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Do the Federal Rules of Evidence Matter

Victor J. Gold

DO THE FEDERAL RULES OF EVIDENCE MATTER?

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I. INTRODUCTION

Before the Federal Rules of Evidence, federal evidence law was a confusing conglomerate of common law and statutes. Much of this law was ancient and of dubious merit. The Federal Rules were intended to reform and then assemble in a single document all the significant aspects of federal evidence law.[1] The goal was to simplify that law, make its content more certain and its application more uniform, efficient and fair.[2]

Nearly a generation after the Federal Rules were enacted and after many thousands of decisions purporting to apply them, there is reason to doubt the extent to which the Rules have achieved their goals. Of course, measuring the success of the Rules is not easy. It is impossible to "grade" the Rules by evaluating each trial and appellate application like an answer to a multiple-choice exam. Many issues under the Rules do not easily lend themselves to "objective test" treatment.[3] Moreover, the Rules address an enormous number of issues. To completely review the impact of every Rule would require a multi-volume treatise.[4]

However, a summary of the case law in one area of the Rules' coverage—witness competency and impeachment—is possible here. This sum-

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1. H.R. REP. NO. 650, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075; S. REP. NO. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7051; Diane Kiesel, Comment, *One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the* Hillman *Doctrine*, 33 CATH. U. L. REV. 699, 699 (1984).

2. H.R. REP. NO. 650, *supra* note 1, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 7075 (stating that Rules represent milestone to better administration of justice in federal courts by providing clear, precise and readily available rules for trial judges that will be uniformly applicable throughout federal judicial system); STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 12 (1990) (stating that Rules' goals "are to provide speedy, inexpensive and fair trials designed to reach the truth.").

3. Ironically, most evidence law professors, including the author, seem to prefer this mode of testing students.

4. Since the author does not have to read bluebooks, he has had plenty of time to read the cases and write about them. A more detailed analysis of the issues discussed in this Essay can be found in 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE (1990), and in a forthcoming volume of that treatise.

mary reveals some disturbing developments. In some instances, courts have twisted or ignored the clear language of the Rules and continued to apply old common law.[5] In other cases, courts have created new common law to address issues that fall within the scope of a Rule.[6] In still other cases, courts have found discretion to decide admissibility where the Rules set forth standards intended to limit discretion.[7] Finally, in many instances undefined terms or convoluted phraseology have led the courts to ignore or completely misconstrue what the Rules say.[8] In short, these cases cast doubt on whether the Rules have achieved their goals or even made much of a difference in the way courts deal with some important issues.

After a discussion of a few examples, the reasons for these developments will be explored. That analysis will call into question the efficacy of a codification of evidence law in the form taken by the Federal Rules. Specifically, this Essay suggests that a pure common law approach to the development of evidence law is preferable to rules that employ a balancing test or ambiguous language.

II. PROBLEMS WITH WITNESS COMPETENCY AND IMPEACHMENT IN ARTICLE VI

A. Rule 601

Rule 601 sets the tone for Article VI of the Federal Rules and for much of the modern law concerning witness competency and impeachment. That Rule states that "[e]very person is competent to be a witness," subject to limited exceptions not pertinent here.[9] The Rule represents a significant departure from the traditional common law of witness competency. In the words of the Advisory Committee, the Rule effects a "general ground clearing," eliminating almost all the categories of witness incompetency recognized at common law.[10] The Advisory Committee emphasized that the Rule eliminates all mental or moral qualifications for testifying.[11] Thus, Rule 601 converts the issues formerly addressed by the common law of witness competency into credibility questions to be resolved by the trier of fact.

Notwithstanding the unambiguous language of Rule 601, the federal

5. *See infra* notes 9-36 and accompanying text.
6. *See infra* notes 9-36 and accompanying text.
7. *See infra* notes 41-52 and accompanying text.
8. *See infra* notes 37-40 and accompanying text.
9. FED. R. EVID. 601.
10. FED. R. EVID. 601 advisory committee's note.
11. *Id.*

courts have failed to take seriously the "ground clearing" terms of the provision. Instead, the courts have concluded that the Rule leaves them with the power to disqualify witnesses with limited mental or moral capacities.[12] Decisions following the enactment of Rule 601 frequently assume the existence of judicial power to conduct competency hearings[13] and psychiatric examinations to determine competency,[14] both of which the Rule had seemingly rendered obsolete. While a few courts have taken the literal language of Rule 601 more seriously, most courts apparently do not treat witness competency issues any differently than they did before the enactment of Rule 601.[15] As a consequence of ignoring the clear language of Rule 601, courts have undermined the goal of making competency determinations more certain and simple.

B. Rules 602 and 603

Some authorities have resurrected common law mental and moral competency requirements in the guise of interpreting Rules 602[16] and 603.[17] Some courts read Rule 602 as imposing a mental capacity requirement, suggesting that witnesses lack personal knowledge unless they can

12. United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.), *cert. denied*, 493 U.S. 841 (1989) (recognizing that Rule 603 allows judge to exclude testimony if person unable to take or comprehend oath or affirmation); *see infra* notes 16-23 and accompanying text.

13. *See, e.g.*, United States v. Peyro, 786 F.2d 826, 831 (8th Cir. 1986); United States v. Hyson, 721 F.2d 856, 863-64 (1st Cir. 1983); Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983); United States v. Martino, 648 F.2d 367, 384 (5th Cir. June 1981), *cert denied*, 456 U.S. 949 (1982); State v. Smith, 370 N.W.2d 827, 835 (Wis. Ct. App. 1985); *see also* United States v. Odom, 736 F.2d 104, 111 (4th Cir. 1984) ("[A] district judge has great latitude in the procedure he may follow in determining the competency of a witness to testify."); United States v. Raineri, 91 F.R.D. 159, 163 (W.D. Wis. 1980) ("[T]he form of a competency inquiry should be left to the trial judge's discretion.").

14. *See, e.g.*, *Martino*, 648 F.2d at 384; United States v. Jackson, 576 F.2d 46, 48 (5th Cir. 1978); United States v. Haro, 573 F.2d 661, 665-66 (10th Cir.), *cert. denied*, 439 U.S. 851 (1978); United States v. Pacelli, 521 F.2d 135, 140 n.4 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

15. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 601-10 to 601-11 (1991) ("Thus the practice remains much as it has been in determining that the witness meets minimum credibility standards."); *see also* United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986) (stating that trial judges have broad discretion to determine competence of witnesses; failing to even acknowledge existence of Rule 601); *Raineri*, 91 F.R.D. at 163 (reducing Rule 601 to mere rebuttable presumption of competence); John E. B. Myers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287, 301, 303 (1986-87) ("While there is only a handful of federal decisions dealing with Rule 601 and witness competence, the cases that are available indicate that federal courts continue to draw upon common law principles of competence. . . . [These] decisions reveal that when genuine competency issues arise, federal courts tip their hats to Rule 601, and then move beyond its seemingly all-inclusive language to discuss and rely upon common law principles of witness competence.").

16. FED. R. EVID. 602.

17. FED. R. EVID. 603.

comprehend their observations to an extent that makes their testimony trustworthy.[18] Similarly, many courts establish a moral capacity requirement by concluding that the oath or affirmation requirement of Rule 603 cannot be satisfied unless the witness appreciates the nature of truth and the duty to tell the truth.[19]

On its face, Rule 602 does not justify excluding testimony on the ground that a witness lacks the mental capacity to make testimony trustworthy. The Rule requires no more than that the trier of fact find there is evidence "sufficient to support a finding" that the witness has personal knowledge.[20] This standard should be satisfied if a reasonable juror or judge could believe that the witness perceived the matters testified to. Based on the Rule's standard, it is up to the jury, not the judge, to decide if the witness is trustworthy. Rule 603 likewise imposes no moral capacity requirement. The Rule requires only that the witness perform the mechanical act of taking an oath or affirmation in a form calculated to awaken the witness's conscience and impress his or her mind with the legal duty to tell the truth.[21] Nothing in the Rule suggests that the witness must in fact have his or her conscience awakened and mind so impressed. A member of the Advisory Committee reports that the Committee specifically considered and rejected imposition of any standard of moral qualification.[22] Further, in his testimony before Congress

18. *See, e.g.*, United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.) ("[A] person might be impaired to the point that he would not be able to satisfy the 'personal knowledge' requirement of Rule 602."), *cert. denied*, 493 U.S. 841 (1989).

19. *See, e.g.*, United States v. Odom, 736 F.2d 104, 110-13 (4th Cir. 1984) (stating that witness may be disqualified if judge determines witness does not understand duty to testify truthfully); United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982) ("[E]very witness is presumed competent to testify, . . . unless . . . he does not understand the duty to testify truthfully."). *But see* United States v. Roach, 590 F.2d 181, 185-86 (5th Cir. 1979) (asserting that language and legislative history of Rule 601 indicate common law incompetency law abolished, thus eliminating need to evaluate mental capacity of witness for competency purposes); United States v. Lemere, 16 M.J. 682, 686 (A.C.M.R. 1983) (stating that all witnesses are competent under Rules 601 and 603; thus, child witness's agreement to tell truth and efforts to impress upon witness her duty to testify truthfully were sufficient even if efforts not entirely successful and witness confused truth, falsity, reality and fantasy); United States v. Allen, 13 M.J. 597, 600 (A.F.C.M.R. 1982) (determining that preliminary questions put to child witness calculated to awaken her conscience and impress upon her that she had to provide truthful answers; witness competent to testify under Rules 601 and 603 regardless of whether questions actually accomplished intended purpose).

20. FED. R. EVID. 602.

21. FED. R. EVID. 603.

22. 3 WEINSTEIN & BERGER, *supra* note 15, at 603-06:

> The question remains whether Rule 603 operates as a rule of competency authorizing a judge to reject testimony because he regards the witness as inherently untruthful. . . . [The Advisory Committee] rejected a standard of moral qualification as unenforceable and argued that the main function of such a standard would be to

in support of Rule 601, the Reporter for the Federal Rules made the point that the very presence of the oath or affirmation requirement in Rule 603 diminished the need for competency evaluations of the sort conducted at common law.[23] It is ironic then that Rule 603 has been turned into a vehicle for undermining Rule 601's general statement that every witness is competent.

C. *The Use of Hypnosis to Refresh Recollection*

These are not the only instances where the efficacy of Rule 601 has been questionable. Since the enactment of the Federal Rules of Evidence, dozens of appellate decisions have considered the competency of a witness whose recollection has been refreshed through hypnosis.[24] The recent intensity of the debate on this subject is especially notable since almost all cases[25] and articles[26] on the subject date from after enactment

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impress witnesses with their duty to tell the truth, a function that could be accomplished more directly when administering the oath or affirmation required by Rule 603.

Id.

23. See HOUSE SPECIAL SUBCOMM. ON REFORM OF FEDERAL CRIMINAL LAWS OF THE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess. (1973) (statement of Edward W. Cleary), *reprinted in* 3 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 11, at 95 (1980), discussing Rule 603:

> No mental or moral qualifications for witnesses are specified. (Rule 601) . . . The real utility of voir dire examination in this area has been to impress upon the witness his duty to tell the truth, and this function is served more directly and effectively by the requirement that the oath or affirmation be administered in a form to awaken the conscience of the witness and impress upon his mind his duty to testify truthfully (Rule 603).

Id.

24. For this issue addressed in civil cases, see, for example, Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); Jean E. Maess, Annotation, *Fact that Witness Undergoes Hypnotic Examination As Affecting Admissability of Testimony in Civil Case*, 31 A.L.R.4th 1239 (1984). For this issue addressed in criminal cases, see, for example, Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976); Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976); Harding v. State, 246 A.2d 302 (Md. 1968), *cert. denied*, 395 U.S. 949 (1969); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975); Gregory G. Sarno, Annotation, *Admissability of Hypnotic Evidence at Criminal Trial*, 92 A.L.R.3d 442 (1979).

25. The first reported decision concerning the use of hypnosis for enhancement of a witness's memory was Harding v. State, 246 A.2d 302 (Md. 1968), *cert. denied*, 395 U.S. 949 (1969). As recently as 1980 one of the most prominent commentators in the area was able to state: "Evidence textbooks and law journals have largely ignored hypnosis of witnesses as a means of enhancing witness recall." Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 327 (1980) (citations omitted).

26. *See, e.g.*, Eric M. Alderman & Joseph A. Barnette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases*, 18 CRIM. L. BULL. 5 (1982); James E. Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?*, 6

of the Federal Rules. This is largely because most of the scientific literature concerning the reliability problems presented by hypnotically-refreshed recollection was published after enactment of the Rules.[27] Thus, this issue tests the Rules' ability to deal with new problems.

The use of hypnosis to refresh recollection appears to present a question of witness competency. The essential difference between a rule of competency and a rule of admissibility is that the former focuses on a witness's characteristics while the latter focuses on characteristics of the evidence. Objections to the use of hypnosis to refresh recollection flow from a concern for the effects of suggestion, confabulation and overconfidence on a witness.[28] This concern is especially acute, some experts claim, because it is impossible to accurately detect the influence of such effects on any given recollection of the witness.[29] In other words, a rule founded on such concern is based not on a judgment that specific testimony is unreliable, but on the assumption that the witness is not a sufficiently credible source of information to permit him or her to testify. Thus, a rule that questions the propriety of refreshing recollection through hypnosis is in fact a rule of competency, focusing on witnesses' characteristics in a way reminiscent of traditional competency rules concerning insane or drugged witnesses. Like the insane or drugged witness, the witness who has been hypnotized to refresh his or her recollection is arguably incompetent because the witness is unable to know what the truth is.[30]

The courts have taken various approaches to this question of competency. Some courts hold that the use of hypnosis to refresh recollection does not render the witness incompetent, but is a factor bearing on credibility.[31] Other courts have held that the witness is per se incompetent to

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U. PUGET SOUND L. REV. 155 (1983); Diamond, *supra* note 25; Robert B. Faulk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 ST. JOHN'S L. REV. 30 (1982); Lawrence Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964); Ira Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 SYRACUSE L. REV. 927 (1983); Robert C. Perry, *The Trend Toward Exclusion of Hypnotically Refreshed Testimony—Has the Right Question Been Asked?*, 31 KAN. L. REV. 579 (1983); Robert S. Spector & Teree E. Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567 (1977).

27. Probably the most frequently cited authority is Martin T. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979).

28. *See* Diamond, *supra* note 25, at 333-40.

29. *Id.*

30. State v. Martin, 684 P.2d 651, 657 (Wash. 1984) (Stafford, J., concurring).

31. The Ninth Circuit has considered the issue more frequently than any other federal court. It has consistently ruled that the use of hypnosis to refresh recollection does not render the witness incompetent, but rather, presents a question of credibility for the trier of fact to resolve. *See* United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885

testify as to any subject discussed while under hypnosis.[32] Another group of courts has held that the witness is incompetent to testify except as to those matters the witness recalled prior to hypnosis.[33] Yet another group of courts admit the testimony if certain safeguards are present.[34] Most federal courts apply a balancing approach, permitting the witness to testify if the value of the testimony is reliable and outweighs the risks presented by unreliable testimony.[35]

Consideration of Rule 601 has been almost entirely omitted in this

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(1979); United States v. Adams, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974). Only a handful of other federal courts have confronted the issue. Other federal decisions holding that the issue is one of credibility, not competency, are United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983), and United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1976).

32. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 54, 723 P.2d 1354, 1375, 181 Cal. Rptr. 243, 265, *cert. denied*, 458 U.S. 1125 (1982); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980); Commonwealth v. Nazarovitch, 436 A.2d 170, 177-78 (Pa. 1981); State v. Coe, 750 P.2d 208, 211 (Wash. 1988); *see also* Diamond, *supra* note 25 (favoring per se rule of exclusion).

33. *See* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1295-96 (Ariz. 1982); Elliotte v. State, 515 A.2d 677, 681-82 (Del. 1986); State v. Moreno, 709 P.2d 103, 105 (Haw. 1985); People v. Zayas, 510 N.E.2d 1125, 1134 (Ill. App. Ct. 1987); Strong v. State, 435 N.E.2d 969, 970-71 (Ind. 1982); State v. Collins, 464 A.2d 1028, 1044 (Md. 1983); Commonwealth v. Kater, 447 N.E.2d 1190, 1197-98 (Mass. 1983); People v. McIntosh, 376 N.W.2d 653, 657 (Mich. 1985); State v. Blanchard, 315 N.W.2d 427, 430-31 (Minn. 1982); State v. Patterson, 331 N.W.2d 500, 504 (Neb. 1983); People v. Hughes, 453 N.E.2d 484, 495-96 (N.Y. 1983), *cert. denied*, 492 U.S. 908 (1989); State v. Peoples, 319 S.E.2d 177, 188 (N.C. 1984); Robison v. State, 677 P.2d 1080, 1085 (Okla.), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Taylor, 439 A.2d 805, 808 (Pa. 1982). One judge has referred to the cases adopting this modified per se incompetent approach as representing an "emerging consensus." State v. Wren, 425 So. 2d 756, 760 (La. 1983) (Calogero, J., concurring in part and dissenting in part).

34. Those safeguards include: (1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; (2) the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense; (3) any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form; (4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them; (5) all contacts between the hypnotist and the subject must be recorded; and (6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post hypnotic interview. State v. Hurd, 432 A.2d 86, 95-97 (N.J. 1981); *accord* Brown v. State, 426 So. 2d 76, 91 (Fla. 1983); House v. State, 445 So. 2d 815, 826-27 (Miss. 1984); State v. Beachum, 643 P.2d 246, 252 (N.M. 1981); State v. Weston, 475 N.E.2d 805, 812 (Ohio 1984); State v. Adams, 418 N.W.2d 618, 623-24 (S.D. 1988).

35. Bundy v. Dugger, 850 F.2d 1402, 1416 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987); United States v. Kimberlin, 805 F.2d 210, 219 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); Harker v. Maryland, 800 F.2d 437, 441 (4th Cir. 1986); Wicker v. McCotter, 783 F.2d 487, 492 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1123 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); United States v.

debate.[36] The number and variety of common law approaches devised to deal with this issue are a measure of the extent to which the goal of uniformity has been frustrated by this omission. This failure of Rule 601 is in part attributable to the absence in the Federal Rules of a definition of "competency" making clear the scope of that concept.

D. Rule 606(b)

Rule 606(b) is a good example of another sort of problem. That Rule makes a juror incompetent to impeach a verdict.[37] Rule 606(b) has generated a significant amount of litigation, with courts applying conflicting readings of the Rule.[38] This problem is largely owing to the Rule's confusing structure and language. Its first sentence contains nearly one hundred words, nine of which are "or."[39] Key terms, such as

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Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984); United States v. Charles, 561 F. Supp. 694, 697 (S.D. Tex. 1983).

36. No federal decision in this area has used Rule 601 as a basis for decision. The court in *United States v. Valdez* cited Rule 601 in passing but treated the issue as one of admissibility controlled by Rule 403. 722 F.2d at 1201. In a decision rendered shortly after the Federal Rules went into effect, the court in Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975), based its decision on a finding that the witness was competent but the court did not cite Rule 601. *See also Kimberlin*, 805 F.2d at 217 n.3 ("We think the more logical approach to the question is to determine whether the experience of hypnosis has rendered a witness incompetent to testify."). At least one federal court has squarely held Rule 601 is not applicable. *Sprynczynatyk*, 771 F.2d at 1122. ("Quite simply, we do not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law.").

Many decisions conclude that admissibility rules concerning scientific evidence should be applied when considering the use of hypnotically-refreshed recollection. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 54, 723 P.2d 1354, 1375, 181 Cal. Rptr. 243, 264, *cert. denied*, 459 U.S. 860 (1982); *Hughes*, 453 N.E.2d at 496. Other cases conclude that the admissibility of testimony produced by hypnotically-refreshed recollection is governed by the principles underlying Rule 403. *See, e.g.*, *Sprynczynatyk*, 771 F.2d at 1123; *Valdez*, 722 F.2d at 1201-03. The two approaches appear to be closely related. *See* Contreras v. State, 718 P.2d 129, 135 (Alaska 1986) ("The *Frye* standard is essentially a 'prejudice-versus-probative value test,' similar to Evidence Rule 403.").

Even if it is not absolutely clear that the use of hypnotically-refreshed recollection raises a competency issue, the question is a close one. Thus, the extent to which the courts have ignored Rule 601 in this area would still be remarkable.

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

38. A good example is the United States Supreme Court's recent decision concerning Rule 606(b) in Tanner v. United States, 483 U.S. 107 (1987). With four Justices dissenting, the Court held that the Rule rendered jurors incompetent to testify that they and other jurors had been under the influence of alcohol or drugs during the trial. *Id.* at 126-27. The decision disappointed the expectations of the commentators. *See* 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 289, at 143-44 (1979); 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 606[4], at 606-28 to 606-50.

39. On reading Rule 606(b), one is reminded of how those who proposed a Federal Rules of Evidence regarded the condition of evidence law before the Rules: "What is lamented is

exceptions permitting jurors to testify concerning "extraneous prejudicial information" and "outside influence," are ambiguous and nowhere defined. Courts have expended little effort to decipher the meaning of these terms, often treating them as interchangeable or abandoning the language of the Rule entirely in favor of the hybrid "extraneous influence."[40] Thus, the Rule's goals of simplification and certainty are frustrated by a combination of poor drafting and judicial unwillingness or inability to address the problems thereby created.

E. Rule 608

Rule 608 also presents more than its share of interpretation and application problems.[41] The Rule purports to regulate the admissibility of evidence offered to prove the witness's character for "truthfulness or untruthfulness."[42] The Rule plainly does not deal with evidence offered to impeach on some other basis, such as bias, lack of capacity or contradiction. Unfortunately, it is often unclear whether an item of evidence merely undermines credibility in one of these ways or also impeaches the witness's character for truthfulness or untruthfulness.[43] Where this is unclear, many authorities claim that courts have discretion whether to apply Rule 608.[44]

This distends the notion of discretion, thereby conferring on the courts power that the Rule withholds. Judicial discretion to decide admissibility exists where the Rules fail to state an applicable standard. The fact that the established standards may be vague or difficult to apply

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their infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners." THOMAS F. GREEN, JR., COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS (1962), *reprinted in* 1 BAILEY & TRELLES, *supra* note 23, Doc. 4, at 42 (1980).

40. *See, e.g.*, United States v. Bassler, 651 F.2d 600, 602 (8th Cir.), *cert. denied*, 454 U.S. 1151 (1981); Virgin Islands v. Gereau, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

41. Again, the drafters failed to define terms that are basic to determining the scope of the Rule and the nature of admissible and inadmissible evidence. Among the basic terms that need to be defined are "extrinsic evidence," "character" and "credibility."

42. FED. R. EVID. 608.

43. *See, e.g.*, Outlaw v. United States, 81 F.2d 805, 807-08 (5th Cir. 1936) ("Whether impeachment . . . by proof of contradictory statements constitutes . . . an attack on . . . character . . . has been much debated. . . . [S]ometimes the contradictory statement appears to raise only a question of memory or mistake, while under other circumstances it seems to indicate a want of trustworthiness.").

44. *E.g.*, EDWIN W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 49, at 117-18 (3d ed. 1984); 3 LOUISELL & MUELLER, *supra* note 38, § 308, at 251; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 608[08], at 608-67.

does not mean the courts have discretion to ignore those standards. At most the interpretation and application problems created by vague rules mean the courts need some room to exercise judgment as to the meaning of that language. Calling this discretion invites the courts to simply ignore the standard and create their own standard or decide cases on an ad hoc and standardless basis, thereby undermining the Rules' goals of uniformity and certainty.

F. Rule 609

Rule 609 poses similar problems. That provision permits the impeachment of a defendant in a criminal prosecution by evidence of a prior felony conviction.[45] The evidence is admissible only if the court determines that its probative value outweighs its prejudicial effect.[46] In some instances, the evidence is admissible only if its probative value "substantially outweighs" prejudice.[47] The language of the rule suggests the burden is on the prosecution to show that probative value outweighs any prejudice.

However, appellate courts generally defer to the trial court's determination if there is any way to rationalize the balance struck.[48] This deference accorded to trial courts has been justified on the ground that Rule 609 grants broad discretion to admit or exclude evidence.[49] Some courts have concluded that this discretionary power is so broad that trial court balancing under Rule 609 is "virtually unreviewable."[50]

This overstates the discretion granted by the Rule. Because preju-

45. FED. R. EVID. 609(a)(1). Rule 609(a)(2) also permits impeachment by evidence of convictions involving dishonesty or false statements. FED. R. EVID. 609(a)(2).

46. FED. R. EVID. 609(a)(1).

47. FED. R. EVID. 609(b) (requiring probative value to substantially outweigh prejudice where conviction more than 10 years old).

48. *See, e.g.*, United States v. Brown, 784 F.2d 1033, 1039 (10th Cir. 1986) (upholding trial court's conclusion that probative value outweighed prejudice although apparently neither trial nor appellate court considered prejudicial effects); United States v. Givens, 767 F.2d 574, 579 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985) (stating that Rule 609(a)(1) requirements are met so long as trial court states that it balanced probative value against prejudice); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981) (holding that since it was possible to conclude that probative value of conviction evidence outweighed prejudice, "we cannot say the judge's ruling was an abuse of discretion"); United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) ("[Trial judge's] balancing of the respective values contemplated in Rule 609 at best was inarticulate, and at worst revealed that he misconceived the purpose of the rule. However, the ruling did not constitute an abuse of discretion, as appropriate reasons could have been given for it."), *cert. denied*, 444 U.S. 1034 (1980).

49. United States v. Lipscomb, 702 F.2d 1049, 1068 n.69 (D.C. Cir. 1983) ("[A]ll [circuits] agree that the ultimate standard of review under Rule 609(a)(1) is whether the district court has abused its discretion.").

50. United States v. Pedroza, 750 F.2d 187, 202-03 (2d Cir. 1984), *cert. denied*, 479 U.S.

dice and probative value are complex concepts that are largely incommensurable, it takes little effort to rationalize any result in cases where the balance is even remotely close. The Rule's allocation of the burden of proof has no function if appellate courts defer to the trial court whenever its decision can be rationalized. Although it is true that balancing probative value against prejudice requires judgment, the exercise of this judgment is limited by the Rule's allocation of the burden to the prosecution.[51] Balancing that is not affected by this limitation simply rewrites the careful compromise of conflicting values reached by Congress and embodied in Rule 609.[52]

III. REASONS FOR THESE PROBLEMS

The problems identified above cannot be lightly dismissed.[53] Ignoring the language of a Rule, recognizing discretion where it does not exist or expanding discretion beyond the scope granted, creating new common law or applying old common law in lieu of the Rules—these judicial acts undermine the foundations of a code-based system of law. The mounds of cases still trying to solve the problems of interpretation presented by the Rules quickly dispel the notion that the problems described in this Essay are rare or that the Rules simplified and made more certain the law of evidence.

The question, then, is why do these problems arise? The answer lies

842 (1986); United States v. Washington, 746 F.2d 104, 107 (2d Cir. 1984) (Newman, J., concurring).

51. *See Lipscomb*, 702 F.2d at 1063.

> [T]he district court must carefully and thoughtfully consider the information before it to determine if probativeness outweighs prejudice to the defendant. This balancing must not become a ritual leading inexorably to admitting the prior conviction into evidence. . . . [T]he burden is on the government to show that the probative value of a conviction outweighs its prejudicial effect to the defendant.

Id.; *see also* United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980).

> Although appellate courts should not overturn evidentiary rulings of trial courts based on the proper exercise of their discretion, it is a primary obligation of appellate courts to insist that this discretion be exercised within the applicable framework of legal rules. In some instances this framework may impose no standard at all or none other than good faith and the avoidance of arbitrariness. In others it is more restrictive. The framework of Rule 609(a)(1) is one of the latter. Congress, after much debate, created a framework in which, with respect to a defendant, the burden of persuasion is placed upon the prosecution and a particular process of weighing is required. Both we and the trial courts must respect that decision.

Id.

52. *See Lipscomb*, 702 F.2d at 1063 n.54 ("Once the balancing stage is reached, the nature of the compromise reached by the Conference Committee precludes any presumption that prior felony convictions should be admitted.").

53. The fact that this Essay makes no comment about Federal Rules of Evidence 610 through 615 should not be taken as a suggestion that the author believes that those Rules do not present similar problems.

in the nature of both the rulemakers and the judiciary. If any evidence codification is to work, it must take into consideration the limitations of those who are asked to write and apply it.

The problems described in this Essay are in part the fault of the rulemakers themselves.[54] The Rules are frequently confusing, utilizing undefined terms where meaning is not clear from context. Further, rather than providing a clear rule regulating admissibility, the Rules repeatedly make reference to discretion and the weighing of probative value against prejudicial impact.[55] As with the terms themselves, the manner in which they might be balanced is left undefined. This virtually invites the judiciary to assume an undisciplined, ad hoc approach to applying the Rules.

One reason for the rulemakers' performance is clear: rulemaking is a political process, the lifeblood of which is compromise. While compromise permits rules to be enacted, it frequently undermines clarity and definitiveness. As a political institution it was impossible for Congress to refrain from regarding the Rules in political terms. The Advisory Committee was frequently forced to permit politics to drive its efforts. The alternative might have been rejection of the Rules.

Paradoxically, another reason for Congress's performance was simply lack of political interest. In explaining one of the drafting incongruities of the version of Rule 609 originally enacted, Justice Scalia observed that the bill proposing the Federal Rules was "relatively inconsequential legislation."[56] In other words, many of the Rules were insufficiently political to merit more interest from Congress.

Finally, many of the instances of loose drafting and reliance on discretion found in the Rules are due to the nature of certain evidence issues. Some issues present value conflicts that are not easily resolved. Unable to state a definitive rule, the rulemakers equivocated with vague language or left the issue to the courts' discretion. Rules 608 and 609 are good examples of such value conflicts. The admission of character evidence to impeach a witness promotes the value of accurate factfinding by enabling the trier of fact to properly weigh the reliability of testimony.[57] On the other hand, such evidence might be misused by the trier of fact to draw improper and unfairly prejudicial inferences.[58] Balancing these val-

54. By "rulemakers," I mean both the evidence law experts who drafted the Rules and the members of Congress that evaluated the proposed Rules and enacted them into law.

55. *E.g.*, FED. R. EVID. 403, 412, 609(a)(1).

56. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

57. FED. R. EVID. 608(a) ("[T]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . .").

58. *See* FED. R. EVID. 609(a); H.R. REP. NO. 650, *supra* note 1, at 4, *reprinted in* 1974

ues produced two of the most confusing provisions in the Federal Rules.

Whatever the reasons for the rulemakers' failures, the impression one takes away from reading the Rules is that they often appear closer to a draft of general principles than a finished set of rules. Implicit in every undefined term and convoluted clause is the hope that the courts will finish the job of rulemaking.

However, trial courts are by their nature unable and unwilling to rewrite this draft. The complexity of Rules like 606, 608 and 609 makes thoughtful application at the trial level all but impossible. Trial courts must resolve evidentiary issues quickly to keep from prolonging proceedings that are often already tortuously cumbersome. Thus, where a Rule does not define terms or state a clear standard for admissibility, trial courts lack the time to analyze the policies and legislative history of the rule to discover insight into its meaning. Trial lawyers could mitigate this, but as a group they seem to lack the knowledge of evidence law required to educate the judiciary. Further, the natural inclination of a trial judge when faced with unclear rules and lawyers suggesting different interpretations is to read discretion into vague language or fall back on the familiar common law learned in law school.

Congress could have anticipated this judicial inclination to expand and abuse the discretionary powers created by the Rules. Trial judges, particularly those with lifetime tenure, are notorious for doing what they want. Thus, it should not be surprising to learn that these judges will take every opportunity presented by vague language and grant of discretion to avoid the thrust of a rule. After all, evidence rules can be limits on the powers of the trial judge, allocating power to attorneys and juries, the very people whom a trial judge is hired to control.

Unlike trial judges, appellate judges are not pressured to make quick rulings on evidence questions. However, there is an understandable reluctance to reverse, even where a careful analysis of a rule may indicate the trial court erred. Appellate courts are mindful of the constraints under which trial courts operate and are loathe to require retrials because of evidence law errors. Thus, where the language of the rule permits, appellate courts are inclined to justify the trial judge's decision on the grounds of discretion. Where this is not possible, appellate courts can avoid reversal by sailing the case into that Bermuda Triangle of legal analysis, the Harmless Error Doctrine.[59] The frequency with which this

U.S.C.C.A.N. at 7084; S. REP. NO. 1277, *supra* note 1, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 7061.

59. FED. R. CRIM. P. 52(a) ("[A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Harrington v. California, 395 U.S. 250, 251-52

doctrine is invoked and the language of the Rules is stretched tells us something important about the attitude of appellate judges. When Justice Scalia suggested that Congress regarded the Federal Rules as "relatively inconsequential,"[60] he was also giving us a good look into how he and many other appellate judges regard evidentiary issues. The infrequency with which the Supreme Court hears cases under the Federal Rules of Evidence tends to confirm this suggestion. In short, an appellate court is generally not the place where evidence law will be properly applied or developed. It must happen at the trial level.

IV. WHAT TO DO

These observations call into question the efficacy of an evidence code, at least in the form frequently taken by the Federal Rules of Evidence. A successful codification must be based on a realistic notion of the nature of trial judges: they do not wish to see their powers limited. This suggests that rulemakers cannot rely on trial judges to fine-tune ambiguous rules. Rather, rulemakers must keep rules short and simple. Terms must be defined and ambiguity kept to a minimum. Rules must establish limits from which the trial courts cannot escape. The trial courts might actually grow to favor such rules because they can make the job of judging easier.

Where precise rules cannot be written because of doctrinal and political conflict, it makes sense to allow courts to develop common law rather than force them to cope with rules difficult to fathom.[61] Where rulemakers are unable to provide a clear statement of doctrine, codification does not solve problems, it creates new ones. Judicial efforts to develop doctrine are discouraged because judges are forced to conform to language drafted to avoid rather than resolve issues. Further, courts can justify a result by pointing to the Rule and the discretion it provides, rather than pointing to policy or logic.

The risk inherent in giving courts this power is that they may abuse it, leading to inconsistency, uncertainty and unfairness. After all, these are the judicial abuses that made the Federal Rules necessary. Thus, it is possible that abandoning evidence rules in favor of a common law approach could make worse the problems described in this Essay.

But this Essay does not suggest there should be no rules of evidence.

(1969) (asserting harmless error doctrine permits conviction to stand despite constitutional error if court finds beyond reasonable doubt error did not affect outcome of case).

60. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508 (1989) (Scalia, J., concurring).

61. This is precisely what the Federal Rules do in connection with privileges. *See* FED. R. EVID. 501.

Rather, we should only have rules that can be stated simply and understandably. This is no more than saying we should only have those rules with a chance of preventing abuse. Of course, as to the remaining issues where courts could be given direct responsibility for developing law, there would still be room for abuse. Judges would still have the inclination to assume that their powers are broad. But it makes sense to hope, if not assume, that courts would act more responsibly when given more responsibility. If the courts did not so act, evidence law will be no worse off than it is now. But society may be better off because it would be clear who is to blame.