearly that in situations involving more than one attorney and client, a client may prevent disclosure of responses made by an attorney representing another interested party that inferentially reveal the client's communication.³⁷ Second, uncommunicated opinions in a lawyer's file also should be protected.³⁸ Third, rule 503(c) should be amended to make clear that an attorney may claim the privilege on behalf of his client, even if the communication was made to a different attorney previously representing the client.³⁹ Fourth, the exception for consultations in furtherance of crime or fraud should be expanded to include clear torts.⁴⁰ Fifth, rule 503 should provide guidance regarding stockholder access to communications between the corporation and its lawyers.⁴¹ Finally, the definition of lawyer in

³⁷ The rule presently provides that in such situations, only communications "by" the client are privileged, instead of communications "between" the lawyer and the client, as is stated for the single attorney situation. PROPOSED FED. R. EVID. 503(b) (Supreme Court Draft Nov. 1972). Through use of the word "by," the rule apparently seeks to avoid the situation in which, after a joint conference, a client is prevented by the privilege claims of the other clients from disclosing his own statements or those of his attorney. *See id.* Advisory Comm. Note. As the rule stands, a client's only hope, respecting the problem in text, is to argue that a response by another attorney is "evidence" of a communication "by" the client, much as testimony about it or a document containing it would be, and that the response therefore should be suppressed under the privilege.

³⁸ Such documents might be protected independently of the evidence rules by the work product privilege. *See Hickman v. Taylor*, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(3). However, the attorney-client privilege often will be the only recourse. To apply the rule as presently drafted to this situation requires the sometimes difficult argument that the uncommunicated material contains or evidences a prior communication of the client. Unless explicit coverage is enacted, the attorney-client privilege may not fully encourage disclosure to an attorney, and on occasion the quality of legal services could be affected.

³⁹ The rule presently provides that the "person who was the lawyer at the time of the communication may claim the privilege." PROPOSED FED. R. EVID. 503(c) (Supreme Court Draft Nov. 1972). The inference thus arises that the attorney at trial cannot claim the privilege for his client if he was not the attorney when the communication was made.

⁴⁰ *See id.* 503(d)(1). Whether or not this exception is expanded, a procedure should be enacted for determining whether a consultation was unlawful.

⁴¹ An express exception to the privilege might be provided when a stockholder is involved in litigation on behalf of the corporation or represents a class owning a majority of the shares of the corporation. *See* 45 TUL. L. REV. 1063 (1971). *Contra*, Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 COLUM. L. REV. 309, 316-19 (1969).

rule 503(a)(2) should be expanded to include the new professional corporation law firm. Drafting problems similar to the preceding ones in the attorney-client rule, are present in some of the other privilege provisions.⁴²

A journalists' privilege should not appear in the federal evidence rules even though some form of this privilege is desirable.⁴³ Instead, separate federal legislation should be enacted, mandating the privilege for both

Specific guidance also could be provided on the difficult issue of distinguishing legal communications from business communications when the corporation's attorney is also on the board of directors or otherwise involved in management or ownership.

Further, the Supreme Court Draft permits an extremely liberal test as to what are lawyer-client communications in the corporate context; by one interpretation communications of a legal nature by any employee to the corporation's lawyer would be privileged. Because the work-product principle provides sufficient protection for such employee communications, a more restrictive lawyer-client privilege is preferable. See FED. R. CIV. P. 26(b)(3). See also Comment, *Attorney-Client Privilege For Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

⁴² The problem of uncommunicated opinions also arises in rule 504, the psychotherapist-patient privilege, with respect to notations made and filed by a psychiatrist, not communicated to the patient, and not directly regarding a communication from the patient. Such opinions would not be privileged unless they embody or evidence a patient communication. PROPOSED FED. R. EVID. 504 (Supreme Court Draft Nov. 1972); cf. note 38 *supra* and accompanying text. A general physician-patient privilege, if adopted, would have to be broad enough to cover the various kinds of hospital records that are, arguably at least, neither communications nor uncommunicated opinions. In some cases these extensions of the privilege would foster the seeking of professional help, full disclosure, and more informed medical services.

The trade secrets privilege, rule 508, also reflects poor drafting. By one interpretation that privilege is not available to corporations, who most need the protection. Corporations are not included explicitly among those who may hold the privilege, as they are in rule 502, defining the holder of the required reports privilege, and in rule 503(a)(1), defining the holder of the attorney-client privilege. Compare PROPOSED FED. R. EVID. 508 (Supreme Court Draft Nov. 1972) with *id.* 502 and *id.* 503(a)(1). The trade secrets privilege also should specify that licensees of a trade secret can invoke the privilege.

The communications to clergymen privilege, rule 506, presently covers only communications by the penitent, not communications between clergyman and penitent. PROPOSED FED. R. EVID. 506 (Supreme Court Draft Nov. 1972). Thus, the drafting raises the problem of revealing inferentially the penitent's communication through compelled disclosure of the clergyman's response. Cf. note 37 *supra* and accompanying text.

⁴³ This judgment involves consideration of the extent to which (1) the media are necessary to watchdog other institutions, (2) the media have been effectively performing without privilege, (3) privilege encourages sources to give information or misinformation, and (4) government informants and media informants are comparable. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM REPORTERS' PRIVILEGE ACT (First Tentative Draft, 1973). The Supreme Court has held that a general journalists' privilege is not required constitutionally. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Nevertheless, as of 1970, 19 jurisdictions had some form of journalists' privilege. See *Hearings on Proposed Rules, supra* note 7, at 368 (testimony of The Reporters Committee for Freedom of the Press); Note, *Reporters and Their Sources: The Constitutional Right to Confidential Relationship*, 80 YALE L.J. 317, 321 n.15 (1970).

federal and state proceedings.⁴⁴ If a journalists' privilege is to encourage prospective informants in this day of multi-jurisdictional events and media, it must assure confidentiality in all jurisdictions.

The privileges accorded the Government⁴⁵ and corporations⁴⁶ in the Supreme Court Draft are significantly broader than the narrowly defined personal privileges.⁴⁷ The overly sweeping protection granted the Government in the Supreme Court Draft for "secrets of state" and "official information" resulted from late changes by the Advisory Committee.⁴⁸ If the rule granting this protection is retained,⁴⁹ the category of official information should be removed⁵⁰ since the secrets of state privilege sufficiently protects the Government. The Supreme Court Draft also should be altered to require the Government, in asserting the state secrets privilege, to show more than a reasonable likelihood that evidence would reveal "a governmental secret relating to . . . national defense or

⁴⁴ Twenty-four news media privilege bills of one sort or another have been introduced during the current session of Congress, and 28 during the previous session. See *Hearings on Proposed Rules*, *supra* note 7, at 385 (testimony of The Reporters Committee for Freedom of the Press).

⁴⁵ PROPOSED FED. R. EVID. 509-10 (Supreme Court Draft Nov. 1972).

⁴⁶ *Id.* 502-03, 508.

⁴⁷ This contrast has raised allegations of bias in favor of the wealthy and powerful. See Krattenmaker, *supra* note 14, at 73-74, 77; Letter from Kenneth W. Graham, Jr. to Committee on Rules of Practice and Procedure, Judicial Conference of the United States, July 28, 1971, in *Hearings on Proposed Rules*, *supra* note 7, at 196.

⁴⁸ Compare PROPOSED FED. R. EVID. 509 (Supreme Court Draft Nov. 1972) with *id.* (Rev. Draft Mar. 1971).

⁴⁹ Since only one case, *United States v. Reynolds*, has considered carefully this privilege, codification perhaps should be delayed until more judicial experience concerning the privilege is amassed. See *United States v. Reynolds*, 345 U.S. 1 (1953). Moreover, the state secrets privilege does not come up so frequently in litigation that a codified rule is needed.

⁵⁰ See PROPOSED FED. R. EVID. 509(a) (Supreme Court Draft Nov. 1972). Official information is defined as virtually any information that is not within the state secrets privilege and is not available pursuant to the Jencks Act or the largely ineffectual Freedom of Information Act. *Id.*; see Jencks Act, 18 U.S.C. § 3500 (1970); Freedom of Information Act, 5 U.S.C. § 552 (1970). The concerns behind this privilege apparently are feared loss, destruction, damage, or alteration of government files, avoiding undue inconvenience, separation of powers, avoiding release of viewpoints in the formative stages, and assurance of confidentiality where necessary to encourage free communication both within and from without the Government. While these interests may justify withholding certain information from the general public under the Freedom of Information Act, the same considerations should not govern an evidentiary privilege, where the litigants and the court have special need for the information. See PROPOSED FED. R. EVID. 509, Advisory Comm. Note (Rev. Draft Mar. 1971). Admittedly, the showing necessary to justify secrecy is greater under the rule than under the Freedom of Information Act, for the rule additionally requires a showing that disclosure would be against the public interest. Compare PROPOSED FED. R. EVID. 509(a)(2) (Supreme Court Draft Nov. 1972) with 5 U.S.C. § 552(b) (1970).

international relations.”⁵¹ A better standard would require a showing of reasonable likelihood that disclosure would be detrimental or injurious to national defense or international relations.⁵² Procedurally, the Government should not be able to require that its arguments and showings on the issue of privilege be made in camera;⁵³ rather, a judge should order in camera proceedings only if justice so requires.⁵⁴

The identity-of-informer privilege should be amended to exclude informers to legislative committees and their staffs.⁵⁵ Moreover, the identity of informers to law enforcement agencies should be protected only if the informer furnishes information purporting to reveal a violation of law, not just, as under the Supreme Court Draft, “information relating to or assisting in an investigation of a possible violation of law.”⁵⁶ Additionally, the circumstances should be expanded in which a judge is required to enter an order favorable to a private party who is foreclosed from obtaining information by the government’s privilege.⁵⁷

⁵¹ PROPOSED FED. R. EVID. 509(a) (1) & (b) (Supreme Court Draft Nov. 1972). Moreover, “due regard” apparently is to be accorded the executive’s classification of the information. See *id.* 509, Advisory Comm. Note.

⁵² See *id.* 509(a) (Rev. Draft Mar. 1971).

⁵³ As used in the Rules, an in camera proceeding is an *ex parte* proceeding held in secret. See *id.* 509(c) (Supreme Court Draft Nov. 1972).

⁵⁴ This limitation should apply as well to rule 510, the identity-of-informers privilege. Compare PROPOSED FED. R. EVID. 509(c), 510(c) (2) & (3) (Supreme Court Draft Nov. 1972) with *id.* 509(b), 510(c) (3) (Rev. Draft Mar. 1971). Because government officials may exaggerate the need for secrecy and be more solicitous of their own immediate concerns than of the broad spectrum of societal concerns, it is difficult to see how a court, without some form of party confrontation, can determine fairly whether the privilege should be applied. The Supreme Court Draft should be altered to provide explicitly that an in camera proceeding shall be held only when the judge determines that such a procedure is necessary to protect the state secret or the informer’s identity and that unfairness will not result to the private party. Moreover, the judge should have the power, if warranted by the circumstances, to reveal to a private party matters disclosed in camera, regardless of the contrary wishes of the Government. But see *id.* 509(c) (Supreme Court Draft Nov. 1972) (such power explicitly denied).

Whereas earlier drafts were silent, the Supreme Court Draft rule respecting state secrets provides that the judge may not penetrate the secret to resolve the privilege issue. *Id.* 509(c). In *United States v. Reynolds* the Court held out the possibility that such penetration might be permissible under appropriate circumstances. 345 U.S. 1, 10-11 (1953).

⁵⁵ Compare PROPOSED FED. R. EVID. 510(a) (Supreme Court Draft Nov. 1972) with *id.* (Rev. Draft Mar. 1971). This additional guarantee of confidentiality to potential committee informants probably will not result in significantly more information reaching legislative bodies. Grants of immunity probably are the significant tool in this area.

⁵⁶ Compare PROPOSED FED. R. EVID. 510(a) (Supreme Court Draft Nov. 1972) with *id.* (Rev. Draft Mar. 1971). The expanded provision of the Supreme Court Draft is unlikely to pay dividends sufficient to justify such a broad bar to ascertainment of truth.

⁵⁷ See *id.* 510(c) (2) (Supreme Court Draft Nov. 1972). This rule provides that an order in favor of a private party (for example, establishing a litigated fact or dismissing

WITNESS COMPETENCY

The Supreme Court Draft eliminates all witness incompetencies⁵⁸ other than those of judges,⁵⁹ jurors,⁶⁰ and persons lacking personal knowledge.⁶¹ Gone are the incompetencies of children,⁶² dead men,⁶³ mental defectives,⁶⁴ drug- and alcohol-impaired persons,⁶⁵ spouses,⁶⁶ and atheists,⁶⁷ which join other incompetencies rejected at an earlier stage of our legal history.⁶⁸ Moreover, as in the case of privileges, the competency

a case) may be entered on a showing of reasonable probability that the informer can give testimony necessary to a fair determination of guilt or innocence in a criminal case, or of a material issue in a civil case. *Id.* The material issue test should be applied in both civil and criminal cases, since it is a fairer standard and comes closer to the one provided in the leading case on the subject. *See Roviario v. United States*, 353 U.S. 53, 60-61 (1957) (disclosure of informer's identity permitted where "relevant and helpful to defense . . . or essential to fair determination"). An earlier draft applied the material issue test to both civil and criminal cases. *See PROPOSED FED. R. EVID. 510(c)(2)* (Rev. Draft Mar. 1971). In addition, it should be sufficient that "circumstances indicate" the reasonable probability, without an affirmative showing.

⁵⁸ PROPOSED FED. R. EVID. 601 (Supreme Court Draft Nov. 1972).

⁵⁹ *Id.* 605.

⁶⁰ *Id.* 606.

⁶¹ *Id.* 602.

⁶² *See, e.g., Litzkuhn v. Clark*, 85 Ariz. 355, 339 P.2d 389 (1959); *State v. Segerberg*, 131 Conn. 546, 41 A.2d 101 (1945); *Artesani v. Gritton*, 252 N.C. 463, 113 S.E.2d 895 (1960). *See generally* 2 J. WIGMORE, EVIDENCE §§ 505-09 (3d ed. 1940).

⁶³ *See, e.g., Md. ANN. CODE art. 35, § 3* (1971); N.Y. CIV. PRAC. LAW § 4519 (McKinney 1963); TEX. REV. CIV. STAT. art. 3716 (1925). *See generally* Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

⁶⁴ *See, e.g., People v. McCaughan*, 49 Cal. 2d 309, 317 P.2d 974 (1957); *Aguilar v. State*, 279 App. Div. 103, 108 N.Y.S.2d 456 (1951), *appeal withdrawn*, 304 N.Y. 616, 107 N.E.2d 94 (1952) (mem.); *State v. Comstock*, 137 W. Va. 152, 70 S.E.2d 648 (1952). *See generally* 2 J. WIGMORE, EVIDENCE §§ 492-98, 501 (3d ed. 1940).

⁶⁵ *See, e.g., State v. Ballesteros*, 100 Ariz. 262, 413 P.2d 739 (1966); *Hartford v. Palmer*, 16 Johns. 143 (N.Y. 1819) (per curiam); *Burnette v. Commonwealth*, 172 Va. 578, 1 S.E.2d 268 (1939). *See generally* 2 J. WIGMORE, EVIDENCE §§ 492-97, 499, 501 (3d ed. 1940).

⁶⁶ While the total incompetency of a witness to testify in any case involving his spouse no longer exists, lesser spousal incompetencies have persisted in some jurisdictions. *See, e.g., Sayles v. Sayles*, 323 Mass. 66, 80 N.E.2d 21 (1948); *Zakrzewski v. Zakrzewski*, 237 Mich. 459, 212 N.W. 80 (1927); *In re Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930); *Esparza v. Esparza*, 382 S.W.2d 162 (Tex. Civ. App. 1964). *See generally* 2 J. WIGMORE, EVIDENCE §§ 600-20 (3d ed. 1940); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359 (1952).

⁶⁷ The common law incompetency of nonbelievers has been abrogated widely. *McClellan v. Owens*, 335 Mo. 884, 74 S.W.2d 570 (1934); *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971). Further, the constitutionality of such a rule is questionable. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (similar prerequisite for public office unconstitutional). Nevertheless, there is contrary precedent in some jurisdictions. *See Pumphrey v. State*, 84 Neb. 636, 122 N.W. 19 (1909); *State v. Levine*, 109 N.J.L. 503, 162 A. 909 (1932).

⁶⁸ For example, incompetencies based on conviction of crime and on an interest in the outcome have been abrogated widely. *See McCORMICK, supra* note 30, §§ 61, 64-65;

rules of the Supreme Court Draft make no provision for deference to state law, even in diversity cases.⁶⁹

As one of two important changes, the Subcommittee's proposed amendments would provide that state competency law govern in civil cases "with respect to a claim or defense as to which State law supplies the rule of decision" ⁷⁰ This language unwisely requires application of a dual body of evidence law in cases involving both state and federal claims or defenses.⁷¹ The application of a dual body of evidence law would have its worst effects in, for example, a case involving joined federal antitrust and state unfair competition claims, where a witness might be competent to testify concerning only the antitrust claim even though the same testimony bears on both claims. These problems are compounded by ambiguities inherent in the words "with respect to" ⁷² and

Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 496 (1939). Of course these considerations of capacity may play a role in the jury's assessment of credibility. *But see* PROPOSED FED. R. EVID. 610 (Supreme Court Draft Nov. 1972) (evidence of religious beliefs or opinions not admissible to impair or enhance credibility). In an extreme case, these considerations also might prompt a court to exercise its general authority to exclude substantially worthless, misleading, or prejudicial evidence. *See id.* 403.

⁶⁹ PROPOSED FED. R. EVID. 601 & Advisory Comm. Note (Supreme Court Draft Nov. 1972).

⁷⁰ PROPOSED CHANGES rule 601, *supra* note 10, at 19. Except for competency of jurors, the amendment allows the provisions of the Supreme Court draft to control in other situations. *See* notes 75-76 *infra* and accompanying text.

⁷¹ Irrespective of the basis of jurisdiction, mixed state and federal claims and defenses can be present in the same case, even though there is but a single cause of action. *See, e.g.,* *United States v. Yazell*, 382 U.S. 341 (1966); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1948); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942). The required application of a dual body of evidence law could have the undesirable effect of tipping the balance against the discretionary exercise of pendent jurisdiction, which depends largely upon considerations of judicial economy, convenience, and fairness to litigants. *See* *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

⁷² The language of the witness competency amendment risks introducing difficulties posed by similar language in rule 302 of the Supreme Court Draft, which provides that state law is to determine the effect of a presumption "respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision" PROPOSED FED. R. EVID. 302 (Supreme Court Draft Nov. 1972). Lesser, or "tactical," presumptions are always governed by federal law. *Id.* 302, Advisory Comm. Note. Thus, the rule quite unwisely necessitates an inquiry into whether the presumption relates to an element (ultimate fact) or to a lesser (mediate) fact. This unfortunate distinction which frequently is difficult to draw, can be illustrated by a plaintiff's attempt to apply a presumption under state law concerning regular business procedures. Specifically, he may wish to prove that his letter accepting the defendant's offer was mailed by showing that he placed it in his office out-basket for mailing. The act of mailing the letter would be an ultimate fact only if it establishes acceptance, an element of the plaintiff's claim. If his acceptance is not complete on mailing, but rather on receipt by the offeror, the act

in the words "supplies the rule of decision."⁷³

Although the best solution would be to apply federal evidence law in all federal cases, an intermediate yet satisfactory solution exists. State evidence law might be applied across-the-board in cases wherein the only ground for federal jurisdiction is diversity of citizenship, while federal evidence law might be applied in pure federal question cases.⁷⁴ In those instances where both diversity and federal question jurisdiction exists, the evidence law applicable to the entire case might be determined on the basis of whether state or federal issues predominate.

In another important change, the Subcommittee's proposed amendments would broaden significantly the competency of a juror in an inquiry into the validity of a verdict or indictment in which he participated. Returning to the language of earlier drafts,⁷⁵ the Subcommittee would permit a juror to testify or give affidavit with regard to all matters except his or another juror's mental or emotional processes.⁷⁶ Under the Supreme Court Draft, which itself may be too broad, a juror can testify or give an affidavit concerning extraneous prejudicial information improperly brought to the attention of the jury or an outside influence

of mailing the letter probably is only a mediate fact. Even in cases involving only state claims and defenses, a dual body of evidence law would be applicable, for presumptions of mediate facts always are controlled by federal law under the Supreme Court Draft. *Id.*

The proposed amendments to the privilege and competency rules do not incorporate expressly the ultimate-mediate distinction. The language refers only to a "claim or defense" and not to an element thereof. PROPOSED CHANGES rules 501, 601, *supra* note 10, at 12, 19. Nonetheless, there is danger that the courts might borrow the distinction from the presumption rule in determining whether a privilege or competency is "with respect to" a state claim or defense. The mere elimination of the reference to elements is insufficient to preclude the application of the ultimate-mediate distinction to such questions.

⁷³ The decision as to whether state or federal law provides the rule of decision may be particularly difficult where federal law, concededly controlling, incorporates state law. *See, e.g.,* Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) (amount of damages recoverable); *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (legitimacy of child); *Cope v. Anderson*, 331 U.S. 461 (1947) (statute of limitations). *See also* *United States v. Yazell*, 382 U.S. 341 (1966).

⁷⁴ The approach advocated here should be applied to presumptions, as well as to privileges and competency. The Advisory Committee concludes that under the *Erie* doctrine, state law must govern certain presumptions. PROPOSED FED. R. EVID. 302, Advisory Comm. Note (Supreme Court Draft Nov. 1972). *But see* *Hanna v. Plumer*, 380 U.S. 460 (1965). Indisputably, a presumption has a greater effect on the complexion of a right or obligation than does a privilege or competency. Thus, there is more justification, and perhaps more need, for some deference to state presumption law. That need, when balanced with the federal interest in a single body of evidence law for each case, is met sufficiently if the application of state law is limited to diversity cases. *See* *Hanna v. Plumer*, *supra*.

⁷⁵ *See* PROPOSED FED. R. EVID. 606(b) (Rev. Draft Mar. 1971); *id.* 6-06(b) (Prelim. Draft Mar. 1969).

⁷⁶ PROPOSED CHANGES rule 606(b), *supra* note 10, at 20.

improperly brought to bear on a juror.⁷⁷ The Subcommittee's approach is antithetical to the smooth functioning of the jury system and conflicts with the traditional policy justifications for juror incompetency—the encouragement of full and frank jury deliberations and the avoidance of juror harrassment, annoyance, and reprisals.⁷⁸ Furthermore, although a number of jurisdictions do apply a more liberal standard than that of the Supreme Court Draft, only California's standard seems so expansive as to permit testimony on all matters other than mental and emotional processes.⁷⁹

PRESUMPTIONS AGAINST THE ACCUSED IN CRIMINAL CASES

The Supreme Court Draft, in prescribing the effect of statutory and common law presumptions in civil and criminal proceedings, distinguishes between one general and two special classes of presumptions.⁸⁰ The general class, which consists of presumptions affecting federal claims and defenses in civil cases, presumptions affecting mediate factual propositions involved in state claims and defenses, and presumptions favoring the accused in criminal cases, places the burden of persuasion on the party against whom the presumption operates.⁸¹ Presumptions directly affecting elements of state claims and defenses in civil cases fall within one special class and are governed by state law.⁸² The other special class consists of presumptions against the accused in federal criminal cases.⁸³ These are circumscribed by a prohibition against directing a finding of fact against the accused, and, in addition, their submission to the jury is not mandatory.⁸⁴ Further, the Supreme Court Draft accords little effect to these presumptions,⁸⁵ and no effect when the court con-

⁷⁷ PROPOSED FED. R. EVID. 606 (b) (Supreme Court Draft Nov. 1972). It may be unwise to render jurors competent to testify concerning extraneous prejudicial information improperly brought to the jury's attention. Such a rule might render verdicts subject to challenge on grounds that a news report came to the jury's attention. This may permit juror harrassment or threats by dissatisfied litigants seeking to obtain statements impeaching the verdict. In contrast, juror competency concerning threats and similar outside influences under the Supreme Court Draft does serve the important function of discouraging such threats or harrassments.

⁷⁸ See *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

⁷⁹ Compare *People v. Hutchinson*, 71 Cal.2d 342, 455 P.2d 132, 78 Cal. Rptr. 196 (1969) with *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866) and *Perry v. Bailey*, 12 Kan. 415 (1874) and *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955) and *Grenz v. Werre*, 129 N.W.2d 681 (N.D. 1964).

⁸⁰ See generally UNDERSTANDING THE RULES, *supra* note 13, at 13-18.

⁸¹ PROPOSED FED. R. EVID. 301 (Supreme Court Draft Nov. 1972).

⁸² *Id.* 302.

⁸³ See *id.* 303.

⁸⁴ See *id.* 303(b).

⁸⁵ The only effect of a presumption under the Supreme Court Draft is to invoke the

cludes that, on the evidence presented, the trier of fact reasonably cannot perceive a rational connection between the fact or facts giving rise to the presumption and the presumed fact. This test exceeds the restrictions heretofore endorsed by the Supreme Court.⁸⁶ Although Congress may be displeased by the limited effect given to statutory presumptions, the restrictions prescribed by the Supreme Court Draft are in harmony with Anglo-American notions of fairness in criminal cases.

The Subcommittee's proposed amendments would remove from the *Rules* all criminal presumptions and leave that subject to separate legislation now pending before the Senate.⁸⁷ Even if this separate legislation were not deficient in certain respects,⁸⁸ codifying the entire law of presumptions in the federal evidence rules would be preferable.⁸⁹ Certain changes proposed by this legislation might be incorporated in the proposed amendments if necessary to gain congressional adoption of the *Rules*.⁹⁰

rather mild instruction required by rule 303(c), which in most instances would be given anyway. Rule 303(c) provides that when the existence of a presumed fact is to be decided by the jury, the judge must instruct them that the presumed fact may, but need not, be found. If the presumed fact is an ultimate one, the judge also must instruct that it must be proven beyond a reasonable doubt. *Id.* 303(c).

⁸⁶ The Supreme Court has held that a statutory presumption is acceptable if a reasonable factual basis for the presumption existed before the legislature, not necessarily in the evidence before the jury. *Leary v. United States*, 395 U.S. 6 (1969); *cf.* *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965). *See generally* CLARK BOARDMAN FEDERAL PRACTICE SERIES, FEDERAL RULES OF EVIDENCE (P. Rothstein ed. 1973) [hereinafter cited as ROTHSTEIN ON RULES].

⁸⁷ *See* S. 1, 93d Cong., 1st Sess. (1973); S. 1400, 93d Cong., 1st Sess. (1973). The prototype of S. 1 is the final report of the Brown Commission. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE (1971), reprinted in *Hearings on the Report of the National Commission on Reform of Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedure of the Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 129 (1971) [hereinafter cited as NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS].

⁸⁸ S. 1 fails to insure that findings of fact will not be directed against the accused since it contains no specific prohibition and since it applies only to statutory presumptions (and probably only those pertaining to ultimate facts), thus leaving common law and mediate fact presumptions unregulated. S. 1 also is defective because it applies a reasonable doubt standard to all presumptions, not just to presumptions of ultimate facts and presumptions against the accused. S. 1, 93d Cong., 1st Sess., tit. II, § 201(h) (1973); *see* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 87, at 3-4.

⁸⁹ An acceptable alternative would be to place the provisions dealing with civil and criminal presumptions in the *Federal Rules of Civil Procedure* and the *Federal Rules of Criminal Procedure* respectively. However, this would entail unnecessary duplication since criminal presumptions in favor of the accused and civil presumptions presumably should be treated alike.

⁹⁰ For instance, submission to the jury, when a reasonable juror could find the presumed fact, might be made mandatory, if the rather slim effect given statutory presump-

The Supreme Court Draft provision respecting presumptions against the criminal accused should be amended to delete the distinction between questions of presumed ultimate fact and questions of presumed mediate fact.⁹¹ Under the rule, the standards for submission of a presumed fact to the jury⁹² and for instructing the jury⁹³ depend upon this distinction. Difficulties in administering this distinction are inevitable, as most judges, lawyers, and juries will find it difficult to comprehend. Moreover, the confusing distinction is unnecessary, since the same result as under the rule would ensue if the ordinary rules governing sufficiency of evidence and burden of proof were applied to presumptions. The presumption rule merely should provide for submission to the jury whenever such would be warranted in the absence of a presumption, and provide for

tions by the Supreme Court Draft is particularly objectionable to Congress. S. 1 as respects presumptions provides for mandatory submission.

A distinction between statutory standards purporting to define prima facie cases and those purporting to create presumptions also might be inserted in the Supreme Court Draft. The Supreme Court Draft treats both as presumptions. In contrast, both S. 1 and the Brown Commission Report contain specific provisions prescribing the effect of prima facie standards: submission to the jury is not mandatory but only warranted and there is to be no instruction attributing any special weight to the facts constituting the prima facie case. An instruction somewhat stronger than that authorized by rule 303(c) of the Supreme Court Draft would be required in the case of presumptions. See S. 1, 93d Cong., 1st Sess., tit. II, § 201(h) (1973); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 87, at 4. While introducing unnecessary complexity into the trial and appeal of criminal cases, a distinction may accurately reflect congressional intent behind the legislative prescription of prima facie cases.

⁹¹ See PROPOSED FED. R. EVID. 303 (Supreme Court Draft Nov. 1972).

⁹² *Id.* 303(b). Ultimate facts are submitted only when a reasonable juror could find the fact beyond a reasonable doubt; mediate facts are submitted where there is substantial evidence. *Id.* The Advisory Committee may have included the provision to create a uniform standard regarding motions for judgment of acquittal. At the time the Supreme Court Draft was written, three distinct views concerning when it is appropriate to direct an acquittal were extant in the federal courts. This now may have been reduced to two, for the Second Circuit recently has joined the majority position. Compare *United States v. Brown*, 436 F.2d 702 (9th Cir. 1970) (directed acquittal when reasonable juror could not find prosecution's case proved beyond a reasonable doubt; majority view) with *United States v. Feinberg*, 140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944) (directed acquittal when reasonable juror could not find prosecution's case proved by a preponderance of the evidence), *overruled*, *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972) and with *Isbell v. United States*, 227 F. 788 (8th Cir. 1915) (directed acquittal when there is no substantial evidence of facts excluding every hypothesis but that of guilt). However, an evidentiary provision should not be used as a backdoor vehicle of such reform. A more appropriate and effective mandate could be inserted in the *Federal Rules of Criminal Procedure*. See S. 1, 93d Cong., 1st Sess., tit. II, § 201(h) (1973).

⁹³ PROPOSED FED. R. EVID. 303(c) (Supreme Court Draft Nov. 1972). The jury is instructed that presumed ultimate facts cannot be found unless the jury is convinced of them beyond a reasonable doubt, but presumed mediate facts simply may or may not be found, with no specification of the degree of persuasion required. *Id.*

a mandatory instruction that the jury "may but need not find the presumed fact from the evidence which gives rise to the presumption," without any indication of the degree to which the jurors must feel convinced—for example, beyond a reasonable doubt or by a preponderance of the evidence.

IMPEACHMENT

CONVICTIONS

Rule 609 of the Supreme Court Draft provides that, unless stale, prior convictions of crimes punishable by more than one year's imprisonment or involving false statements or dishonesty may be used to impeach a witness, including a criminal defendant.⁹⁴ The Subcommittee's proposed amendments would add to the rule a provision empowering the judge, in his discretion, to bar ordinarily admissible prior convictions if they are unduly prejudicial when compared to their impeaching value.⁹⁵ This veto power should be adopted. It is required to safeguard the rights of witnesses, particularly if they also are the criminal accused, and to avoid discouraging witnesses unnecessarily.

Allowing the use of prior convictions to impeach a witness is in accord with prevailing law, although the type and age of convictions that may be used varies greatly.⁹⁶ The power to exclude such evidence if unduly prejudicial also has met with acceptance in a significant number of decisions.⁹⁷ An earlier draft of rule 609 included this judicial veto power,⁹⁸ but the Advisory Committee finally yielded to the entreaties of "law and order" advocates and deleted it.⁹⁹ In light of this deletion, it would

⁹⁴ *Id.* 609. The rule is fashioned after the *District of Columbia Code*. See D.C. CODE § 14-305 (Supp. V, 1972).

⁹⁵ PROPOSED CHANGES rule 609, *supra* note 10, at 21-22.

⁹⁶ See, e.g., *United States v. Greely*, 471 F.2d 25 (3d Cir. 1972) (12-year-old robbery conviction admitted to impeach defendant charged with robbery); *United States v. Tubbs*, 461 F.2d 43 (7th Cir. 1972) (two-year-old and seven-year-old robbery convictions admitted to impeach defendant charged with robbery); *United States v. Williams*, 445 F.2d 421 (10th Cir. 1971) (convictions for manslaughter and assault with intent to kill admitted to impeach defendant charged with stealing a television).

⁹⁷ See, e.g., *United States v. Pucio*, 453 F.2d 539, 541 (2d Cir. 1971); *United States v. Palumbo*, 401 F.2d 270, 273 (2d Cir. 1968); *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965); *People v. Montgomery*, 47 Ill. 2d 510, 515, 268 N.E.2d 695, 698 (1971).

⁹⁸ See PROPOSED FED. R. EVID. 609 (Rev. Draft Mar. 1971).

⁹⁹ Senator McClellan and the Justice Department accused the Advisory Committee of ignoring congressional disapproval of the judicial veto power, which Congress intentionally failed to include in its 1970 revision of section 14-305 of the *District of Columbia Code*. *Hearings on Proposed Rules*, *supra* note 7, at 317 (letter from Senator John McClellan to William Hungate, Feb. 16, 1973); see D.C. CODE § 14-305 (Supp. V, 1972).

seem difficult to contend that the judicial veto power still exists in the Supreme Court Draft by virtue of rule 403, which grants the general power to bar evidence that is unduly prejudicial in relation to its probative value.

The absence of a judicial veto power in the Supreme Court Draft will foster undesirable results. For example, in a case where a defendant charged with involuntary manslaughter takes the stand, a prior conviction of the same offense may be admitted ostensibly for impeachment purposes, despite its low probative value on the question of witness credibility and its high potential for prejudicing consideration of the merits.¹⁰⁰

The Subcommittee's proposed amendment, while wisely including the veto power, suffers from ambiguity. The amendment is not clear whether prior convictions both for crimes punishable by more than one year and for crimes of false statement and dishonesty are subject to the veto power.¹⁰¹ Although the Subcommittee Note, in an apparent attempt at compromise, indicates that only crimes punishable by more than one year are subject to judicial veto,¹⁰² this power should apply to both categories of prior convictions. In the same manner as prior convictions for crimes punishable by more than one year, convictions of minor offenses involving false statement or dishonesty can prejudice the merits of a case while adding little to the question of witness credibility.

Rule 609(b) of the Supreme Court Draft provides that a prior conviction is barred as stale only if the witness has not been convicted of any crime within the 10 years preceding trial.¹⁰³ Apparently a conviction occurring in that 10-year period can render earlier convictions usable,

¹⁰⁰ See PROPOSED FED. R. EVID. 403 (Supreme Court Draft Nov. 1972). Yet a court would not countenance direct use of a prior conviction to establish the propensity of a defendant to commit a certain crime. See *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930).

¹⁰¹ The amendment provides:

[Evidence of a prior conviction] is admissible if, but only if, (1) the crime involved dishonesty or false statement or (2) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value or the evidence of the conviction.

PROPOSED CHANGES rule 609, *supra* note 10, at 21. The problem, of course, is whether the last clause modifies both the first and the second categories.

¹⁰² *Id.*, Subcomm. Note, at 22.

¹⁰³ PROPOSED FED. R. EVID. 609(b) (Supreme Court Draft Nov. 1972). These sweeping provisions, allowing revival of an otherwise stale conviction by more current convictions, apparently were forced upon the Advisory Committee by "law and order" proponents. See *Hearings on Proposed Rules*, *supra* note 7, at 317 (letter from Senator John McClellan to William Hungate, Feb. 16, 1973).

even though the recent crime involves a punishment of less than a year and does not involve a false statement or dishonesty. Such a rule might achieve the highly undesirable result of allowing a 40-year-old conviction into evidence merely because the witness was convicted of a minor offense within the last 10 years. This result is especially troublesome when the witness is the criminal defendant since the admission of a stale conviction unjustifiably may prejudice not merely the issue of credibility, but the merits as well.¹⁰⁴ The proposed amendments laudably would prohibit the use, for impeachment, of any conviction more than 10-years-old.¹⁰⁵

JUVENILE ADJUDICATIONS AND OTHER TYPES OF WRONGDOING

The Supreme Court Draft, while generally barring use of prior juvenile adjudications, allows their use for impeachment of a witness other than a criminal defendant if the judge concludes that exceptional circumstances justify it.¹⁰⁶ The Subcommittee's proposed amendments would limit the use of juvenile adjudications for impeachment to criminal proceedings where the accused is not the witness to be impeached.¹⁰⁷ The Subcommittee apparently made this change under the mistaken assumption that this is the real intent behind the Supreme Court Draft.¹⁰⁸ However, the Supreme Court Draft clearly intends its rule to apply to both civil and criminal proceedings, except for the special case of the criminal-accused witness.¹⁰⁹ Nevertheless, the amendment is a good one, bringing the rule more into accord with prevailing goals of the juvenile

¹⁰⁴ See UNDERSTANDING THE RULES, *supra* note 13, at 55-63. When coupled with the manslaughter example above, the result seems totally unconscionable. See also note 105 *infra*.

¹⁰⁵ PROPOSED CHANGES rule 609(b), *supra* note 10, at 21. The Supreme Court Draft regards a conviction as having occurred within the 10-year period in any of the following occurred in the 10-year period: final judgment of conviction, release from actual confinement, or expiration of parole, probation, or the official sentence. PROPOSED FED. R. EVID. 609(b) (Supreme Court Draft Nov. 1972). The amendments wisely would calculate the 10-year period from the date of conviction or the date of release from confinement, whichever is later. PROPOSED CHANGES rule 609(b), *supra* note 10, at 21.

¹⁰⁶ PROPOSED FED. R. EVID. 609(d) (Supreme Court Draft Nov. 1972).

¹⁰⁷ PROPOSED CHANGES rule 609, *supra* note 10, at 22.

¹⁰⁸ *Id.*, Subcomm. Note.

¹⁰⁹ PROPOSED FED. R. EVID. 609, Advisory Comm. Note (Supreme Court Draft Nov. 1972). The Supreme Court Draft provides in part: "The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if . . ." *Id.* 609. Use of the word "accused" does not mean the Advisory Committee intended to authorize the judge's power to permit use only in criminal cases. Rather, that term is meant to preclude the power in one criminal situation and to affirm it in all other criminal and civil situations.

system¹¹⁰ and with the general policy of avoiding undue embarrassment or discouragement of witnesses.¹¹¹ In criminal cases, where the necessity for and probative value of a juvenile record are likely to be greater, these policies are overridden.

The new amendments would provide needed clarification on the matter of when wrongdoing, not the subject of a conviction or a juvenile adjudication, may be used for impeachment. The amendments state expressly, rather than impliedly as under the Supreme Court Draft, that inquiry into such wrongdoing (limited in both drafts to cross-examination) is permissible only in the discretion of the judge.¹¹² Unfortunately, remoteness in time is dropped from specific mention as a factor for the judge to consider, although it may still be implied.

HEARSAY

PRIOR STATEMENTS OF WITNESSES

Under prevailing American law, prior statements of witnesses, if offered as substantive evidence and not coming within some exception to the hearsay rule, are hearsay and inadmissible. As substantive evidence, the truthfulness of such prior statements would be relied upon, but the statements would not have been subject to certain courtroom safeguards when made, such as cross-examination in the light of current issues, and hence must be excluded.¹¹³ The present availability of the witness for cross-examination is not considered an adequate safeguard; to be effective, cross-examination must occur when the statement is first made.¹¹⁴

¹¹⁰ The preservation of confidentiality and the minimization of adverse consequences from an adjudication are goals of the juvenile system fostered by the limited use of juvenile records for impeachment purposes. See *In re Gault*, 387 U.S. 1, 14-16, 22-25 (1967); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 286-89 (1967).

¹¹¹ See McCORMICK, *supra* note 30, § 42, at 83.

¹¹² Compare PROPOSED CHANGES rule 608(b), *supra* note 10, at 21 with PROPOSED FED. R. EVID. 608(b) (Supreme Court Draft Nov. 1972).

¹¹³ See, e.g., *Ruhala v. Roby*, 379 Mich. 102, 121, 150 N.W.2d 146, 153 (1967); *In re Dalton Estate*, 346 Mich. 613, 622, 78 N.W. 2d 266, 271 (1956); *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

The majority viewpoint, however, is not without strong dissent among some courts and commentators. See, e.g., *California v. Green*, 399 U.S. 149, 164 (1970); *United States v. De Sisto*, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); *Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969); *Gelhaar v. State*, 41 Wis. 2d 230, 240-41, 163 N.W.2d 609, 614 (1969); McCORMICK, *supra* note 30, §§ 39, 251; 3A J. WIGMORE, EVIDENCE §1018, at 996 n.2 (J. Chadbourn rev. 1970).

¹¹⁴ *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

The Supreme Court Draft, following in some measure the lead of the new *California Evidence Code*,¹¹⁵ makes an exception to this rule for certain prior statements, including prior inconsistent statements, and declares that such statements are not hearsay.¹¹⁶ The Subcommittee's proposed amendments wisely would restrict the admissibility of prior inconsistent statements to those made under oath and subject to penalty for perjury at a trial, hearing, deposition, or grand jury proceeding.¹¹⁷ The proposed amendment represents a compromise between the relatively unlimited use of prior inconsistent statements permitted under the Supreme Court Draft and the prevailing law which totally forbids substantive use unless the statement qualifies for some regular exception to the hearsay rule.¹¹⁸

In criminal trials, the Supreme Court Draft's liberal standard respecting prior inconsistent statements will favor the prosecution, which is better able to procure such statements and which often must rely on witnesses who grow increasingly hostile as trial nears. Such a rule may encourage widespread gathering of prior statements by the Government and may lead toward trial by affidavit and away from full and effective confrontation. A witness' obdurate disclaimer of all knowledge concern-

¹¹⁵ See CAL. EVID. CODE §§ 1235, 1236, 1238 (West 1966).

¹¹⁶ PROPOSED FED. R. EVID. 801(d)(1) (Supreme Court Draft Nov. 1972). The Supreme Court Draft, in addition to prior inconsistent statements, admits into evidence prior statements of identification and prior consistent statements offered to rebut an express or implied charge of recent fabrication or improper influence or motive. *Id.*

¹¹⁷ PROPOSED CHANGES rule 801(d)(1), *supra* note 10, at 11. Statements before a grand jury, while not subject to cross-examination, at least are surrounded by some judicial safeguards. In addition to the oath, these safeguards include the penalty for perjury, reliable transcription of and observers to the making of the statement, and the witness' realization of the importance of the matter and occasion. These safeguards, when combined with present opportunity for cross-examination, arguably compensate for lack of actual cross-examination at the making of the statement.

The proposed amendment does not require, however, that the prior hearing or grand jury proceeding have been in the same case as that in which the evidence is now sought to be used. Thus, the witness' motivations, contemplation of stakes, and realization of the issues may be quite different and present a threat to reliability or accuracy. See *United States v. Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967).

¹¹⁸ This change probably reflects the influence of then Chief Judge Henry J. Friendly of the Second Circuit, who voiced his opposition to the permissiveness of the Supreme Court Draft respecting prior statements and who formulated the Second Circuit's *De Sisto* rule. *Hearings on Proposed Rules*, *supra* note 10, at 219-20 (letter from Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit to Committee on Rules of Practice and Procedure, Mar. 31, 1970); *id.* at 246-65 (testimony and statement of Chief Judge Friendly); see *United States v. De Sisto*, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964) (admission of prior inconsistent statement as substantive evidence permitted because made under oath). See also *United States v. Briggs*, 457 F.2d 908, 910 n.3 (2d Cir. 1972).

ing his prior statement can make effective cross-examination especially difficult. The decisions of the Supreme Court have shown that the confrontation clause furnishes little protection against substantive use of prior statements.¹¹⁹ Since analogous dangers are present to a sufficient degree in civil cases, the amendment should be adopted for civil as well as criminal cases.

STATEMENT OF RECENT PERCEPTION

Rule 804(b)(2) of the Supreme Court Draft provides an innovative exception to the hearsay rule. Good faith statements of recent perception made by a presently unavailable declarant while his memory was clear are admissible if not made in response to a person interested in a claim arising out of the event or condition perceived nor made in contemplation of litigation.¹²⁰ The proposed amendments wisely delete this exception.¹²¹

This new exception makes enormous inroads into the ban on hearsay. In an auto collision case, for example, it allows into evidence a disinterested and unsolicited letter written by an uninvolved bystander to her mother shortly after the occurrence if the bystander is unavailable at trial. Moreover, the exception would admit the testimony of the mother's neighbor as to what the mother told the neighbor about the contents of the letter if the mother also is unavailable and made her statement to the neighbor without litigation motive shortly after perceiving the letter.¹²² While the neighbor's testimony would be double hearsay—there are two out-of-court declarants whose credibility is at issue—rule 805, in accord with accepted law,¹²³ provides that "hearsay within hearsay" is acceptable if each of the two branches of the hearsay is covered by an exception to the hearsay rule.¹²⁴ Here each branch would be covered

¹¹⁹ See *Nelson v. O'Neil*, 402 U.S. 622 (1971); *California v. Green*, 399 U.S. 149 (1970). Under the Supreme Court Draft, a conviction might be obtained in a case where the sole "live" evidence consists of witnesses' testimony favorable to the accused, if one or more of these witnesses made a prior written inconsistent statement embracing the facts necessary to convict. Hopefully, a court would direct an acquittal on grounds that on this evidence, a reasonable man must entertain a reasonable doubt concerning guilt.

¹²⁰ PROPOSED FED. R. EVID. 804(b)(2) (Supreme Court Draft Nov. 1972).

¹²¹ PROPOSED CHANGES rule 804(b)(2), *supra* note 10, at 31.

¹²² One member of the Advisory Committee has indicated that the use of the words "event or condition" in the rule, rather than the word "fact," to describe what it is that must be recently perceived, precludes admissibility in this hypothetical case because the letter, while a fact, is not an event or condition. Interview with Craig Spangenberg, Member of Advisory Comm. on Rules of Evidence, in Asheville, N.C., Aug. 25, 1973.

¹²³ See generally *McCORMICK*, *supra* note 30, §§ 310, 313.

¹²⁴ PROPOSED FED. R. EVID. 805 (Supreme Court Draft Nov. 1972); *accord*, PROPOSED CHANGES rule 805, *supra* note 10, at 32.

by the new exception for statements of recent perception provided by rule 804(b) (2).

The proposed deletion of the recent perception exception would not affect the continued vitality of two other similar hearsay exceptions which are better supported by precedent. Rule 803(2), pertaining to excited utterances, allows admission of statements made about a startling event or condition while under the stress of excitement caused thereby.¹²⁵ This exception differs from the recent perception exception in that the statement must concern a startling occurrence; the time in which the statement must be made is not measured in terms of "recent" but rather in duration of excitement; the declarant need not be unavailable; and the requirements concerning litigation motive are not express. Rule 803(1), the other similar hearsay exception not affected by the proposed amendment, deals with present sense impressions.¹²⁶ This rule is accepted in fewer jurisdictions¹²⁷ and comes very close to the controversial recent perception exception. The present sense impressions exception embraces statements recounting an event or condition perceived contemporaneously with the statement or immediately previously. Contemporaneity supposedly guarantees trustworthiness as excitement allegedly does under rule 803(2). The controversial recent perception exception differs from the present sense impression exception in that the requisite time period is "recently perceived" rather than perceived contemporaneously or immediately previously. Further, the recent perception exception requires a presently unavailable declarant and an absence of litigation motive. Thus, deletion of the recent perception exception will not leave without recourse the litigant who offers a deserving hearsay statement along these lines.

BUSINESS RECORDS

The hearsay provisions of the Supreme Court Draft would be modified further by proposed Subcommittee amendments restricting the business records exception to "business and professional records"¹²⁸

¹²⁵ PROPOSED FED. R. EVID. 803(2) (Supreme Court Draft Nov. 1972). This exception is accepted nearly everywhere. 6 J. WIGMORE, EVIDENCE, §§ 1746-50 (3d ed. 1940 & Supp. 1972).

¹²⁶ PROPOSED FED. R. EVID. 803(1) (Supreme Court Draft Nov. 1972).

¹²⁷ See, e.g., *Kelly v. Hanwick*, 228 Ala. 336, 153 So. 269 (1934); *McCaskill v. State*, 227 So. 2d 847 (Miss. 1969); *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942). See generally *McCORMICK*, *supra* note 30, § 298.

¹²⁸ PROPOSED CHANGES rule 803(6), *supra* note 10, at 27. The proposed amendment seems even narrower than some interpretations of the existing Federal Business Records Act. 28 U.S.C. § 1732 (1970), formerly codified in 28 U.S.C. § 695 (1940), construed in *Palmer v. Hoffman*, 318 U.S. 109 (1943).

rather than the records of any "regularly conducted activity."¹²⁹ Although the Subcommittee rightly may fear that overly broad language will bring the records of social clubs or small community organizations within the scope of the exception, their proposed solution would raise inevitable questions about the inclusion of police, charity, and low-level government records. Clearly these latter records should qualify if they possess the same guarantees of trustworthiness that are assumed to inhere in regular business records.¹³⁰ The language of the Supreme Court Draft, "regularly conducted activity," when read in conjunction with the Advisory Committee commentary and general case law, will eliminate many unnecessary questions posed by the Subcommittee's proposed limitations while guaranteeing that records excepted from the hearsay rule do meet high standards of reliability.¹³¹

The Federal Business Records Act¹³² should be repealed with the adoption of the federal evidence rules, to the extent they conflict. At present, there is no clarification of the relationship between the *Rules* and the Act.¹³³

STATEMENTS AT EARLIER PROCEEDINGS

The common law excepts from the hearsay rule testimony given at former judicial or quasi-judicial hearings in the same or a different case if the witness is presently unavailable, the earlier proceeding provided an opportunity for cross-examination, and if the issues, stakes, and parties were the same in the earlier proceeding as in the later proceeding.¹³⁴ Strict adherence to these requirements seems to be eroding as courts begin to realize their purpose: to insure that someone, with at least as great an interest or motive as the present opponent of the evidence, confronted the evidence in the earlier proceeding.¹³⁵ The Supreme Court

¹²⁹ PROPOSED FED. R. EVID. 803(6) & (7) (Supreme Court Draft Nov. 1972).

¹³⁰ The reliability of such records derives from systematic checking of the records, regularity and continuity in keeping the records, actual reliance on the records, and a continuing occupational duty to maintain accurate records. *Id.* 803(6), Advisory Comm. Note.

¹³¹ *See id.* An additional difficulty with the proposed amendment is its failure to make clear that the "regular course" requirement applies to each element of the exception.

¹³² 28 U.S.C. § 1732 (1970).

¹³³ UNDERSTANDING THE RULES, *supra* note 13, at 121-22; *see* 28 U.S.C. § 1732 (1970); note 128 *supra*.

¹³⁴ *See* Rio Grande So. Ry. v. Campbell, 55 Colo. 493, 136 P. 68 (1913); Atwood v. Atwood, 86 Conn. 579, 89 A. 29 (1913). *See generally* 5 J. WIGMORE, EVIDENCE §§ 1401-18 (3d ed. 1940).

¹³⁵ *See* McCORMICK, *supra* note 30, §§ 256-58.

Draft expands this former testimony exception by dispensing with any express requirement that the issues, stakes, or parties at the two proceedings be comparable.¹³⁶ The Supreme Court Draft instead substitutes a requirement that someone with a motive and interest similar to that of the present opponent of the evidence have had an opportunity to cross-examine the witness in the earlier proceeding.¹³⁷ No distinction is made between civil and criminal cases.

The proposed amendments require instead that "the party against whom the testimony is now offered, or a predecessor in interest, [have] had an opportunity to develop the testimony by . . . examination."¹³⁸ However, the proposed amendment would not require that the prior opportunity for cross-examination have been adequate, nor that the issues, stakes, or the examiner's motive or interest in the earlier proceeding have been comparable to those in the present proceeding. Thus, a party might be bound by his own or his predecessor in interest's less-than-vigorous examination, or by an examination which, although possibly adequate in the light of the earlier stakes and issues, is inadequate in the light of the later ones.

This is an area in which a distinction should be made between civil and criminal cases. The Supreme Court Draft is an excellent formulation for civil cases, and one which some courts may be approaching anyway. In civil matters a person frequently is bound by the efforts of another or of himself in a previous, though somewhat different, case in the interests of limiting litigation, easing the burden on public coffers, and freeing judicial resources for dispensing justice to more people.¹³⁹ But these interests should not be given priority in criminal cases where they might result in undeserved criminal stigma and deprivation of personal liberty. Therefore, the proposed amendment, with an additional requirement that the prior opportunity to examine must have been adequate, comparable, or in excess of the present needs and with the deletion of the "predecessor in interest" language, should be adopted for criminal cases where the evidence is to be used against the accused. For civil cases and

¹³⁶ PROPOSED FED. R. EVID. 804(b)(1) (Supreme Court Draft Nov. 1972). Gone also is the requirement that the party against whom the evidence was offered must be the same. *Id.* 804(b)(1), Advisory Comm. Note.

¹³⁷ *Id.* 804(b)(1).

¹³⁸ PROPOSED CHANGES rule 804(b)(1), *supra* note 10, at 31.

¹³⁹ The law of res judicata and collateral estoppel is an example. *See, e.g.*, Johnson v. Muelberger, 340 U.S. 581 (1951); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (subsequent history of case consistent); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937). *See generally* F. JAMES, CIVIL PROCEDURE §§ 11.23-35 (1965).

for criminal cases where the evidence is to be used against the Government, the rule of the Supreme Court Draft is appropriate.¹⁴⁰

STATEMENTS AGAINST INTERESTS

The traditional declaration against interest exception to the hearsay rule embraces a declarant's out-of-court statements that, in the mind of the declarant when made, were so far against his pecuniary or proprietary interest that he probably would not have made the statements had he believed them untrue.¹⁴¹ The major issue under the traditional exception has been the interpretation of "pecuniary or proprietary interest." Statements which expose the declarant to civil or criminal liability, or may subject him to hatred, ridicule, or disgrace, or have an adverse effect on a legal claim or defense, generally have fallen outside the definition of pecuniary or proprietary interest.¹⁴² Nonetheless, some decisions have recognized these risks as within the exception by liberal construction of the words "pecuniary or proprietary."¹⁴³ The common law has been uniform, however, in excluding out-of-court statements which expose the declarant to criminal liability and are offered to exculpate or inculpate an accused other than the declarant.¹⁴⁴

Both the Supreme Court Draft and the proposed amendments have expanded significantly the reception of statements exposing the declarant to a risk of criminal liability. The Supreme Court Draft permits admission of statements jointly incriminating both the declarant and the accused if far enough against the declarant's self-interest that trustworthi-

¹⁴⁰ The Supreme Court Draft may accomplish the result recommended here if the constitutional right of confrontation is held to limit the rule as applied against a criminal defendant. See PROPOSED FED. R. EVID. 804(b)(1), Advisory Comm. Note (Supreme Court Draft Nov. 1972). Nevertheless, the law should not be located in two places but rather should be codified clearly in the *Rules*.

¹⁴¹ See Jefferson, *Declaration Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declaration Against Interest*, 5 VAND. L. REV. 451 (1952); Comment, *Declarations Against Interest—Rules of Admissibility*, 62 NW. U.L. REV. 934 (1968).

¹⁴² See McCORMICK, *supra* note 30, §§ 178-79.

¹⁴³ See, e.g., *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915) (exposure to criminal liability); *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 91 N.W. 28 (1902) (exposure to tort liability for negligence); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945) (exposure to shame and possible criminal indictment).

¹⁴⁴ See *Donnelly v. United States*, 228 U.S. 243 (1913) (third party confession exculpating accused inadmissible); *Commonwealth v. Antonini*, 165 Pa. Super. 501, 69 A.2d 436 (1949) (suicide note jointly implicating deceased and accused inadmissible); cf. *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844). But see Comment, *Declaration Against Penal Interest—A Plea for Parity*, 5 TULSA L.J. 302 (1968).

ness is probable.¹⁴⁵ Embodying a more restrictive rule, the proposed amendments would render jointly implicating statements inadmissible on constitutional grounds.¹⁴⁶ Both the Supreme Court Draft and the proposed amendments admit singly incriminating statements—those inculcating the declarant and by implication exculpating the accused—but only if sufficiently against interest and corroborated.¹⁴⁷ The corroboration requirement is defined more precisely in the proposed amendment.¹⁴⁸

The proposed amendment's ban on jointly incriminating statements generally is sound. *Bruton v. United States*¹⁴⁹ does seem to compel exclusion of certain out-of-court statements which inculcate the accused as well as the declarant. The unreliability of such statements may not be appreciated fully by the jury without cross-examination of the declarant. However, the language of the amendment seems to exclude all jointly incriminating statements, made on or off the stand, and needs to be modi-

¹⁴⁵ PROPOSED FED. R. EVID. 804(b)(4) (Supreme Court Draft Nov. 1972). The decision as to whether it is so far against self-interest may be complex, because of the hope for leniency or to share, or relieve oneself partially of guilt. If a statement is both against interest and self-serving, the traditional rule permits admission of the evidence if the aspect that is against interest predominates over the self-serving aspect. See, e.g., *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S.E. 92 (1905); *Demassi v. Whitney Trust & Sav. Bank*, 176 So. 703 (La. Ct. App. 1973); *Small v. Rose*, 97 Me. 286, 54 A. 126 (1903).

¹⁴⁶ PROPOSED CHANGES rule 804(b)(4) & Subcomm. Note, *supra* note 10, at 31-32. The Subcommittee felt this rule was compelled by *Bruton v. United States* in which the Court held that the out-of-court statements of Bruton's non-testifying, codefendant companion, jointly implicating both, could not be admitted in the trial even though the jury was instructed to use it only against the maker of the statement. *Id.* at 32; see *Bruton v. United States*, 391 U.S. 123, 137 (1968).

¹⁴⁷ PROPOSED FED. R. EVID. 804(b)(4) (Supreme Court Draft Nov. 1972); PROPOSED CHANGES rule 804(b)(4), *supra* note 10, at 31.

¹⁴⁸ PROPOSED CHANGES rule 804(b)(4), *supra* note 10, at 31. The Supreme Court Draft simply said "not admissible unless corroborated." PROPOSED FED. R. EVID. 804(b)(4) (Supreme Court Draft Nov. 1972). The amendments state "not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The comment attending the amendment states that this provision was meant to indicate that the accused's own testimony shall not be corroboration. See PROPOSED CHANGES rule 804(b)(4), Subcomm. Note, *supra* note 10, at 32.

The Supreme Court, as a matter of constitutional due process, recently forbade the exclusion of a rather fully corroborated out-of-court statement of a third party, confessing to the crime and thereby exculpating the accused. *Chambers v. Mississippi*, 410 U.S. 284, 306 (1973).

Drafts prior to the Supreme Court Draft, like the common law, excluded jointly incriminating statements from evidence but, unlike the common law, allowed singly incriminating statements on a par with other statements against interest. No corroboration was required. PROPOSED FED. R. EVID. 804(b)(4) (Rev. Draft Mar. 1971); *id.* (Prelim. Draft Mar. 1969).

¹⁴⁹ 391 U.S. 123, 137 (1968).

fied in this regard.¹⁵⁰

The amendment's requirement that singly incriminating statements exculpating an accused be corroborated should be abandoned. Although third parties may be motivated to confess by forceful or fraudulent inducements of defense counsel, singly incriminating statements seem as reliable as any other evidence admitted on behalf of criminal defendants. The jury is as capable of assessing this evidence as other evidence admitted pursuant to exceptions to the hearsay rule where the declarant cannot be cross-examined.¹⁵¹

The proposed amendments reject that part of the Supreme Court Draft which expressly broadens the common law exception to include statements exposing the declarant to civil liability, hatred, ridicule or disgrace, and statements having adverse effect on legal claims or defenses.¹⁵² The Subcommittee apparently believes that these consequences are insufficient to assure substantial trustworthiness or that a judge or jury will be unable to distinguish when they are and are not.¹⁵³ However, these evaluations fall within lay experience. A jury is capable of evaluating, for example, the relative weight to be accorded statements merely embarrassing a declarant and those costing him a large sum of money. In addition, the rule allows a judge to keep the evidence from the jury if it is not sufficiently against interest to substantially guarantee trustworthiness. Thus the Supreme Court Draft should be adopted in this respect.

The amendment nevertheless would be acceptable if the Subcommittee Note made clear that a court may admit statements against these "new"

¹⁵⁰ The Subcommittee's proposed amendment provides simply that a jointly incriminating statement "is not admissible." PROPOSED CHANGES rule 804(b)(4), *supra* note 10, at 31. One solution would be to change this phrase to "is not included within this exception" to the hearsay rule. This substitute language embodies what actually was intended and eliminates the problem that, as worded, the amendment would exclude the statements even if they are within another exception to the hearsay rule or are not hearsay at all.

A similar problem is involved in the language of the Supreme Court Draft and the proposed amendment respecting singly incriminating statements offered to exculpate accused ("is not admissible unless corroborat[ed] . . .").

¹⁵¹ A jury is more sophisticated about the possibilities of private coercion to obtain such exculpating statements than they are about the analogous governmental pressures to obtain inculpatory statements. Exculpatory statements are no different in this respect from any other testimony. Even if they were, free reception of exculpating statements and not inculpatory ones can be justified on the grounds that there is not and never has been parity between the rules or burdens applicable to the Government and those applicable to the defense.

¹⁵² PROPOSED CHANGES rule 804(b)(4) & Subcomm. Note, *supra* note 10, at 31-32; *see* PROPOSED FED. R. EVID. 804(b)(4) (Supreme Court Draft Nov. 1972).

¹⁵³ *See* PROPOSED CHANGES rule 804(b)(4), Subcomm. Note, *supra* note 10, at 32.

interests if they have sufficient adverse effect derivatively on "pecuniary or proprietary interest." Had the broad exception of the Supreme Court Draft never been formulated, a court might have felt justified in admitting relatively reliable statements against the new interests because of their derivative effect on pecuniary or proprietary interests. However, a court probably would be reluctant to do so in light of the amendment's outright rejection of the Supreme Court Draft provision.

DYING DECLARATIONS

Rule 804(b)(3) of the Supreme Court Draft provides a hearsay exception permitting admission of "a statement made by a declarant while believing that his death was imminent" if the statement "concern[s] the cause or circumstances of what he believed to be his impending death."¹⁵⁴ The rule, abandoning the common law restriction to criminal homicide prosecutions, applies in all kinds of cases.¹⁵⁵ The proposed amendments, on the other hand, while permitting admission of dying declarations in all civil cases, limit the exception in criminal cases to homicide prosecutions.¹⁵⁶

The assumptions behind admission of dying declarations are subject to serious question. When a declarant stands "before his Maker" and is knowingly on his deathbed, does he somehow become a more accurate perceiver, rememberer, and reporter, and abandon all motivation to lie? Should the rule be different if the declarant is an atheist? If such a guarantee of reliability actually exists,¹⁵⁷ arguably it should extend to any statement made in that position, whether or not related to the cause or circumstances of what the declarant perceived as his approaching death.

Any limitation of the dying declaration rule in criminal cases is welcome. The amendment wisely would eliminate the rule in most criminal cases, retaining it only for homicide prosecutions.¹⁵⁸ However, the proposed amendment unfortunately does not limit the exception to state-

¹⁵⁴ PROPOSED FED. R. EVID. 804(b)(3) (Supreme Court Draft Nov. 1972).

¹⁵⁵ *Id.*, Advisory Comm. Note.

¹⁵⁶ PROPOSED CHANGES rule 803(b)(3), *supra* note 10, at 31.

¹⁵⁷ The theory that dying declarations are especially reliable is at odds with the theory of the dead man rule, which considers testimony unreliable if it relates to a statement made by someone who has died. The dead man rule excludes such testimony because it cannot be tested. See McCORMICK, *supra* note 30, § 65.

¹⁵⁸ PROPOSED CHANGES rule 803(b)(3), *supra* note 10, at 31. However, the Subcommittee's argument that a special need exists for dying declarations in homicide cases is specious. See *id.* rule 804(b)(2), Subcomm. Note, at 32. A dying declaration may be an essential piece of circumstantial evidence in a criminal case other than a homicide prosecution and may be superfluous or collateral in some homicide prosecutions.

ments about the very death at issue in the prosecution as did the common law.¹⁵⁹

THE "CATCH-ALL" EXCEPTION

The seemingly most revolutionary, yet in actuality most traditional, hearsay provisions of the Supreme Court Draft, are those that authorize the court to make new exceptions to the hearsay rule for evidence comparable in trustworthiness to evidence admitted under other exceptions specifically codified in the *Rules*.¹⁶⁰ The proposed amendments unwisely delete this authorization.¹⁶¹ If the common law courts had been deprived of this power to create exceptions, none of the present exceptions to the hearsay rule would have evolved.¹⁶² Inflexible codification of the hearsay exceptions in the *Rules* would freeze the contours of the hearsay rule and necessitate formal amendment for growth.¹⁶³ Yet new rules in the area can be evolved sensibly only through case-by-case judicial accretion and development. Compared with the inroads into the hearsay rule proposed or already made in England,¹⁶⁴ the Supreme Court Draft is quite moderate.

The Subcommittee's reasons for deleting the "catch-all" exceptions probably include fear of "adjudication without law," unpredictability, difficulty in preparing and evaluating a case, lack of uniformity, forum shopping, abandonment of the values inherent in the hearsay rule, and lack of congressional control. Admittedly, a power appearing in a codification is more likely to be liberally used than one implicit in antiquity, and thus is more open to these charges. An express exhortation that the

¹⁵⁹ Contrary to the common law, which requires that a declarant have died as a result of the injury that was the subject of the declaration, the proposed amendments require only that the declarant be "unavailable." Compare *id.* rule 804(b)(2), at 31 with *McCORMICK*, *supra* note 30, § 283. Dying declarations about the very death at issue arguably constitute the most compelling case of need.

¹⁶⁰ PROPOSED FED. R. EVID. 803(24), 804(b)(6) (Supreme Court Draft Nov. 1972).

¹⁶¹ PROPOSED CHANGES rule 803, *supra* note 10, at 30; *id.* rule 804(b), at 31.

¹⁶² The power to develop new exceptions to the hearsay rule has been recognized more recently. See, e.g., *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968); *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963); *Letendre v. Hartford Acc. & Indem. Co.*, 21 N.Y.2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 (1968).

¹⁶³ PROPOSED CHANGES, *supra* note 10, at 39-40. Under the Subcommittee's proposal, the Supreme Court would have the power to prescribe amendments, but the amendments would have to be reported to Congress to take effect after 180 days if neither house of Congress disapproves. *Id.*

¹⁶⁴ In England, fairly liberal rules of admissibility, including a notice requirement, have been adopted for civil cases and proposed for criminal cases. (ENGLISH) CIVIL EVIDENCE ACT 1968, c. 64, §§ 2-4, 8; (PROPOSED) CRIMINAL EVIDENCE ACT 1972, §§ 31, 32.

power is to be used sparingly, or only in the most compelling of cases; might render the Supreme Court Draft more acceptable.

Although the confrontation clause surely overrides, or is implicit in the "catch-all" exception of the Supreme Court Draft,¹⁶⁵ greater solicitude should be provided for the criminal accused's right to confrontation than the Constitution demands.¹⁶⁶ The rule expressly should alert judges and practitioners to the special considerations which demand extra caution in admitting hearsay evidence against criminal defendants.

Additionally, the "catch-all" exception of the Supreme Court Draft should require that evidence be comparably necessary to that admitted under the other exceptions as well as comparably trustworthy. As a safeguard against uncontrolled use of the exception, written findings by the judge on the need for and trustworthiness of the evidence should be required.¹⁶⁷ Moreover, the rule should require pretrial notice of intent to invoke the exception, including particulars about the statement and the identity and residence of the declarant, to enable the other side to bring forward the declarant, or facts concerning the declarant, for purposes of examining the credibility of the declarant's statement.¹⁶⁸

DEFINITION OF UNAVAILABILITY

In general conformity with traditional law, five of the hearsay exceptions in the Supreme Court Draft require that the declarant be unavailable to testify.¹⁶⁹ The Supreme Court Draft's definition of unavailability includes the situation in which "the proponent of [a declarant's] statement has been unable to procure his attendance by process or other reasonable means."¹⁷⁰ The Subcommittee, by inserting "or testimony" after the word "attendance," purports to render a declarant "available" if he

¹⁶⁵ See U.S. CONST. amend. VI; Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

¹⁶⁶ At any rate, all the law on the matter should be in one place to avoid misleading impressions and to avoid placing too much emphasis on assiduous research and on specialization, especially when many counsel are appointed from noncriminal practices.

¹⁶⁷ Cf. Recommendation of District of Columbia Committee with Respect to Article VIII Federal Rules of Evidence, pp. 11-12.

¹⁶⁸ An absent declarant may be impeached as though he testified in person. See PROPOSED FED. R. EVID. 806 (Supreme Court Draft Nov. 1972). Although the civil discovery rules occasionally may be adequate to provide the information necessary for effective impeachment, the limited criminal discovery rules probably are not. Compare FED. R. CIV. P. 26-37 with FED. R. CRIM. P. 15-16.

¹⁶⁹ PROPOSED FED. R. EVID. 804(b)(1)-(5) (Supreme Court Draft Nov. 1972) (former testimony, statement of recent perception, statement under belief of impending death, statement against interest, statement of personal or family history); see McCORMICK, *supra* note 30, § 253.

¹⁷⁰ PROPOSED FED. R. EVID. 804(a)(5) (Supreme Court Draft Nov. 1972).

has been deposed on the matter sought to be introduced or if a reasonable opportunity to depose him has been foregone.¹⁷¹ This insertion raises questions concerning what the new words embrace in addition to a deposition in the same case. For example, do they encompass testimony at other judicial, quasi-judicial, or administrative proceedings; affidavits; unsworn statements; statements before grand juries; or depositions in other cases? If they apply to depositions in other cases, a logical conflict exists with rule 804(b)(1) which provides a hearsay exception for former testimony, including depositions in other cases, but requires unavailability.¹⁷² Moreover, why should the duty to depose apply only to situations where the declarant's unavailability is predicated upon "inability to procure his attendance by reasonable means" and not to situations falling within other definitions of unavailability?¹⁷³ If applicable to the statements of all allegedly unavailable declarants, a rule of preference for depositions taken in the same case over other forms of hearsay, is probably salutary. However, such a rule should not apply in small cases where the expense of taking depositions is prohibitive.¹⁷⁴

SCOPE OF CROSS-EXAMINATION

The Supreme Court Draft rejects the "restrictive" scope of cross-examination rule traditionally followed by the federal courts¹⁷⁵ in favor of the "wide open" rule that now prevails in a number of states.¹⁷⁶ Un-

¹⁷¹ PROPOSED CHANGES rule 804(a)(5) & Subcomm. Note, *supra* note 10, at 30, 32. No other changes in the definition of unavailability are contemplated by the amendments.

¹⁷² See *id.* rule 804(b)(1), at 31.

¹⁷³ Other definitions of unavailability include, for example, death before trial and illness at the time of trial. See *id.* rule 804(a)(4), at 30.

¹⁷⁴ Provision should be made for the exercise of judicial discretion on this matter, and upon proper application, the matter might be decided in advance of trial.

¹⁷⁵ See, e.g., *Philadelphia & T.R.R. v. Stimpson*, 39 U.S. (14 Pet.) 448 (1840); *United States v. Fontana*, 231 F.2d 807 (3d Cir. 1956); *Branch v. United States*, 171 F.2d 337 (D.C. Cir. 1948).

¹⁷⁶ PROPOSED FED. R. EVID. 611(b) (Supreme Court Draft Nov. 1972); see, e.g., *State v. Domino*, 234 La. 950, 962, 102 So.2d 227, 231 (1958); *Rush v. State*, 254 Miss. 641, 654, 182 So.2d 214, 219 (1966); *State v. Huskins*, 209 N.C. 727, 728, 184 S.E. 480, 481 (1936).

However, the restrictive view is the majority rule among American jurisdictions, although there is considerable variation as to how the rule should be interpreted and applied. See, e.g., *Carey v. Oakland*, 44 Cal. App. 2d 503, 112 P.2d 714 (Dist. Ct. App. 1941) (witnesses who testified about incident, but not about conversations, could not be cross-examined as to such conversations); *State v. Guilfoyle*, 109 Conn. 124, 145 A. 761 (1929) (doctor who gave general description of wound could not be asked his opinion of the gun's distance from victim on cross-examination); *Nagel v. McDermott*, 138 Wash. 536, 244 P. 977 (1926) (witness who testified only about collision could not be cross-examined as to speed before collision). See generally Carlson, *Cross-Examination of the Accused*, 52 CORNELL L.Q. 705 (1967).

der the wide open rule, any admissible evidence within the knowledge of a witness may be adduced upon cross-examination.¹⁷⁷ The proposed amendments, however, would reinstate the restrictive rule.¹⁷⁸

Under this restrictive rule, cross-examination is limited to matters opened up on direct examination, except in the case of cross-examination directed at impeaching the witness. The cross-examining party who wishes to adduce evidence on a substantive subject not explored on direct examination, must do so when it is his turn to introduce evidence. The restrictive rule engenders disputes since it is without objective standards and is subject to varying interpretations. In addition, to administer the restrictive rule properly, a court must undertake the difficult task of ascertaining in advance where a line of cross-examination is heading, a determination that can neutralize some of the value of cross-examination which depends in considerable measure on surprise. On the other hand, the restrictive rule encourages orderly proof and allows a party to control his own case. On balance, the restrictive rule appears preferable and should be adopted.¹⁷⁹

Neither the Supreme Court Draft nor the traditional federal rule codified in the proposed amendment is inflexible. Rule 611(b) of the Supreme Court Draft allows the judge to deviate from the wide open view if, in his discretion, the "interests of justice" so require.¹⁸⁰ Under the proposed amendment, the judge, in a similar exercise of discretion, may deviate from the restrictive rule and broaden the scope of cross-examination.¹⁸¹ Both proposals place the burden of persuasion on the party seeking to invoke the judge's discretion to deviate from the norm. This burden is

¹⁷⁷ See McCORMICK, *supra* note 30, § 21.

¹⁷⁸ PROPOSED CHANGES rule 611, *supra* note 10, at 22.

¹⁷⁹ The restrictive rule can make a considerable difference in several situations. (1) If the prosecution during cross-examination cannot adduce evidence known solely to the accused, such evidence may never be adduced since the privilege against self-incrimination may prevent the prosecution from calling the accused to the stand. See *Brown v. United States*, 356 U.S. 148 (1958); *Fitzpatrick v. United States*, 178 U.S. 304 (1900); *United States v. Guajardo-Melendez*, 401 F.2d 35 (7th Cir. 1968). See generally 8 J. WIGMORE, EVIDENCE §§ 2250, 2252 (3d ed. 1940); Carlson *supra* note 176, at 710-17. (2) A party may avoid certain legal disadvantages by using cross-examination rather than direct examination to adduce a piece of evidence. See *Vondrashek v. Dignan*, 200 Minn. 530, 274 N.W. 609 (1937) (cannot impeach one's own witness); *In re Estate of Rogan*, 404 Pa. 205, 171 A.2d 177 (1961) (leading questions allowed on cross, not on direct) *But cf.* *State v. Murphy*, 216 S.C. 44, 56 S.E.2d 736 (1949) (when cross-examiner exceeds scope of cross-examination, witness is his and may not be impeached). (3) Psychologically a party is identified with a witness if he calls him.

¹⁸⁰ PROPOSED FED. R. EVID. 611(b) (Supreme Court Draft Nov. 1972).

¹⁸¹ PROPOSED CHANGES rule 611(b), *supra* note 10, at 23; see *United States v. Taylor*, 312 F.2d 159, 160-61 (7th Cir. 1963); *Urling v. Fink*, 141 F.2d 58, 60 (3d Cir. 1944).

considerably more onerous under the Supreme Court Draft because the party seeking to limit the scope of cross-examination may not know in advance the direction the cross-examiner seeks to take, but nonetheless must argue that his objection to a line of questioning should be sustained. Under the proposed amendment, the party seeking an exercise of discretion asks that the scope of cross-examination be broadened to allow his own line of questioning, which is an easier argument to make.

The Supreme Court Draft does not state whether, when the scope of cross-examination exceeds that of direct, a witness should be treated as the cross-examiner's own witness or as the opponent's witness. This distinction, while no longer important for the purposes of the right to impeach the witness,¹⁸² still may have vitality for purposes of determining the right to ask leading questions.¹⁸³ The scope of cross-examination rule of the Supreme Court Draft creates another difficulty for the prosecution in criminal cases and plaintiffs in civil cases, both of whom frequently must rely in their cases-in-chief on essentially unfriendly witnesses to establish some essential although limited points. Wide open cross-examination affords defense counsel a broad opportunity to introduce favorable affirmative evidence during the other party's case-in-chief, and probably to do so through leading questions. Because such evidence may appear more favorable to the defense than if presented later in the context of the defendant's own case, defendants may increase their chances of obtaining an undeserved directed verdict. The problem can be ameliorated somewhat, perhaps, by requiring a defendant who cross-examines beyond the scope of direct, to wait until the close of all the evidence before moving for a directed verdict.¹⁸⁴

¹⁸² Rule 607 removes restrictions on the right of a party to impeach his own witness. PROPOSED FED. R. EVID. 607. (Supreme Court Draft Nov. 1972); accord PROPOSED CHANGES rule 607, *supra* note 10, at 20.

¹⁸³ PROPOSED FED. R. EVID. 611(c) (Supreme Court Draft Nov. 1972) (leading questions ordinarily allowed on cross, not ordinarily on direct). In some jurisdictions, where a cross-examiner exceeds the scope of the direct examination in a substantive inquiry, the witness to that extent becomes the cross-examiner's own witness for purposes of the right to impeach or ask leading questions. See *People ex rel. Phelps v. Court*, 83 N.Y. 436, 459-60 (1881); *State v. Hickman*, 77 Ohio App. 479, 486-87, 67 N.E.2d 815, 818-19 (1945). Since rule 611(c) prescribes only what ordinarily is to be allowed or disallowed, the net result probably will be that the judge has discretion in allowing leading questions when the scope of direct is exceeded. PROPOSED FED. R. EVID. 611(c) (Supreme Court Draft Nov. 1972). See also *id.* 611(a).

¹⁸⁴ Some federal courts have held the introduction of documents by defense counsel during the prosecution's case-in-chief to constitute waiver of the right to request a directed verdict of acquittal at the close of the prosecution's case. The Supreme Court Draft is silent concerning whether cross-examination by defense counsel beyond the scope of direct is to be treated in the same fashion as defense counsel's introduction of documents. Another unanswered question is whether, assuming a motion at the close

The Supreme Court Draft does not eliminate disputes over whether a particular matter was opened up on direct, although theoretically this issue is irrelevant under a wide open cross-examination rule. The right to use leading questions on cross-examination and the right to move for a directed verdict after the initial case-in-chief may depend upon such a determination. Moreover, the judge must consider this question in exercising his discretion to confine the inquiry on cross-examination. Thus, far from eliminating disputes, the Supreme Court Draft engenders some for which existing federal law provides little guidance.¹⁸⁵

JUDICIAL NOTICE

The Supreme Court Draft's rule respecting judicial notice of fact expressly applies only to judicial notice of adjudicative fact whereas the proposed amendments would permit judicial notice of both legislative and adjudicative fact.¹⁸⁶ Although the distinction between these two types of fact often may be elusive,¹⁸⁷ the basic difference is illustrated easily.¹⁸⁸ In determining whether a particular criminal act alleged to have transpired at the Empire State Building is within the geographic jurisdiction covered by the New York courts, a court might take judicial notice of the adjudicative fact that the Empire State Building is in New York.¹⁸⁹ On the other hand, in determining whether a husband-wife

of the plaintiff's or prosecution's case is permitted, the evidence is to be assessed without reference to material brought out on cross by defendant that exceeded the scope of the direct.

¹⁸⁵ In addition, the draft raises questions as to what factors the judge is to consider when asked to exercise his discretion under rule 611(b) to confine cross-examination, or under rule 611(c) to allow or disallow leading questions when cross-examination exceeds the scope of direct.

¹⁸⁶ PROPOSED FED. R. EVID. 201 (Supreme Court Draft Nov. 1972); PROPOSED CHANGES rule 201 & Subcomm. Note, *supra* note 10, at 7-8. The Supreme Court Draft leaves to existing law judicial notice of law and of facts that are not "adjudicative." PROPOSED FED. R. EVID. 201 (Supreme Court Draft Nov. 1972).

¹⁸⁷ See *Triangle Publications, Inc. v. Rohylich*, 167 F.2d 969 (2d Cir. 1948) (title of "Seventeen" magazine acquired secondary meaning).

¹⁸⁸ [A]djudicative facts are those . . . that normally go to the jury They relate to the parties, their activities, their properties, their businesses. Legislative facts . . . help the tribunal determine the content of law and . . . policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take . . . [F]indings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence.

2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958). See also Davis, *Judicial Notice*, 1969 L. & Soc. ORDER 513 (1969).

¹⁸⁹ See *Meredith v. Fair*, 298 F.2d 696 (5th Cir.), *reappealed*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962) (judicial notice of Mississippi's school segregation policy); *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223 (1919) (judicial notice that a certain two-

privilege should be extended to cover a situation where the communicating spouse has died by the time of trial, a court may base its decision on judicial notice of legislative fact.¹⁹⁰

Judicial notice of legislative fact is inherent in the judgment which a judge is called upon to exercise daily.¹⁹¹ Although it may make considerable sense to require some kind of indisputability before a court may take judicial notice of adjudicative facts, it would be antithetical to the process of exercising judgment to require indisputability respecting whether a particular privilege rule would promote or discourage or not affect communication.¹⁹²

The Supreme Court Draft's rule on judicial notice requires that before a fact can be judicially noticed, it must be a fact that is "not subject to reasonable dispute" either because it is "generally known within the territorial jurisdiction" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."¹⁹³ Applying these standards to judicial notice of adjudicative fact is a sound policy. However, the Subcommittee's proposed amendments would extend the Supreme Court Draft's rule to legislative facts as well¹⁹⁴ and would create a rule impossible of administration and, if literally applied, totally destructive of our judicial system. The amendments show a basic misconception of the judicial function and a simplistic belief that nothing even resembling a legislative function should be

block area in San Francisco was in a business district). *But see* Reinert v. Superior Ct., 2 Cal. App. 3d 36, 82 Cal. Rptr. 263 (Dist. Ct. App. 1969) (physical symptoms of thick speech and dilated eyes not judicially noticed as evidence of drugged state).

¹⁹⁰ The court may decide (1) that the purpose of the spousal privilege is to encourage communications between husband and wife; (2) that such encouragement is normally marginal at best; (3) that parties, when communicating, usually are not thinking about possible disclosure should they die; and (4) even if they did think about this, they ordinarily would not be too concerned about after-death disclosure. The court, therefore, might deny the privilege.

¹⁹¹ *See, e.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (judicial notice of factors constituting fairness and unfairness of asserting jurisdiction over business having minimum contacts with a state); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (judicial notice of psychiatric theory and the nature of mental illness and criminal acts as they relate to insanity defense); *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921) (judicial notice of foreseeability of rescue attempt).

¹⁹² A decision either way on the privilege question presented the court in the above hypothetical case requires acceptance of one or another of the three fact propositions in the last text clause above, none of which is indisputable. If a judge were to decide the issue of privilege without regard to these propositions, he would be shirking his responsibility to exercise reasoned judgment. Either the judge must be allowed to take judicial notice of one or another of these disputable facts, or he must take evidence on them. Plainly the latter is not always an acceptable solution.

¹⁹³ PROPOSED FED. R. EVID. 201(b) (Supreme Court Draft Nov. 1972).

¹⁹⁴ PROPOSED CHANGES rule 201, *supra* note 10, at 7.

tolerated on the part of a court. Admittedly, as the Subcommittee points out, the decision as to whether a fact is adjudicative or non-adjudicative can be difficult and elusive.¹⁹⁵ Nevertheless, some such distinction is necessary.¹⁹⁶

The proposed amendments additionally would permit evidence and argument, disputing a judicially noticed fact, to be considered by the trier of fact.¹⁹⁷ In contrast, the Supreme Court Draft requires that the jury be instructed to accept a judicially noticed fact as established and does not permit evidence and argument disputing the fact to be introduced before the jury.¹⁹⁸ The parties have an opportunity to dispute the matter before the judge prior to his taking final judicial notice,¹⁹⁹ which the Subcommittee apparently overlooked in permitting dispute before the trier of fact.²⁰⁰ The likely consequence of the proposed amendment would be to render judicial notice a nullity, for it apparently would not foreclose evidence, would not result in an instruction to the jury, and would have no express effect on the question of the sufficiency of a case to get to the jury.

The Supreme Court Draft draws no distinction between civil and criminal cases and thus allows facts in criminal cases to be judicially noticed against the accused.²⁰¹ The Advisory Committee seems to have forgotten here what they recognized in the presumption area—where a right to trial by jury exists, findings of fact should not be directed against a criminal accused.²⁰² The judicial notice rule in the Supreme Court Draft allows a fact to be judicially noticed and conclusively established against the accused after a hearing before only the judge.²⁰³ With respect to

¹⁹⁵ *Id.*, Subcomm. Note, at 8.

¹⁹⁶ For reasons similar to those advanced respecting legislative facts, the rule also must exclude from its coverage, as did the Supreme Court Draft, judicial notice of “non-evidence” facts used in the evaluation of evidence. See PROPOSED FED. R. EVID. 201, Advisory Comm. Note (Supreme Court Draft Nov. 1972); notes 188-191 *supra* and accompanying text.

¹⁹⁷ This would result from the deletion of rule 201(g). PROPOSED CHANGES rule 201 & Subcomm. Note, *supra* note 10, at 7-8.

¹⁹⁸ PROPOSED FED. R. EVID. 201(g) (Supreme Court Draft Nov. 1972).

¹⁹⁹ *Id.* 201(e).

²⁰⁰ The proposed amendments would not change rule 201(e). PROPOSED CHANGES rule 201 & Subcomm. Note, *supra* note 10, at 7-8.

²⁰¹ PROPOSED FED. R. EVID. 201(g) (Supreme Court Draft Nov. 1972).

²⁰² See *id.* 303(b).

²⁰³ *Id.* 201(g). Whether allowing directed findings of fact against an accused, either by presumption or judicial notice, would violate constitutional guarantees of due process and trial by jury is an open question, except perhaps where the fact is an element of the crime. See *Woolmington v. Director of Pub. Prosecutions*, [1935] A.C. 462; MODEL PENAL CODE § 1.12(1) (Proposed Official Draft 1962); *id.* § 1.13, Comment, at 108 (Tent. Draft No. 4, 1955); 6 WILLIAMS, CRIMINAL LAW § 288, at 882-886 (2d ed. 1961).

criminal cases, the Supreme Court Draft should be amended to allow, as do the proposed amendments, dispute of a judicially noticed fact before the jury. Provisions also should be added governing the effect of judicial notice on the sufficiency of the prosecution's case to go to the jury and prescribing jury instructions.²⁰⁴

JUDGE'S COMMENT ON WEIGHT OF EVIDENCE

At common law and in federal courts, as in a number of state courts and in England, the judge may indicate to the jury his own views on the weight to be ascribed to the evidence, provided he stays within the limits of judicial propriety and impartiality, and provided he makes clear that his comments are advisory only.²⁰⁵ In federal courts there has been considerable judicial reluctance to use this power, while in England and in some of the states it has been exercised somewhat more liberally.²⁰⁶ The Supreme Court Draft simply states that the judge has this power²⁰⁷ while the Subcommittee, although apparently intending not to alter the power as it exists under present law, proposes to delete the express provision in the *Rules*, on the theory that the matter is procedural rather than evidentiary in nature.²⁰⁸

If the eventual result of the proposed amendment is that the deleted provision is placed in the rules of civil and criminal procedure, the Subcommittee will have accomplished little. If, on the other hand, the power is left in its present uncodified state, governed only by decisional or common law, a salutary result will have been achieved. The power of judicial comment on the weight of the evidence should be available; but, if it is expressly codified, the tendency may be to use it too liberally, unless the codification contains some exhortation that the power shall be used only where the evidence is complicated or difficult to assess.

DOCUMENTS USED TO REFRESH WITNESS' RECOLLECTION

The Supreme Court Draft provides, subject to certain qualifications, that counsel has a right to see and use documents that opposing counsel

²⁰⁴ These provisions should be consistent with the provisions on these matters for presumptions against the accused. See notes 83-84 *supra* and accompanying text.

²⁰⁵ *Vicksburg & M.R.R. v. Putnam*, 118 U.S. 545, 553 (1886); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 420 (1966); A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 224-29 (1949); Wright, *The Invasion of the Jury: Temperature of the War*, 27 *TEMP. L.Q.* 137 (1953).

²⁰⁶ See H. KALVEN & H. ZEISEL, *supra* note 205, at 417-25; cf. A. VANDERBILT, *supra* note 205, at 224-26.

²⁰⁷ PROPOSED FED. R. EVID. 105 (Supreme Court Draft Nov. 1972).

²⁰⁸ PROPOSED CHANGES rule 105 & Subcomm. Note, *supra* note 10, at 7.

has employed to refresh his witness' recollection, whether the documents are so employed before the witness takes the stand or during his testimony.²⁰⁰ Most authority has denied this right where the witness uses the document before testifying, although sometimes the matter is made discretionary with the trial judge.²¹⁰ The Subcommittee, fearing "fishing expeditions,"²¹¹ would amend the Supreme Court Draft to permit examination of documents used before testifying only where, in the judge's discretion, such examination is "necessary in the interests of justice."²¹² The amendment seems unwise, as the Supreme Court Draft provides adequate safeguards against abuses by requiring that the witness actually have used the document in preparing his testimony and by authorizing in camera inspection by the judge to excise nongermane matter.²¹³

SOME CONSTITUTIONAL PROBLEMS

The Constitution vests the "judicial Power" of the United States over certain categories of cases, including diversity and federal question, in the Supreme Court and in the lower courts,²¹⁴ and gives the Supreme Court "appellate Jurisdiction" over the lower federal courts.²¹⁵ Arguably this includes the power to make rules of evidence,²¹⁶ in which case Congress might have no authority to deprive the Supreme Court of the power to promulgate rules of evidence for itself and for the federal courts of appeals and district courts. Nor might Congress have the power to prevent the lower courts from making their own evidentiary rulings, though the lower courts would be subject to Supreme Court rules and appellate review. Under this theory the Supreme Court Draft could

²⁰⁰ PROPOSED FED. R. EVID. 612 (Supreme Court Draft Nov. 1972).

²¹⁰ *Goldman v. United States*, 316 U.S. 129, 132 (1942); Annot. 7 A.L.R.3d 181, 247-51 (1966); Annot. 82 A.L.R.2d 473, 562-66 (1962). *Contra*, 3 J. WIGMORE, EVIDENCE § 762 (J. Chadbourn ed. 1970); Annot. 82 A.L.R.2d 473, 566-69 (1962).

²¹¹ PROPOSED CHANGES rule 612, Subcomm. Note, *supra* note 10, at 24.

²¹² *Id.* rule 612, at 23.

²¹³ PROPOSED FED. R. EVID. 612 (Supreme Court Draft Nov. 1972). As an additional safeguard, the rule might provide that if a party fails to comply with an order of examination, the penalty is limited to striking the witness' testimony or, in an extreme case, declaring a mistrial. Thus, the party resisting examination could choose to suffer the penalty and avoid an ordered examination if it is extremely important to his case to avoid a fishing expedition. Rule 612 of the Supreme Court Draft provides such a rule where the fishing expedition fear is likely to have most merit—when the Government seeks to avoid examination in a criminal case. In other cases, the judge may enter such orders as justice may require, penalizing either the recalcitrant party, his case, or, presumably, his lawyer.

²¹⁴ U.S. CONST. art. III, § 1; *cf. id.* art. I, § 8, cl. 9.

²¹⁵ *Id.* art. III, § 2.

²¹⁶ *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 327-29 (1816).

be made effective without congressional approval despite the enabling statutes and congressional attempts to amend the *Rules*.²¹⁷ However, this theory of absolute Supreme Court power over rules of evidence is subject to serious dispute. Congress' ability to restrict the powers seemingly granted to courts by the Constitution has been upheld on a number of occasions. Specifically Congress' ability to deny federal district courts jurisdiction over certain cases,²¹⁸ to restrict their power to grant certain remedies²¹⁹ or consider certain issues in a case before them,²²⁰ and to curtail Supreme Court appellate jurisdiction²²¹ has been upheld on the theory that Congress has express constitutional power to refrain from creating district courts²²² and to make exceptions to the appellate jurisdiction of the Supreme Court.²²³ Furthermore, the congressional power to require legislative approval of the *Federal Rules of Civil Procedure* apparently was accepted when those rules were issued.²²⁴ To

²¹⁷ In this connection it is notable that the Supreme Court Draft makes exceptions from its provisions for other rules "adopted by the Supreme Court." PROPOSED FED. R. EVID. 402, 802, 901(b) (10), 902(4), 1101(e) (Supreme Court Draft Nov. 1972). The proposed amendments would make exceptions only for rules "prescribed by the Supreme Court pursuant to statutory authority," purportedly barring unilateral judicial amendment or deviation from the federal evidence rules. PROPOSED CHANGES rule 402 & Subcomm. Note, *supra* note 10, at 9; *id.* rule 802, at 27; *id.* rule 901(b) (10), at 34; *id.* rule 902(4), at 35; *id.* rule 1101(e), at 38. Of course, the courts still could act unilaterally in an area not covered by the *Rules*—for example, impeachment by bias. See generally Schmertz & Czapanskiy, *supra* note 14.

²¹⁸ See 50 U.S.C. § 460(b) (3) (1970) (barring preinduction judicial review of selective service classification decisions), *upheld in* Clark v. Gabriel, 393 U.S. 256 (1968) (per curiam) and *in* Clark v. Gabriel, *supra* at 259-60 (Douglas, J., concurring); Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 79, as amended, 28 U.S.C. § 1359 (1970) (barring action by assignee on promissory note where lack of diversity would have precluded suit by assignor), *upheld in* Turner v. Bank of N. America, 4 U.S. (4 Dall.) 7, 10 & n.(a), 11 (1799).

²¹⁹ See Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (1970) (restricting injunctive relief in labor disputes), *upheld in* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938). See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366-70 (1953).

²²⁰ In *Yakus v. United States* an alternative procedure was provided by Congress for challenging the issue; otherwise, the Court might have found a violation of due process. See 321 U.S. 414, 433 (1944).

²²¹ An example is appeals of habeas corpus petitions. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-13 (1869); *Durousseau v. United States*, 10 U.S. (6 Cranch.) 307, 314 (1810). But see *Glidden v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting). See also *Luckenback S.S. Co. v. United States*, 272 U.S. 533 (1926) (review of fact decisions of Court of Claims precluded); *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847) (review of diversity action precluded because statutory monetary minimum not met).

²²² U.S. CONST. art. III, § 1.

²²³ *Id.* § 2.

²²⁴ See Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934). See also 28 U.S.C. § 2072 (1970). The questions

distinguish the rules of evidence from this precedent, one would have to assume that evidentiary matters are more central to the judicial function.²²⁵

Thus, as a general matter, the congressional suspension of, and proposed amendments to, the Supreme Court Draft probably are constitutionally permissible. Nevertheless, where Congress attempts to interfere with the essence of the judicial function, as under the proposed amendments concerning judicial notice, or to require adjudication according to evidentiary rules deemed by the courts to be unjust, as may occur under the proposal to freeze the hearsay exceptions, or if certain presumption proposals are made,²²⁶ Congress well may be infringing the

in the literature and the cases, both before and after adoption of the *Federal Rules of Civil Procedure*, have been whether any agency of the federal government has rule making power and whether Congress itself should prescribe rules or delegate the power to the judiciary. See *Sibbach v. Wilson*, 312 U.S. 1, 9 (1941); *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 359 (1835); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20-50 (1825); Clark & Moore, *supra*; Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making*, 65 HARV. L. REV. 234 (1951); Levin & Amsterdam, *Legislative Control over Judicial Rule-Making*, 107 U. PA. L. REV. 1 (1958); Sunderland, *supra*. Evidently only Professor Wigmore explicitly questioned whether congressional authority was needed for issuing the rules. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). See generally Medalie, *Federal Rules of Criminal Procedure*, 4 LAW. GUILD REV. 1 (1944); Pound, *The Rule Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

²²⁵ Some federal judges have referred to legitimate congressional authority in evidentiary matters but do not state clearly where legislative authority gives way to judicial. See *Barrett v. United States*, 322 F.2d 292, 294 & n.1 (5th Cir. 1963) ("special competency of the legislature" in evidence matters but only to point where it begins to infringe "the Judiciary's prerogative"); Order, *supra* note 7, at 185 (Douglas, J., dissenting) (rules should be left for "case-by-case development by the courts or by Congress," but "the task [is] essentially a judicial one.")

Traditionally it has been assumed that state legislatures have wide competence in the area of evidence. See *Letendre v. Hartford Acc. & Indem. Co.*, 21 N.Y.2d 518, 525, 236 N.E.2d 467, 471, 289 N.Y.S.2d 183, 189 (1968); *Fleury v. Edwards*, 14 N.Y.2d 334, 341, 200 N.E.2d 550, 554, 251 N.Y.S.2d 647, 653 (1964) (Fuld, J., concurring); CAL. EVID. CODE (West 1966); D.C. CODE ANN. §§ 14-101 to -309 (1967 & Supp V, 1972); KAN. STAT. ANN. §§ 60-401 to -470 (1964); MD. ANN. CODE art. 35, §§ 1-101 (1957); VA. CODE ANN. §§ 8-263 to -329. *But cf.* *Winberry v. Salisbury*, 5 N.J. 240, 24 A.2d 406 (1950) (legislatures have no competence to make procedural rules; particular constitutional provision).

Two cases ascribing to Congress authority to make evidence rules are more concerned with the propriety of rule making than with the proper locus for that authority. *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910) (dictum) (presumptions); *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893) (witness competency); see note 224 *supra*.

²²⁶ This may also be the case if other branches of government have indeed "forced" the Advisory Committee (an arm of the judicial branch) to abandon the convictions veto power. See notes 98-99 *supra* and accompanying text. Some courts have indicated that there may be constitutional difficulty with such action. See *Dixon v. United States*, 287 A.2d 89 (D.C. Ct. App. 1972); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971); *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

constitutional grant of judicial power and appellate jurisdiction.²²⁷ This could be true whether or not the particular adjudication is one which is so unreasonable vis-a-vis an individual as to violate his right to due process.

²²⁷ Any sensible reading of the congressional constitutional power to make exceptions to the appellate jurisdiction of the Supreme Court must add the implied phrase "exceptions consistent with basic functions and purposes prescribed by the Constitution."

APPENDIX

The following materials cite or discuss the *Proposed Federal Rules of Evidence*.

CASES

Rule 104.

United States v. Glenn, 473 F.2d 191, 196 n.1 (D.C. Cir. 1972) (per curiam) (Robinson, J., dissenting)

Howard v. Sigler, 454 F.2d 115, 118-19 (8th Cir.), *cert. denied*, 409 U.S. 854 (1972)

United States v. Branker, 418 F.2d 378, 381 (2d Cir. 1969)

Rule 301.

Psatz v. United States, 442 F.2d 1154, 1160 n.11 (3d Cir. 1971)

United States v. Jones, 418 F.2d 818, 822 n.3 (8th Cir. 1969)

Rule 401.

Hull v. United States, 404 U.S. 893, 896 n.5 (1971) (mem.) (Douglas, J., dissenting)

Lehrman v. Gulf Oil Corp., 464 F.2d 26, 42 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972)

United States v. Ravich, 421 F.2d 1196, 1203 n.9 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970)

Rule 403.

Olin-Matheison Chem. Corp. v. Allis-Chalmers Mfg. Co., 438 F.2d 833, 838-39 (6th Cir. 1971)

Rule 404.

United States v. Plante, 472 F.2d 829, 831 n.4 (1st Cir.), *cert. denied*, 411 U.S. 951 (1973)

United States v. Brown, 453 F.2d 101, 111 (8th Cir.) (Bright, J., concurring), *cert. denied*, 405 U.S. 978 (1972)

United States v. Smith, 432 F.2d 1109, 1112 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971)

United States v. Marine, 413 F.2d 214, 217 (7th Cir. 1969), *cert. denied*, 396 U.S. 1001 (1970)

Rule 406.

United States v. Sorrell, 473 F.2d 1054, 1060 (7th Cir. 1973) (Pell, J., dissenting)

Rule 501.

Branzburg v. Hayes, 408 U.S. 665, 690 n.29 (1972)

United States v. Woodall, 438 F.2d 1317, 1327 n.6 (2d Cir.) (en banc), *cert. denied*, 403 U.S. 933 (1971)

United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

Rule 503.

Pfizer, Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972)

United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971)

Garner v. Wolfinbarger, 430 F.2d 1093, 1098 n.12 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971)

Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), *aff'd by an equally divided Court*, 400 U.S. 348 (1971)

Rule 504.

Fitzgerald v. A.L. Burbank & Co., 451 F.2d 670, 682 n.10 (2d Cir. 1971)

United States v. Harper, 450 F.2d 1032, 1035 n.3 (5th Cir. 1971)

Rule 505.

United States v. Long, 468 F.2d 755, 757 n.2 (8th Cir. 1972)

United States v. Harper, 450 F.2d 1032, 1045 n.8 (5th Cir. 1971)

United States v. Shipp, 409 F.2d 33, 35 n.3 (4th Cir.), *cert. denied*, 396 U.S. 864 (1969)

Rule 509.

EPA v. Mink, 410 U.S. 73, 89 n.16 (1973) (by implication)

Rule 510.

United States v. Hürse, 453 F.2d 128, 130 & n.1 (8th Cir. 1971)

United States v. Skeens, 449 F.2d 1066, 1072 (D.C. Cir. 1971) (Bazelon, C.J., dissenting)

Rule 511.

United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972)

United States v. Woodall, 438 F.2d 1317, 1325 n.3 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971)

Ellis v. United States, 416 F.2d 791, 801 n.26 (D.C. Cir. 1969)

Rule 603.

United States v. Looper, 419 F.2d 1405, 1407 n.3 (4th Cir. 1969)

Rule 606.

Castleberry v. NRM Corp., 470 F.2d 1113, 1117 (10th Cir. 1972)

Rule 607.

Chambers v. Mississippi, 410 U.S. 284, 296 n.9 (1973)

Rule 608.

United States v. Sposato, 446 F.2d 779, 781 n.6 (2d Cir. 1971)

Rule 609.

United States v. Malasanos, 472 F.2d 642, 645 & n.3 (7th Cir. 1973) (per curiam)

United States v. Gray, 468 F.2d 257, 262 n.2 (3d Cir. 1972) (en banc)

United States v. Dow, 457 F.2d 246, 251 (7th Cir. 1972) (Kiley, J., concurring)

United States v. Puco, 453 F.2d 539, 543 (2d Cir. 1971)

United States v. McCarthy, 445 F.2d 587, 590 & n.10, 591 & n.11 (7th Cir. 1971)

United States v. Williams, 445 F.2d 421, 423 n.1 (10th Cir.), *cert. denied*, 404 U.S. 966 (1971)

United States v. Scarpellino, 431 F.2d 475, 479 (8th Cir. 1970)

United States v. Escobedo, 430 F.2d 14, 19 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971)

United States v. Zubkoff, 416 F.2d 141, 143 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970)

United States v. Morefield, 411 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 396 U.S. 916 (1969)

Rule 611.

United States v. Walker, 449 F.2d 1171, 1174 (D.C. Cir. 1971)

United States v. Dillon, 436 F.2d 1093, 1096 (5th Cir. 1971)

Rule 701.

Burchill v. Kearney-National Corp., 468 F.2d 384, 386 (3d Cir. 1972)

Rule 702.

United States v. Atkins, 473 F.2d 308, 313 (8th Cir.), *cert. denied*, 93 S. Ct. 2751 (1973)

Rule 703.

United States v. Williams, 447 F.2d 1285, 1291 (5th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 954 (1972)

Sears, Roebuck & Co. v. Penn Cent. Co., 420 F.2d 560, 563 n.4 (1st Cir. 1970)

Rule 704.

Bosse v. Ideco Div. of Dresser Indus., Inc., 412 F.2d 567, 570 n.4 (10th Cir. 1969)

Rule 705.

Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., 409 F.2d 1195, 1200 n.2, 1201 (8th Cir. 1969)

Rule 801.

California v. Green, 399 U.S. 149, 155 n.6 (1970)

United States v. Briggs, 457 F.2d 908, 910 n.3 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972)

United States v. Rodrigues, 452 F.2d 1146, 1148 n.2 (9th Cir. 1972)

United States v. Manarite, 448 F.2d 583, 590 n.9 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971)

United States v. Cunningham, 446 F.2d 194, 198 (4th Cir.), *cert. denied*, 404 U.S. 950 (1971); *id.* at 200 (separate opinion)

United States v. Small, 443 F.2d 497, 499 n.7 (3d Cir. 1971)

United States v. Metcalf, 430 F.2d 1197, 1199 (8th Cir. 1970)

United States v. Calarco, 424 F.2d 657, 664 n.2 (2d Cir. 1970) (Dooling, J., dissenting)

United States v. Insana, 423 F.2d 1165, 1169 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970)

United States v. Cohen, 418 F.2d 68, 70 n.1 (5th Cir. 1969)

Joseph T. Ryerson & Son, Inc. v. H.A. Crane & Bro., 417 F.2d 1263, 1270 n.18 (3d Cir. 1969)

Rule 803.

Bair v. American Motors Corp., 473 F.2d 740, 744-45 (3d Cir. 1973)

United States v. Glenn, 473 F.2d 191, 195 n.1 (D.C. Cir. 1972) (per curiam); *id.* at 197 n.15 (Robinson, J., dissenting)

- United States v. Zito, 467 F.2d 1401, 1404 n.4 (2d Cir. 1972)
 Ross v. American Export Isbrandtsen Lines, Inc., 453 F.2d 1199, 1201 n.2 (2d Cir. 1972)
 (per curiam)
 United States v. Stonehouse, 452 F.2d 455, 459 n.6 (7th Cir. 1971)
 United States v. Wilkes, 451 F.2d 938, 939 n.2 (2d Cir. 1971)
 Virgin Islands v. Carr, 451 F.2d 652, 658 (3d Cir. 1971)
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 McDonnell v. United States, 472 F.2d 1153, 1155 (8th Cir. 1973)
 M.S. Walker, Inc. v. Travelers Indem. Co., 470 F.2d 951, 952-53 (1st Cir. 1973)
 Chestnut v. Ford Motor Co., 445 F.2d 967, 972 n.5 (4th Cir. 1971)
 United States v. Brown, 411 F.2d 1134, 1138 n.6 (10th Cir. 1969)

Rule 806.

- United States v. Glenn, 473 F.2d 191, 195 n.1 (D.C. Cir. 1972) (per curiam)

General reference.

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