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Some Themes in the Proposed Federal Rules of Evidence

Paul F. Rothstein
Georgetown University Law Center, rothstei@law.georgetown.edu

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SOME THEMES IN THE PROPOSED FEDERAL RULES OF EVIDENCE

Paul F. Rothstein*

Although the Federal Rules of Evidence are under consideration by Congress, it is unlikely that many of their major themes will be reversed. The present article examines some of these themes as they appear in the Supreme Court-approved draft. The aim is merely to make more explicit the effects of the Rules and suggest some questions for study.

I. THE BIAS TOWARD ADMISSIBILITY

Perhaps the predominant theme is a "bias" in favor of admissibility. Rule 102 states the objective of the Rules to be "that the truth may be ascertained and proceedings justly determined." This by itself may seem equivocal. But Rule 401 draws the circle of relevancy very wide: evidence is relevant if it has "any tendency" to make a material proposition "more" or "less" probable, to any degree. All relevant evidence is admissible unless otherwise provided by the Constitution, a statute, the Rules, or other rules adopted by the Supreme Court. Rule 403 provides for exclusion on an ad hoc balancing, but in order for there to be such exclusion, probative value must be "substantially" outweighed by certain dangers, including "unfair" prejudice.

Article V of the Rules does away with all but a few privileges. Gone are the spousal communications privilege, the general physician - patient privilege, the journalist privilege, and privileges for accountants and social workers.

Article VI does much the same in the area of witness competency, abolishing all incompetencies except those relating to witnesses without per-

*Professor of Law, Georgetown University Law Center.

1See H.R. 5463, Committee Print, Subcommittee on Criminal Justice of the House Judiciary Committee, 93d Congress, 1st Session, June 28, 1973 and Oct. 10, 1973, reported out somewhat modified, Nov. 15, 1973. See Appendix to this article for tabulation of the proposed changes, with citations.


3Thus rejecting purportedly stricter tests of relevancy. See, e.g., Standafer v. First Nat'l Bank of Minneapolis, 236 Minn. 123, 52 N.W. 2d 718 (1952); Engel v. United Traction Co., 203 N.Y. 321, 56 N.E. 731 (1911).

4Rule 402.

5For proposed amendments to this, see Appendix hereto.


7See, for example, of this privilege, 8 Wigmore §2286 (McNaughton rev.).

8See, for an example of this privilege, New York Civil Practice Law and Rules 4508.

9Rule 601. For proposed changes in this, see Appendix hereto. For discussion of traditional incompetencies see generally Rowley, The Competency of Witnesses, 24 Iowa L. Rev. 482 (1939); Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345 (1957); Ladd, Witnesses, 10 Rutgers L. Rev. 523 (1956); Davidson, Testimonial Capacity, 39 B. U. L. Rev. 172 (1959); Comment, 13 Wayne L. Rev. 1236 (1969); Note, 23 Ala. L. Rev. 405 (1971); Note 36 Mo. L. Rev. 382 (1971); Note, 55 Iowa L. Rev. 1286 (1970); Note, 30 Mont. L. Rev. 72 (1969); No, 40 Miss. J. 121 (1968); Note, 38 Notre Dame Lawyer 95 (1962); Note, 24 Mich. L. Rev. 507 (1926).

On Dead Man rules see: New York Civil Practice Law and Rules 4519; Md. Code Art. 35 §3; D.C.
sonal knowledge and to judges and jurors. Rule 607 allows impeachment of one's own witness as freely as of other witnesses, contrary to the traditional rule. Rule 608, in common with Rule 405, allows a "new" form of character evidence, personal opinion. Rule 611(b) adopts the "wide open" view of cross examination, as opposed to the "restrictive view." While the primary impact of this last matter is on when something may be introduced, not what may be introduced, nevertheless the rule reflects a de-emphasis of goals other than truth-ascertainment, and can, on occasion, result in the tribunial hearing information it would not otherwise hear.

Rule 701 expands the admissibility of well founded lay opinion and conclusion, allowing such where "helpful" rather than under the traditional

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For cases citing the Federal Rules of Evidence on the matter of scope of cross examination, see United States v. McMann, 435 F.2d 166 (5th Cir. 1970); United States v. Lewis, 447 F.2d 134 (2d Cir. 1971) (Rule 611(b)); United States v. Walker, 449 F.2d 1171 (D.C. Cir. 1971) (Rule 611(b)); United States v. Scarbrough, 470 F.2d 166 (9th Cir. 1972) (Rule 611(b)).

For proposed amendment of Rule 611(b) see Appendix hereto.
“collective facts” rule which in some jurisdictions required that there be no other way to express the matter except by opinion or conclusion.\textsuperscript{20} Rule 702 allows expert testimony not only where the matter is totally beyond lay knowledge, as ostensibly required in some jurisdictions,\textsuperscript{21} but also where the testimony would “assist” the trier-of-fact. Rules 703 and 705 do away with the stilted requirement of a hypothetical question, allowing expert testimony based on a hypothetical set of facts presented to the expert before trial, as well as on an at-trial hypothetical question, or on testimony heard, or on personal observation. These rules dispense with the requirement that the bases of expert opinions be given on direct; and they allow expert opinions rationally\textsuperscript{22} based on otherwise inadmissible evidence, contrary to the ostensibly required in some jurisdictions.\textsuperscript{23} Rule 704 abolishes the ultimate opinion rule that purportedly forbids otherwise admissible lay or expert opinion that is based on otherwise inadmissible evidence, contrary to the ostensibly required in some jurisdictions.\textsuperscript{24} Rule 706 encourages court-appointment of experts.

Article VIII greatly expands the reception of formerly inadmissible hearsay: prior statements of witnesses for substantive purposes;\textsuperscript{25} agent statements in addition to those recognized under some tests;\textsuperscript{26} statements of present\textsuperscript{27} or recent\textsuperscript{28} sense impression; statements of medical history to doctors;\textsuperscript{29} statements to medical personnel who are not doctors;\textsuperscript{30} states-

\textsuperscript{22}Rationally means founded on a type of information “reasonably relied upon by experts in the particular field.”
\textsuperscript{23}See, e.g., Sirico v. Cotto, 324 N.Y.S.2d 483 (1971).
\textsuperscript{24}See, for restricted reading of the scope of the traditional “ultimate issues” rule, S.E.C. v. Texas Gulf Sulfur Co., 446 F.2d 1301 (2d Cir. 1971) citing the Federal Rules of Evidence.
\textsuperscript{25}But only if they are inconsistent with the present testimony, or consistent but offered to rebut express or implied charges of improper influence, motive or recent fabrication; or if they are statements of identification on personal perception. See Rule 801(d)(1). This is proposed to be restricted. See Appendix to this article. For critical discussion of the traditional position, see Comment, 2 L. Rev. 238 (1971); Comment, 23 VAND. L. Rev. 1365 (1970); Comment, SUBSTANTIVE USE OF EXTRA JUDICIAL STATEMENTS OF WITNESSES UNDER THE PROPOSED FEDERAL RULES OF EVIDENCE, 4 U. RICH. L. Rev. 110 (1969); Note, 82 Harv. L. Rev. 475 (1968); See also Dow, K.L.M. v. Tuller, A NEW APPROACH TO ADMISSIBILITY OF PRIOR STATEMENTS OF A WITNESS, 41 Neb. L. Rev. 598 (1961); DAVIDSON, THE PREVIOUS STATEMENTS OF A WITNESS, 32 IOWA L.J. 38 (1958); McCormick, THE TURNCOAT WITNESS: PREVIOUS STATEMENTS AS SUBSTANTIVE EVIDENCE, 25 Texas L. Rev. 573 (1947); Note, 41 Marq. L. Rev. 317 (1957-58); Note, 30 Corn. L. Q. 311 (1945).
\textsuperscript{28}Rule 803(1).
\textsuperscript{29}Rule 804(b)(2). For proposed amendment of this, see Appendix to this article.
ments made to doctors for preparation of their testimony; 31 recorded recollection though memory is not completely gone; 32 records of "regularly conducted activities" in addition to businesses and professions and including conclusions or opinions; 33 reports of public agencies (relating to the agency's activities or to matters observed pursuant to law, or setting forth findings, in certain cases); 34 ancient documents though only 20 years old; 35 market reports; 36 commercial publications; 37 treatises; 38 certain judgments; 39 former testimony although traditional requirements relating to identity of issues and parties have not been complied with; 40 statements under belief of impending death in more cases than traditionally allowed; 41 statements against interests in addition to pecuniary and proprietary; 42 and any other

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36 Rule 803(16). Compare requirement as set forth in 7 WIGMORE §2145(a) (usually 30 yrs. old).

37 Rule 803(17). See 6 WIGMORE §1702-1706.

38 Rule 803(17). See 6 WIGMORE §1702-1706.


40 Rules 803(22) and (23). Cf. Annot. 18 A.L.R.2d 1287; Patterson v. Gaines, 47 U.S. 550 (1847).


43 Rule 804(b)(3). For proposed amendment of this see Appendix to this article. See 5 WIGMORE §1443.

44 Rule 804(b)(4). For proposed amendment of this see Appendix to this article. For discussion of the traditional rule, see Morgan, Declarations Against Interest, 5 VAND. L. REV. 451 (1952); Jefferson, Declarations Against Interest: An Exception to the HearSay Rule, 38 HARV. L. REV. 1 (1944); Comment, 16 N.Y.L.J. 504 (1970); Comment, 62 N.W.U. L. REV. 934 (1968); Comment, 98 U. PA. L. REV. 755 (1950); Comment, 5 Tulsa L. J. 302 (1968);
hearsay statement deemed "comparably trustworthy" to those listed.\(^{43}\)

In addition, the list of self-authenticating documents has been expanded;\(^{44}\) authentication requirements in other instances have been eased;\(^{45}\) and the Best Evidence rule has been relaxed to allow, in most instances,\(^{46}\) reliable documentary copies such as xeroxes.\(^{47}\)

In view of the emphasis on admissibility, it is surprising that the Rules did not provide specific guidance opening the way to admissibility of lie detector evidence\(^{48}\) and other comparable scientific evidence.\(^{49}\) There may, however, be some such implication in the Rules' expanded receptivity to expert evidence (Article VII) and to opinion evidence of character for substantive and credibility purposes (Rules 405 and 608). Conceivably a lie detector operator may be in a position to offer such an opinion.\(^{50}\)

Without expressing a value judgment either way, it should be noted that a general liberalization favoring admissibility works against the criminal

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In addition to the above liberalizations of the hearsay rule, Article VIII also excludes non-assertive conduct from the definition of hearsay, unlike some decisions. Compare Rule 801 (a)(2) with Wright v. Doe d. Tatham, 7 Ad. and El. 313 (H.L. 1838).

* Rule 902.
* Rule 901(b), especially (3), (6), and (8). See ADVISORY COMMITTEE NOTES, 56 F.R.D. 183, 333-335.
* Except where there is a "genuine question" raised as to authenticity of the original.
* Rules 1003, 1001(4). The Best Evidence rule is relaxed in a number of other respects as well. See Rules 1005, 1006.
* See Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971); United States v. Raymond, 337 F. Supp. 641 (D.D.C. 1972). The rules do attempt in several places to spell out how they would apply to modern devices such as x-rays, films, recordings, videocassettes, and computer materials. See Rules 901(b)(7), (8), (9), 902(4), 1001, 1005, 803(6), (7), (8), (9), (10).
* Could the same be said of an F.B.I. agent who interviewed the accused or interviewed a witness favorable to the accused? Could the same be said of a psychiatrist stationed in the gallery to hear and pass on a witness or on the accused, as in the Alger Hiss trial?
accused in at least two ways: (1) It makes it more difficult for the defense to rely on the prosecution's inability to meet its burden. Greater admissibility means it is easier to put in evidence to meet the burden. (2) A cutting down of exclusionary principles hurts the defense because some judges administer exclusionary rules in a way favorable to the defense. These judges exclude prosecution evidence but not defense evidence because only exclusion of defense evidence or admission of prosecution evidence carries any risk of reversal, owing to the fact that no appeal lies by the prosecution.\footnote{51}

II. **Shifting the Burden of Investigation**

An apparently ignored by-product of the increased admissibility in some areas, is that an investigation or preparation burden formerly on the proponent of evidence, will be placed on the opponent.

\subsection*{a. Rules relating to experts.}

As described above, an effect of Article VII is to deprive one who wishes to challenge an expert opinion, of information he formerly obtained "up front" in the expert's direct examination: the hypothetical facts and/or other bases for the opinion (including personal examination, textbooks, x-rays, consultations, etc.). True, he can get the information on cross examination,\footnote{52} but it would be tactically unwise to tackle these matters for the first time in cross-examination. The only alternative for the challenger is to obtain it before the trial, through discovery, and through other investigation of the field of expertise. In other words, the challenger must put in more pre-trial time and expense than he might otherwise have thought the magnitude of the case or his client's budget warranted.

He may not be able to effectively gather the information before trial because of legal strictures on discovery. In criminal cases there is as yet no provision for pre-trial notice that an expert will be called,\footnote{53} nor for discovery respecting the government's experts except in the narrow situations covered by Rules 15 and 16 of the Federal Rules of Criminal Procedure. In civil cases, discovery respecting opponents' experts is limited to the right to a cursory written statement prepared by the party who will offer the expert testimony, with greater discovery allowed only at the discretion of the judge and at financial risk to the discoverer.\footnote{54}

\subsection*{b. Hearsay.}

As noted above, Article VIII alters the hearsay rule and its exceptions to let in significantly more evidence that would be regarded as inadmissible hearsay by many courts today. This means there will be more instances in which the declarant (the "invisible witness" who made the statement) or background facts or details about him or his circumstances, will have to be searched out and brought forward by he who wishes to challenge the hearsay
If the hearsay rule applied to bar the evidence unless the proponent of the evidence brought the "invisible witness" forward, and the proponent thus brought him forward, the job of the opponent in exploring the validity and circumstances of his statement would be considerably facilitated.

c. Authentication and Best Evidence

Article IX relaxes authentication requirements in a number of respects, e.g., expanding the list of self-authenticating documents, as noted above. Instead of the proponent of the document having to make out a case of genuiness and come forward with witnesses or other material on that issue (which witnesses and material can be questioned or explored), the opponent, if he wishes to attack genuiness, must search out the material and witnesses himself. The burden is exceptionally heavy if the "document" happens to be computerized information requiring sophisticated programs for its retrieval and retrieval of related information. If it happens to be information in proponent's own business computer banks, Federal Rule of Civil Procedure 34(a) would require that it be furnished by proponent in "reasonably understandable" form in response to a motion to produce, although nothing is provided concerning who bears the cost.

Article X (Best Evidence) relaxes the requirement of the original document in several ways, and accepts xeroxes and similar copies quite freely, as described above. Since proof of forgery, falsification, alteration and the like will ordinarily require the original, the burden is on the challenger to obtain it. Additionally, in some instances he may not be able to do so. The computer problem mentioned above also rears its head here.

Research should be done to determine the impact of shifting the investigation-preparation burden to the challenger in the above several areas. Does it tend to favor the large corporate or governmental litigant at the expense of the small litigant of limited means? Is the shifting particularly inappropriate where the evidence is sought to be used against the criminal accused? Does the shifting necessitate a re-evaluation of the rules and practices respecting government subsidization of an accused's investigation and preparation expenses? Does the shifting necessitate a re-examination of the rules and practice respecting allocation of costs of investigation and discovery in civil cases? These questions seem to have been given little attention.

Rule 806 provides for "impeachment" of the declarant's credibility. Cf. ENGLISH CIVIL EVIDENCE ACT, 1968, c. 64; Order 38, Rules 20-33, THE ENGLISH SUPREME COURT PRACTICE, FOURTH CUMMULATIVE SUPPLEMENT (FEB. 1971); and proposals in the ELEVENTH REPORT (EVIDENCE) OF THE CRIMINAL LAW REVISION COMMITTEE OF GREAT BRITAIN (June, 1972). These provide for advance notice (with relevant particulars concerning the declarant and his statement) of intent to use hearsay.

Rules 901(b)(7), (8), (9), and 902(4), bring computer materials within the rules relating to authentication of documents.

Rules 901(b)(7), (8), (9), and 902(4), bring computer materials within the rules relating to authentication of documents.

Rules 1001 and 1005 bring computer materials within the Best Evidence rule.
III. Favoring Government and Business in the Privilege Area

Under Article V, if a man cannot afford a psychiatrist but rather has only his wife to confide in, he gets no privilege. So too if he takes his tax problems to a supermarket accountant instead of a tax lawyer. Even confiding in an ordinary doctor rather than a (more expensive) psychiatrist may not be safe. Meanwhile, a corporation can claim a trade secrets privilege, a required reports privilege, and, on an extremely broad basis, an attorney-client privilege. And the government has a sweeping state secrets privilege that requires little more than an executive assertion that a secret is involved; has a privilege covering, essentially, any other "official information;" and has an extensive identity-of-informers privilege covering informants not only to law enforcement officers, but to legislative committees as well, and covering not only informants who furnish information revealing violations of law but also those furnishing information "relating to or assisting in an investigation of a possible violation of law." This privilege protecting sources of information to government is accorded at the same time as a similar privilege protecting sources of information to newspapers is denied in the Rules.

Whatever one may think of the justifiability of all this, it is apparent immediately that the policy of increased admissibility has been effectuated in Article V principally through restriction of the personal or individual privileges rather than the privileges accruing to organizations. It should be noted that Article V has been proposed to be amended, though not in a way that attempts to solve the difficult policy issues presented. Rather, the proposed amendments defer to state law and case by case development.

In connection with the privileges of corporations in the Supreme Court-approved draft, particular attention should be given to the attorney-client privilege. While it is generally agreed that corporations may claim an attorney-client privilege, the drafters passed up an opportunity to codify the more restrictive of the two prevailing views as to which employees of the corporation may make protected communications to the corporation's lawyers—the "control group" view which confines it to those persons authorized...
to seek and act on legal advice, as opposed to the "directed, job related" view which expands it to encompass, additionally, any employee communication of a legal nature directed to be made by corporate authority if related to the employee's work. Instead of making a choice of views, the drafters left the matter to case development. Although originally prescribing the "control group" view, they abandoned this when, without opinion, an equally divided Supreme Court refused to overturn a lower court ruling adopting the "directed, job related" view.

The drafters of the attorney-client privilege in the Federal Rules of Evidence also passed up an opportunity to define the right of shareholders to overcome corporate claims of attorney-client privilege, or to assert the privilege; and to define the extent to which communications to attorneys who participate in a corporation's business decisions, e.g., as officers or directors, are privileged.

In addition, it would seem that the drafting of Article V of the Federal Rules of Evidence would provide an excellent opportunity for an empirical study of some of the psychological and other assumptions underlying the various traditional privileges or underlying their revision or abolition—assumptions pertaining to, for example, the questions of whether privileges encourage fuller communication and information, facilitate certain services and relationships, foster the seeking of professional help, and correspond to popular notions of fairness. Such an opportunity was not taken, although the fault, of course, is not with the drafters, but rather perhaps with the conception and funding of the project.

IV. BROAD GRANTS OF DISCRETIONARY POWERS

It has been rumored that several members of the Advisory Committee felt that the Federal Rules of Evidence would be more appropriately titled "the Federal Non-Rules of Evidence." If the story is not apocryphal, what they were probably referring to is the Rules' broad grant of discretion to judges. For example, Rule 403, which apparently cuts across the entire body of the Rules, allows ad hoc exclusion where prejudice, time, and the like are deemed to outweigh probativity. Rule 611 grants judges tremendous discretion in matters formerly subject to at least some type of rules. The discretion covers mode and order of interrogating witnesses and presenting evidence, including, inter alia, leading questions, scope of cross examination, scope and permissibility of re-direct examination, and scope and permissi-

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71See Rule 503(a)(3) in Drafts of March, 1971, and March, 1969. The Nevada Evidence Code, Nevada Rev. Stat. tit. 4, ch. 47-52 (1971), modelled on the Federal Rules of Evidence Draft of March, 1969, incorporates this view. Because modelled on the early draft, the Nevada Code also limits, as that draft did, "lawyer's representative" (to whom privileged communications may be made) to one employed by the lawyer to assist legal services.
bility of rebuttal and surrebuttal. Rule 701 allows lay opinion if "rationally" based on perception and if "helpful." Rule 702 sets up the test for expert testimony: will it "assist" the trier of fact? Rule 703 allows opinions based on inadmissible evidence if that evidence is of the type "reasonably" relied upon by experts in the field. Rule 705 grants discretion to require disclosure (on direct examination) of facts or data underlying an expert opinion. Rule 706 leaves it up to the judge when to appoint and call his own experts. Rule 803(24) and 804(b)(6) confer broad discretion to manufacture new exceptions to the hearsay rule based on trustworthiness. Other provisions of Rules 803 and 804 expressly confer power to exclude evidence otherwise within hearsay exceptions if deemed untrustworthy. Rule 901(b) allows authentication by means other than those listed in the rule. Rule 1003 allows duplicates if the judge does not feel there is a "genuine" question as to authenticity. Rule 1006 grants broad discretion to allow summaries of documents. Other examples appear in the margin.

A number of questions can be raised respecting such broad discretion:

1. Does it presuppose an extraordinarily qualified judiciary? If we have such a judiciary in federal courts, do we also have it in state courts at all levels? The Proposed Federal Rules will be used as a model for the states.

2. Does it render vain the hope that the Federal Rules of Evidence will supply a ready guide, between two covers, for busy trial lawyers in the hurly burly of daily litigation? Doesn't it mean that existing evidence case law and authorities will still have to be consulted and will still control in determining what factors should govern discretion and what is and is not a permissible exercise of discretion?

3. If not, doesn't broad discretion in the trial judge mean that appellate courts will have wide power to reverse for nothing more precise than "abuse of discretion" whenever they are dissatisfied with the result below for any reason, properly within appellate cognizance or not?

4. Does discretion mean there will be disuniformity, unpredictability, and inability on the part of lawyers to prepare their cases, advise their clients with certainty, or estimate or proportion efforts and expenses to the worth of the case?

V. Influence of National Attitude Toward Crime

There is a trend today in the law of criminal evidence and procedure away from protecting the accused. Rightly or wrongly, this is apparently seen as one economical and effective measure to help stem the rising crime rate.

\footnote{See Rothstein, Understanding the Federal Rules of Evidence, 63 (1973).}
\footnote{E.g., Rules 803(6), (7), and (8).}
\footnote{See Rule 104(c) (when are preliminary matters out of hearing of jury); Rule 105 (codifying and endorsing the rarely used power of Federal trial judges to comment on the weight of the evidence); Rule 303 (criminal presumptions — submission to jury never mandatory); Rules 508-510 (trade secrets and governmental privileges, giving the judge power to make certain orders as justice may require); Rules 405-406, 608-609 (character, habit, misconduct, convictions, both substantive and for impeachment; necessarily implying a great amount of discretion); Rule 613 (manner and timing of foundation for prior inconsistent statement); Rule 614 (judge's power to call and interrogate witnesses).}
The trend is discernible in the decisions of the Supreme Court in the period immediately preceding the Court's promulgation of the Federal Rules of Evidence. For example, questions respecting such matters as police stop-and-frisk authority,\textsuperscript{76} the breadth of immunity required to compel self-incriminatory testimony,\textsuperscript{77} the right to counsel,\textsuperscript{78} procedures respecting proof of voluntariness of confessions,\textsuperscript{79} "harmlessness" of evidentiary constitutional error,\textsuperscript{80} and non-unanimous verdicts,\textsuperscript{81} were all resolved against the accused, although, on the other side, the prosecutor's limited duty to disclose was affirmed,\textsuperscript{82} the most questionable extension of the executive's power to wiretap was restricted,\textsuperscript{83} convictions in violation of the right to counsel were forbidden to be used as impeachment,\textsuperscript{84} certain kinds of statutes were voided for vagueness,\textsuperscript{85} and the defendant's rights to transcripts,\textsuperscript{86} to fairness in plea bargaining,\textsuperscript{87} to fair juries,\textsuperscript{88} and to testify at a point in trial of his own choosing,\textsuperscript{89} were affirmed or expanded. In addition, the death penalty was severely curtailed if not abolished.\textsuperscript{90} The gains for the accused seem, however, to be the kind that could hardly be denied him in a civilized, developed society.

Similar forces appear to be at work in Britain, as well. The Eleventh Report (Evidence) of the Criminal Law Revision Committee of Great Britain, June, 1972, recommends vastly increased reception of hearsay despite lack of confrontation; freer use of an accused's station-house or courtroom silence as evidence against him; and curtailment of police warnings, the "fruit of the poisonous tree" doctrine, criminal corroboration requirements, and the availability of the spousal and self-incrimination privileges.\textsuperscript{91}

\textsuperscript{77}Kastigar v. United States, 406 U.S. 441 (1972) (the privilege against self-incrimination may be overcome by a grant of immunity from use of the testimony and fruits thereof; immunity from prosecution for the transaction not required).
\textsuperscript{79}Giglio v. United States, 405 U.S. 150 (1972) (obligation on the government to prove the voluntariness of confessions fixed at "preponderance of the evidence" rather than "beyond a reasonable doubt"; also deciding that it is not constitutionally required that the jury pass on voluntariness after the judge has determined the confession to be voluntary).
\textsuperscript{80}Harmlessness" was made easier to find. See Schneble v. Florida, 405 U.S. 427 (1972); Milton v. Wainwright, 407 U.S. 371 (1972).
\textsuperscript{81}Non-unanimous verdicts were approved as constitutional. Apodaca v. Oregon, 406 U.S. 404 (1972).
\textsuperscript{82}Giglio v. United States, 405 U.S. 150 (1972) (obligation on the prosecutor to disclose unfavorable matters). But see Moore v. Illinois, 408 U.S. 786 (1972) (limiting such obligation).
\textsuperscript{84}Loper v. Beto, 405 U.S. 473 (1972).
\textsuperscript{85}Papachristos v. Jacksonville, 405 U.S. 156 (1972), and Smith v. Florida, 405 U.S. 172 (1972) (voiding certain kinds of vagrancy statutes); Gooding v. Wilson, 405 U.S. 518 (1972) (voiding certain kinds of abusive language statutes).
\textsuperscript{86}Mayer v. Chicago, 404 U.S. 189 (1971).
\textsuperscript{87}Santobello v. New York, 404 U.S. 257 (1971) (voiding a guilty plea due to government default in performing the terms of a plea bargain agreement).
\textsuperscript{89}Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant wishing to testify cannot be required to do so as first witness).
\textsuperscript{90}Furman v. Georgia, 408 U.S. 238 (1972).
\textsuperscript{91}The Report suggests other interesting reforms, many similar to or in areas dealt with by the Federal Rules of Evidence, e.g., opinion testimony, competency of children, foundation for prior inconsistent writings, and character evidence (substantive and credibility). There are also suggestions concerning production and persuasion burdens respecting affirmative defenses.
The same forces seem to have had some influence on the Federal Rules of Evidence, particularly on the draft that was finally approved by the Supreme Court. (Earlier efforts of the Advisory Committee to resist are chronicled elsewhere.92)

Some of the Rules manifest the forces more than others. Rule 104(c) was altered in the final draft to deny the accused an absolute right to a hearing out of jury range on preliminary matters.93 Rule 201(g) pertaining to judicial notice allows binding instructions against the accused on matters of fact.94 Rule 510 accords a broad privilege covering identity of informers.95 Rule 607, allowing free impeachment of one's own witness, will benefit primarily the prosecution, who frequently must rely on turncoat or hostile witnesses. Rule 609 allows very broad impeachment by prior convictions. It contains insufficient regulation of the kind of conviction, to insure that only the most probative are used. For example, it allows involuntary manslaughter convictions. Further, it provides that extremely old convictions can be revived by minor and irrelevant recent convictions.96 While earlier drafts conferred on the judge an ad hoc power to override the rule and exclude for undue prejudice (for example, where an old involuntary manslaughter conviction is offered against a criminal accused who is a witness for himself in a trial on similar charges), this veto power was deleted from the final draft.97 Rule 801(d)(1) allows prior inconsistent statements of witnesses to

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93 Amendments to this have been proposed. See Appendix hereto.
94 This rule, relating to judicial notice, has been proposed to be amended. See Appendix hereto. See generally, Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404-407 (1942); Davis, Judicial Notice, 55 Colum. L. Rev. 945 (1955); Davis, Administrative Law Treatise, ch. 15 (1958);
95 Rule 510. See Appendix hereto for proposed amendments. See also note 66, supra.
96 Rule 609(b). See Appendix hereto for proposed amendments.
97 Compare Rule 609(a) in draft of March, 1971, with Supreme Court-approved draft. The veto power has been proposed to be at least partly reinstated by amendment to the Federal Rules of Evidence. See Appendix hereto. This veto power is the famous "Luck" power, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), overruled by Congress in 14 D.C. Code §305 (1973). See, Smith & Phelps, District of Columbia Annotation to the Proposed Federal Rules of Evidence, 32 Fed. Bar J. 270, 326 (1973).

See, for cases embracing the power, United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968); People v. Montgomery, 47 Ill.2d 510, 268 N.E. 2d 695 (1971). For cases that have rejected the power, see Commonwealth v. West, 357 Mass. 245, 258 N.E. 2d 22 (1970); State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967). Note that in Berg v. United States, 406 F.2d 235 (9th Cir. 1969) there was a three way split, one judge criticizing the power, another approving it and a third refusing to make a choice. The Second Circuit has embraced the power. See United States v. Puco, 453 F.2d 539 (2d Cir. 1971); United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971). These rulings are consistent with the skepticism expressed in some Second Circuit opinions (notably by Judge Friendly) about the jury's ability to apply the lawyer's finely wrought distinction between the use of evidence for substantive and for impeachment purposes. See, e.g., United States v. DeSisto, 329 F.2d at 933 (2d Cir. 1964), cert. denied 377 U.S. 979 (1965) where that skepticism was advanced as a reason for allowing former statements of witnesses made at grand jury or similar proceedings to come in substantively as well as on the issue of credibility.

This area has been quite controversial and has engendered considerable discussion. See, e.g., Chandler, Attacking Credibility of Witnesses by Proof of Charge of Conviction of Crime, 10 Tex. L. Rev. 257 (1932); Ehhrhardt, Use of Prior Conviction to Impeach the Defendant in a Criminal Case, 10 The Judges Journal 45 (1971);
be used substantively. This benefits primarily prosecutors, since the prosecution is in the best position to obtain such statements and often must rely on turncoat or hostile witnesses.\(^8\) Rule 804(b)(1), dealing with the admissibility of former testimony, dispenses with requirements of party or issue identity. It seems to infringe the concept of confrontation.\(^9\) Rule 804(b)(4), in a reversal of its original position, allows third party admissions to be used against the accused, but not for him unless corroborated.\(^10\) Rules 803(24) and 804(b)(6) allow any substantially trustworthy hearsay to be admitted, without any special consideration of the need for confrontation in criminal cases.\(^11\)

**Conclusion**

One final “theme” that is inherent in the very conception of the Rules, is, of course, the belief that uniformity in the field of Evidence amongst all federal courts, is preferable to conformity to state law of the state where the federal court happens to be. The literature on this battle has been extensive,\(^12\) and there will be no attempt here to recapitulate the arguments

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8See note 25 supra.

9See note 40 supra.

10See note 42 supra.

11See note 43 supra.

pro and con, except to say that the commentators have come out overwhelmingly in favor of uniformity amongst federal courts. It is regrettable that currently pending proposed amendments to the Federal Rules of Evidence have found it necessary to enlarge the area of deference to state law accorded by the Supreme Court-approved draft. The enlargement embraces state law of privileges and witness competency in, basically, diversity cases.

APPENDIX Follows


See Rule 302 of the Supreme Court-approved draft (state law of presumptions applied in, essentially, diversity cases—drafters felt compelled here; see Advisory Committee Note). Cf. Rules 502, 803(8), (14); 804(b)(1), 901(b)(7); 902(1); 903; 1005.

See Appendix hereto.
<table>
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<th>RULE</th>
<th>PROPOSED AMENDMENTS OF SUBCOMMITTEE</th>
<th>Substance of Change or Comment</th>
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### Article I. General Provisions:

#### Rule

101. Scope

102. Purpose and construction

103. Rulings on evidence:
   - (a) Effect of erroneous ruling:
     - (1) Objection
     - (2) Offer of proof
   - (b) Record of offer and ruling
   - (c) Hearing of jury
   - (d) Plain error

104. Preliminary questions:
   - (a) Questions of admissibility generally
   - (b) Relevancy conditioned on fact
   - (c) Hearing of jury
   - (d) Testimony by accused
   - (e) Weight and credibility

105. Summing up and comment by judge

106. Limited admissibility

107. Remainder of or related writings or recorded statements

### Article II. Judicial Notice:

#### Rule

201. Judicial notice of adjudicative facts:
   - (a) Scope of rule
   - (b) Kinds of facts
   - (c) When discretionary
   - (d) When mandatory
   - (e) Opportunity to be heard
   - (f) Time of taking notice
   - (g) Instructing jury

### Article III. Presumptions:

#### Rule

301. Presumptions in general

302. Applicability of state law in civil cases

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*This Appendix charts the progress of the proposed amendments from June 28, 1973, when they first appeared, through Nov. 15, 1973, the latest version of them as of the date of this article (Dec. 31, 1973). As of Dec. 31, 1973, no Congressional action has been taken on them. The body of the chart shows the rule headings as the rules were adopted by the Supreme Court, Nov. 20, 1972, 56 F.R.D. 183, but suspended pending Congressional review, by Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. The body of the chart then shows the substance of the changes in these rules, proposed by Committee Print dated June 28, 1973, H.R. 5463, Subcommittee on Criminal Justice, of the House Judiciary Committee. Changes in this, proposed by a later Committee Print (Oct. 10, 1973), same subcommittee, same H.R. number, are shown in the numbered footnotes to this Appendix. Finally, the lettered footnotes show changes in all this appearing in Bill H.R. 5463 as reported out of Committee, Nov. 15, 1973, with its accompanying report, House Rep. No. 93-650, 93d Cong. 1st Sess., Nov. 15, 1973. A footnote bearing both a number and a letter (e.g., “11c”) near a provision of the chart means two footnotes are attached: a numbered footnote and a lettered footnote, connoting, therefore, that the provision has been addressed or changed twice since the body of the chart.

1. New comment questions desirability of current law; suggests future re-examination.
2. Reinstated as in Supreme Court-draft. On the need for this revision, see Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125 at 162 (1973); hereinafter cited as “GEO.”
3. Reinstated in altered form to give lesser effect in criminal cases. On the need for this, see GEO. at 163.
4. Further altered to give civil presumptions lesser effect than shifting persuasion burden.
### Presumptions in Criminal Cases (against accused)

- **Scope**
- **Submission to jury**
- **Instructing the jury**

### Article IV: Relevancy and its Limits:

#### Rule

- **Definition of “relevant evidence”**
- **Relevant evidence generally admissible; irrelevant evidence inadmissible**
- **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**
- **Character evidence not admissible to prove conduct; exceptions; other crimes;**
  - **Character evidence generally:**
    - (1) Character of accused
    - (2) Character of victim
    - (3) Character of witness
  - **Other crimes, wrongs, or acts**
- **Methods of proving character:**
  - **Reputation or opinion**
  - **Specific instances of conduct**
- **Habit; routine practice:**
  - **Admissibility**
  - **Method of proof**
- **Subsequent remedial measures**
- **Compromise and offers to compromise**
- **Payment of medical and similar expenses**
- **Offer to plead guilty; nolo contendere; withdrawn plea of guilty**

### Article V: Privileges:

#### Rule

- **Privileges recognized only as provided**
- **Required reports privileged by statute**
- **Lawyer-client privilege:**
  - **Definitions**
  - **General rule of privilege**
  - **Who may claim the privilege**
  - **Exceptions:**
    - (1) Furtherance of crime or fraud
    - (2) Claimant through same deceased client
    - (3) Breach of duty by lawyer or client
    - (4) Document attested by lawyer
    - (5) Joint clients
- **Psychotherapist-patient privilege:**
  - **Definitions**
  - **General rule of privilege**
  - **Who may claim the privilege**
  - **Exceptions:**
    - (1) Proceedings for hospitalization
    - (2) Examination by order of judge
    - (3) Condition an element of claim or defense

---

*Allowance of opinion evidence deleted.

*Deleted.

*New comment states that deletion of (b) not meant as “general authorization of opinion evidence in this area.”

*Altered as to statements of fact in compromise negotiations—effect uncertain.

*Exception for other acts of Congress added.

*Word “element” added—now conforms more precisely to presumptions language—little substantive effect intended.

["Diversity cases" is a generalization in this chart. Consult text of amendment.]
505. Husband-wife privilege:
   (a) General rule of privilege
   (b) Who may claim the privilege
   (c) Exceptions

506. Communications to clergymen:
   (a) Definitions
   (b) General rule of privilege
   (c) Who may claim the privilege

507. Political vote

508. Trade secrets

509. Secrets of state and other official information:
   (a) Definitions:
      (1) Secrets of state
      (2) Official information
   (b) General rule of privilege
   (c) Who may claim
   (d) Procedure
   (e) Notice to government
   (f) Effect of sustaining claim

510. Identity of informer:
   (a) Rule of privilege
   (b) Who may claim
   (c) Exceptions:
      (1) Voluntary disclosure; informer a witness
      (2) Testimony on merits
      (3) Legality of obtaining evidence

511. Waiver of privilege by voluntary disclosure

512. Privileged matter disclosed under compulsion or without opportunity to claim privilege

513. Comment upon or inference from claim of privilege; instruction:
   (a) Comment or inference not permitted
   (b) Claiming privilege without knowledge of jury
   (c) Jury instruction

Article VI. Witnesses:
Rule
601. General rule of competency
602. Lack of personal knowledge
603. Oath or affirmation
604. Interpreters
605. Competency of judge as witness
606. Competency of juror as witness:
   (a) At the trial
   (b) Inquiry into validity of verdict or indictment
607. Who may impeach
608. Evidence of character and conduct of witness:
   (a) Opinion and reputation evidence of character
   (b) Specific instances of conduct
609. Impeachment by evidence of conviction of crime:
   (a) General rule

37

THEMES

Omitted.

Omitted.

Omitted.

Omitted.

Omitted.

Omitted.

Omitted.

Omitted.

State law governs in diversity cases.6

6Same addition as in footnote 8, supra, Appendix. [See also brackets, footnote 8 supra, Appendix.]

6Allowance of opinion deleted.

6Clarified so ad hoc judicial veto power does not apply to crimen falsi (i.e., to crimes of dishonesty and false statement). On the earlier confusion, see GEO. at 144 n. 101.

6Admissibility limited to crimes of dishonest and false statement (i.e., to "crimen falsi"); ad hoc judicial veto power removed. For criticism of broader crimes of earlier versions, see GEO. at 143-45.
(b) Time limit
(c) Effect of pardon, annulment, or certificate of rehabilitation
(d) Juvenile adjudications
(e) Pendency of appeal

610. Religious beliefs or opinions

611. Mode and order of interrogation and presentation:
(a) Control by judge
(b) Scope of cross-examination
(c) Leading questions

612. Writing used to refresh memory

613. Prior statements of witnesses:
(a) Examining witness concerning prior statement
(b) Extrinsic evidence of prior inconsistent statement by witness

614. Calling and interrogation of witnesses by judge:
(a) Calling by judge
(b) Interrogation by judge
(c) Objections

615. Exclusion of witnesses

Article VII. Opinions and Expert Testimony:
Rule
701. Opinion testimony by lay witnesses
702. Testimony by experts
703. Bases of opinion testimony by experts
704. Opinion on ultimate issue
705. Disclosure of facts or data underlying expert opinion
706. Court appointed experts:
(a) Appointment
(b) Compensation
(c) Disclosure of appointment
(d) Parties' experts of own selection

Article VIII. Hearsay:
Rule
801. Definitions:
(a) Statement
(b) Declarant
(c) Hearsay
(d) Statements which are not hearsay:
   (1) Prior statement by witness
   (2) Admission by party-opponent

802. Hearsay rule
803. Hearsay exceptions; availability of declarant immaterial:
   (1) Present sense impression
   (2) Excited utterance

Old crimes can't be revived by more recent ones. Clarified.

Only usable in criminal cases (still in judge's discretion).

Cross limited to matters opened on direct. "Civil cases" to "civil actions"; also mere clarification.

Opponent's right to see and use documents not used on the stand cut down—made discretionary. Also, clarifying word change.

Prior inconsistent statements may be used substantively only if made at earlier hearing or grand jury.

Same wording change as in Rule 402.

Clarified; requirements altered somewhat.

Right to call adverse party or associated witness left to existing law.

Adds "hostile" witness to category of leadable witnesses. Clarifies applicability to criminal cases.

Added comment that privilege is still applicable.

Grand jury eliminated. Requirement added that prior hearing must provide opportunity to cross examine. See criticism of earlier position in GEO. at n. 117.
(3) Then existing mental, emotional, or physical condition
(4) Statements for purposes of medical diagnosis or treatment
(5) Recorded recollection
(6) Records of Regularly conducted activity
(7) Absence of entry in records of regularly conducted activity
(8) Public records and reports
(9) Records of vital statistics.
(10) Absence of public record or entry
(11) Records of religious organizations
(12) Marriage, baptismal, and similar certificates
(13) Family records
(14) Records of documents affecting an interest in property
(15) Statements in documents affecting an interest in property
(16) Statements in ancient documents
(17) Market reports, commercial publications
(18) Learned treatises
(19) Reputation concerning personal or family history
(20) Reputation concerning boundaries or general history
(21) Reputation as to character
(22) Judgment of previous conviction
(23) Judgment as to personal, family, or general history, or boundaries
(24) Other exceptions

804. Hearsay exceptions: declarant unavailable:
(a) Definition of unavailability
(b) Hearsay exceptions:
(1) Former testimony
(2) Statement of recent perception
(3) Statement under belief of impending death
(4) Statement against interest
(5) Statement of personal or family history
(6) Other exceptions

New comment added to the effect that the state of mind exception cannot be used to show intention of person other than declarant or to show that such intention of such other person was probably carried out. Need for this clarification is discussed in Rothstein, Understanding the Federal Rules of Evidence 118 (1973).

Corresponding change to rule 803(6) above.

Duty to depose eliminated as to former testimony exception. On the need for this, see GEO. at 148.

Requirement of similar motive added. On the need for this, see GEO. at 151.

June 28 & Oct. 10 comment modified to permit court to recognize that interests other than pecuniary, proprietary, or penal, may have derivative adverse effects on pecuniary, proprietary, or penal interests. On the need for this modification, see GEO. at 154-55.

Clarified to state that exclusion of co-conspirator statement is merely exclusion from this hearsay exception. On the need for this, see GEO. at n. 150.

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805. Hearsay within hearsay
806. Attacking and supporting credibility of declarant

Article IX. Authentication and Identification:

Rule
901. Requirement of authentication or identification:
  (a) General provision
  (b) Illustrations:
    (1) Testimony of witness with knowledge
    (2) Nonexpert opinion on handwriting
    (3) Comparison by trier or expert witness
    (4) Distinctive characteristics and the like
    (5) Voice identification
    (6) Telephone conversations
    (7) Public records or reports
    (8) Ancient documents or data compilations
  (9) Process or system
  (10) Methods provided by statute or rule

902. Self-authentication:
  (1) Domestic public documents under seal
  (2) Domestic public documents not under seal
  (3) Foreign public documents
  (4) Certified copies of public records
  (5) Official publications
  (6) Newspapers and periodicals
  (7) Trade inscriptions and the like
  (8) Acknowledged documents
  (9) Commercial paper and related documents
  (10) Presumptions under Acts of Congress

903. Subscribing witness' testimony unnecessary

Article X. Contents of Writing, Recordings, and Photographs:

Rule
1001. Definitions:
  (1) Writings and recordings
  (2) Photographs
  (3) Original
  (4) Duplicate

1002. Requirement of original
1003. Admissibility of duplicates

1004. Public records
1005. Summaries
1006. Testimony or written admission of party
1007. Functions of judge and jury

Article XI. Miscellaneous Rules:

Rule
1101. Applicability of rules:
  (a) Courts and magistrates
  (b) Proceedings generally
  (c) Rules of privilege

---

Wording change similar to Rule 402.

"Under hand and seal" changed to "as provided by law."

"General commercial law" means U.C.C. and state law.

To encompass videotape.

Hopefully judge will be easy to convince there is genuine dispute on authenticity, which would mean duplicate not treated like original.

Loss or destruction at direction of proponent hopefully treated like proponent's act.

"Rules" changed to "rule"—to conform to changes in Article V.

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28Rules extended to court of claims.
(d) Rules inapplicable:
   (1) Preliminary questions of fact
   (2) Grand jury
   (3) Miscellaneous proceedings

(e) Rules applicable in part

Substance of Change or Comment

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Method of citations changed.

[Appendix continued on next page]
APPENDIX CONTINUED

Additional Matters

A. In addition to the matters noted in the preceding chart, a few less significant matters appearing in the Nov. 15, 1973 bill and its accompanying report should be noted:

Rule 104 (c) (preliminary questions, hearing of jury). Comment notes that civil cases are comprehended by the rule except where specifically noted otherwise.

Rule 106 (limited admissibility). Comment disclaims intent to affect law of severance.

Rule 103 (4) (statements to medical persons). Comment states that particular consideration has been given to the effect of rule as respects physical examination to prepare physician to testify, and disclaims intent to adversely affect privilege.

Rule 803 (5) (past recollection recorded). Slight rule text change: writing may be made "or adopted" by witness.

Rule 804 (a) (3) (lack of memory as unavailability). New comment: judge may of course choose to disbelieve witness as to his lack of memory.

B. In addition, the Nov. 15 bill and report recognize for the first time the potential overlap and conflict between 28 U.S.C. Sec. 1732 (a) (Federal Business Records Act) and Rule 803 (6) (Business Records). For a description of this problem, see Rothstein, Understanding the Federal Rules of Evidence, 121-22 (1973). The bill accordingly strikes out Sec. 1732(a); and similarly amends Sec. 1733 to avoid overlap or conflict with Rule 803(8) (public records and reports).

C. The bill also adopts the Supreme Court's conforming amendments to the civil and criminal rules of procedure. It further provides that the Rules of Evidence are amendable by means of the Supreme Court submitting amendments to Congress, which amendments become effective 180 days after such submission unless either House of Congress vetoes them (as compared with the 90 days and joint action prescribed under existing law, left untouched, for the rules of procedure).

D. The Nov. 15 bill must be passed by both Houses of Congress. As of the date of preparation of this article (Dec. 31, 1973), neither House has acted, although the bill is expected to come before the House shortly at which time possible floor amendments might include the following:

i. Change Rule 609 (convictions) back to an earlier version.

ii. Narrow Rule 803(8) (reports of public offices and agencies).

iii. Re-instate Rules 803 (24) and 804 (b) (6) (the "catch-all" exceptions to the hearsay rule) in a modified compromise version with notice provisions.

iv. Grant Congress a broader role in the process of amending the rules after adoption: require affirmative approval rather than a mere veto procedure.

E. Despite Congressional consideration of the Federal Rules of Evidence, they continue to be cited, including citations in areas most intensely under Congressional scrutiny.

See, e.g.,

Colvin v. United States, 479 F.2d 998 (9th Cir. 1973).
United States v. Soles, 482 F.2d 105 (2d Cir. 1973) (Judge Friendly).
In Re Horowitz, 482 F.2d 72 (2d Cir. 1973) (Judge Friendly).
United States v. Luther, 481 F.2d 429 (9th Cir. 1973).
United States v. Baum, 482 F.2d 1325 (2d Cir. 1973).
United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973).

F. State efforts to imitate the Federal Rules of Evidence have begun.
See:
NEV. REV. STAT. tit. 4, ch. 47-52 (1971);
NEW MEXICO RULES OF EVIDENCE, 84 N.M. xi, xi-cxxxi (1973);
WISC. RULES OF EVIDENCE, WEST, 1973 WISC. LEGIS. SERV. 131;
PROPOSED NEB. RULES OF EVID., NEB. SUPREME COURT COMMITTEE ON PRACTICE AND PROCEDURE, AUG. 1973.