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### Foreword: Should Wyoming Adopt These Rules?

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# LAND AND WATER LAW REVIEW

## SYMPOSIUM ON THE FEDERAL RULES OF EVIDENCE

### FOREWORD: SHOULD WYOMING ADOPT THESE RULES?

*Christopher B. Mueller\**

Evidence law has come a long way when its essence can be distilled in a readable and acceptable form in some sixty-two rules, and these can be printed in full in a pamphlet of manageable size. Just such an achievement is the Federal Rules of Evidence.

This Student Symposium on the Rules has been occasioned not so much by the fact that the Congress has enacted the Federal Rules into law, although that would be reason enough, but by the fact that the rules are now under consideration by two Committees of the Wyoming Supreme Court for possible adoption in Wyoming. The aim of these Committees is to formulate a recommendation to the Supreme Court on the issue of adoption, pro or con.<sup>1</sup> (Parenthetically, it is worth noting that if Wyoming adopted the Rules today, it would be the seventh state to do so: the Rules are now effective in

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1. The Permanent Rules Advisory Committee (Chairman, Professor Frank J. Trelease) and the Criminal Procedure Advisory Committee (Chairman, Judge J. Reuel Armstrong) have met twice in joint session in Laramie, and have studied and discussed many of the Rules at length, taking into consideration the present status of the law of Evidence in Wyoming, and attempting to determine whether and how these Rules would change Wyoming practice. More meetings are anticipated.

six states,<sup>2</sup> and under consideration in at least seven more, in addition to Wyoming.<sup>3</sup>)

For those members of the Wyoming Bar who have not yet become acquainted with the Federal Rules this student exploration of the subject should prove most timely and useful.

Very briefly, for it is the following student materials which get to the meat of the Rules, I want to take up four general subjects: The overall features of the Rules, some of the central themes, the question whether the Rules would be of benefit to Wyoming, the question whether it might be wise in some instances to depart from the federal model.

### *General Features.*

The Federal Rules are sixty-two in number, divided among eleven Articles, three of which (Relevancy and Its Limits, Privileges, and Hearsay) are taken up in the following student Symposium. (In a separate article in this issue, I take up the matter of instructing the jury upon presumptions in civil cases,<sup>4</sup> which is at the heart of Article III.) The Rules cover all of the subjects generally associated with Evidence law, with the exception of presumptions in criminal cases and burdens of persuasion generally;<sup>5</sup> they also do *not*

2. The six states are Arkansas, *see* ARK. STAT. ANN. § 28-1001 (Supp. 1976); Maine, *see* MAINE RULES OF EVIDENCE, set forth at the end of Title 14 (Court Procedure—Civil) in ME. REV. STAT. ANN. (Supp. 1975); Nebraska, *see* NEB. REV. STAT. § 27-101 to -1103 (Supp. 1975); Nevada, *see* NEV. REV. STAT. §§ 47.020-52.295 (1973); New Mexico, *see* N.M. STAT. ANN. §§ 20-4-101 to -1102 (Supp. 1975); and Wisconsin, *see* WIS. STAT. ANN. §§ 901.01-911.02 (1975).
3. I am advised that the Federal Rules are currently under consideration for possible adoption in the states of Florida, Minnesota, Montana, North Dakota, Oklahoma, Vermont, and Washington, in addition to Wyoming.
4. *See* Mueller, *Instructing the Jury Upon Presumptions In Civil Cases: Comparing Federal Rule 301 and Uniform Rule 301*, 12 LAND & WATER L. REV. 219 (1977).
5. The Federal Rules are silent altogether on burdens of persuasion, except for the provision in Rule 301 which makes clear that in civil cases presumptions governed by federal law do not affect the burden of persuasion. In the form in which the Federal Rules were transmitted by the Supreme Court to the Congress, there was a provision governing presumptions in criminal cases. *See* 56 F.R.D. 183, 212 (November, 1972 Draft, Rule 303). The provision was deleted by the House Judiciary Committee because "the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the criminal code." H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 5 (1973). The bills apparently referred to are H.R. 3907, 94th Cong., 1st Sess. 345-46 (1975), and its Senate counterpart, S. 1, 94th Cong., 1st Sess. 345-46 (1975), which would, if en-

cover evidentiary privileges in any detail, leaving this one subject to "Acts of Congress," other "rules prescribed by the Supreme Court pursuant to statutory authority," and to "the principles of the common law as they may be interpreted . . . in the light of reason and experience."<sup>6</sup> However, the Advisory Committee which drafted the Federal Rules had proposed some twelve rules to govern privileges,<sup>7</sup> which the Congress rejected; the new Uniform Rules of Evidence recently adopted by the National Conference of Commissioners on Uniform State Law generally track the Federal Rules, but also include (with some modifications) the twelve rules which the Advisory Committee had proposed, and so it would be easy enough for Wyoming to adopt privilege rules within the general framework of an adoption of the Federal Rules. Whether the Wyoming Supreme Court can adopt such privilege rules is a matter open to some question, and I return to it in a moment.

The most notable features of the Federal Rules include the following:

(1) In Article II (Judicial Notice), a provision for notification of the parties and a hearing in connection with judicial notice of "adjudicative facts" (Rule 201);

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acted, entirely revise Title 18 of the United States Code. The version of the Federal Rules endorsed by the National Conference of Commissioners on Uniform State Laws in 1974 contains language of presumptions in criminal cases which is substantially identical to that proposed by the Advisory Committee and the Supreme Court, but very different from the language contained in the two statutes presently under consideration by the Congress. See 1974 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 912, 919-20.

6. See FED. R. EVID. 501.

7. See 56 F.R.D. 183, 230-61 (1972). The new Uniform Rules track closely this Court-promulgated Draft of the Federal Rules. Like the Uniform Rules, the Court-promulgated Federal Rules would have (1) placed the entire subject of privileges exclusively in the domain of the Constitution, statutes, and rules, and outside the reach of the common law, (2) reduced the number of recognized privileges, and (3) resolved some recurrent questions about the validity of inferences and arguments based upon claims of privilege. The Federal Rules, as transmitted by the Court to the Congress, would have eliminated the physician-patient privilege altogether (substituting in Proposed Rule 504 a psychotherapist-patient privilege), and would also have eliminated altogether an interspousal confidential communication privilege (substituting therefor a limited husband-wife testimonial privilege, under Proposed Rules 505, which would *only* have allowed an accused in a criminal case to prevent his spouse from testifying against him).

(2) In Article IV (Relevancy and Its Limits), a provision insuring that when a person's character may be proved as circumstantial evidence (to show that the person did or did not commit a particular act), it may be proved by "testimony as to reputation *or by testimony in the form of an opinion*" (Rule 405; emphasis added); another provision insuring that statements made during settlement negotiations cannot be received in evidence, regardless whether they were phrased "hypothetically" or "contingently" or "without prejudice," thus making such negotiations easier to conduct with security (Rule 408);

(3) In Article VI (Witnesses), a provision abolishing almost all incompetency rules, suggesting an opportunity for a state like Wyoming to do away with its Dead Man's Statute (Rule 601); a broadly drawn provision preventing jurors from impeaching their verdicts even in cases of so-called "quotient" or "chance" verdicts, although jurors may still give evidence of "extraneous prejudicial information . . . improperly brought to the jury's attention" (Rule 606); a provision insuring that when character evidence is received to attack credibility, the evidence may be testimony "in the form of *opinion* or reputation" (Rule 608; emphasis added); a provision insuring that judges may protect the right of the accused to give evidence by excluding evidence of prior felonies when offered for impeachment purposes by the prosecution, although no such discretion is provided for if the prior conviction was for a crime involving "dishonesty or false statement" (Rule 609); a provision abolishing the requirement that a cross-examining attorney "telegraph his punch" when impeaching a witness by a prior inconsistent statement (Rule 613);

(4) In Article VIII (Opinions and Expert Testimony), provisions substantially simplifying the process of presenting expert testimony, a matter taken up again presently;

(5) In Article III (Hearsay), *broad new exceptions* allowing (i) receipt of substantive evidence of the prior statements of a witness if these were given under oath under

penalty of perjury (Rule 801(d)(1)(A)), (ii) receipt of prior statements of identification of a person (Rule 801(d)(1)(C))—and both of these exceptions may be expected to be of considerable use to prosecutors—and (iii) receipt of statements of “[P]resent sense impression” (Rule 803(I)); also *some older exceptions redrawn*, including provisions dealing with admissions by employees (Rules 801(d)(2)(D)), the use of learned treatises (Rules 803(18)), and declarations against interest, now including *penal* interest (Rule 804(b)(3))—and this redrawn exception should be of considerable use to criminal defense lawyers;

(6) In Article IX (Authentication), a flexible approach to the problem of laying a foundation for the receipt of documents and other physical evidence (Rule 901); expanded self-authentication provisions, which allow receipt of newspapers and trade inscriptions without foundation, if otherwise admissible (Rule 902(6) & (7)); and

(7) In Article X (Contents of Writings, Recordings and Photographs), a considerable reduction of the vigor of the so-called “best evidence rule” in recognition of the fact that we live in an age of instant copies, so that under the Rules a duplicate is as admissible as an original, unless the party opposed to admission of the document raises a “genuine question” as to authenticity or it would “in the circumstances” be otherwise “unfair” to receive the duplicate (Rule 1003).

### *General Theme in the Federal Rules.*

As the above sketch should indicate, one theme in the Rules—perhaps the most important of them all—echoes the thinking of James Bradley Thayer that logically probative evidence should be received unless there is some clear and definite ground in policy to exclude it.<sup>8</sup> In today’s world, that is almost a common-sense notion; it has been endorsed for

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8. *See* THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 530 (1898) (“[T]wo leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.”).

years in Wyoming in the context of Civil Rule 43(a), which provides that "the statute or rule which favors the reception of evidence governs . . . ."

In the Federal Rules, this idea is perhaps most clearly expressed in the provisions of Article VII (Opinions and Expert Testimony), although the same thought is clearly evident throughout the Rules. Thus opinions, as Rule 701 makes clear, may be received if "rationally based on the witness' perceptions and "helpful" in understanding his testimony or determining the facts. And expert testimony has been set free of some of the hobbles of common-law days: An expert is not necessarily somebody with an advanced degree, but rather someone with "knowledge, skill, experience, training, or education" (Rule 702; emphasis added); an expert may give his opinion on the basis of information of any type "reasonably relied upon" by others in his field, whether or not such underlying data would be admissible in evidence (Rule 703); no longer can objection be taken that the expert is giving an opinion on the "ultimate issue" (Rule 704); and no longer is it required that the facts underlying an expert's testimony be first established by evidence (Rule 705)—gone, in other words, is the day when only the hypothetical question will do as the vehicle for getting at the expert's knowledge in any jurisdiction following the Federal Rules.

A second theme in the Rules amounts to a clear affirmation of authority of the trial judge to exercise discretion in areas where Rules simply cannot help. The crucial provisions are Rules 403 and 611. The former allows the trial judge to exclude even relevant evidence if its probative value is "substantially outweighed" by certain dangers ("unfair prejudice," "confusion of the issues," or "misleading the jury") or certain "considerations" ("undue delay, waste of time, or needless presentation of cumulative evidence"). The latter not only authorizes but *directs* the trial judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" to protect the truth-finding process, avoid waste of time, and protect witnesses—and the trial judge is expressly authorized to allow

the cross-examining attorney to explore matters beyond the scope of the direct examination (by questions propounded "as if on direct"—in other words, nonleading questions), although the language of the rule makes clear that ordinarily cross-examination should be "limited" to the scope of direct.

Other examples of this flexible approach, which allows latitude to the trial judge, are found in the hearsay rules. Hearsay not within a particular exception may nevertheless be received *if* it has "circumstantial guarantees of trustworthiness" which are "equivalent" to those in the recognized exceptions, but the needs of the practicing bar for some certainty in Evidence law is protected by provisions requiring fair notice to the opposition, and there must be good reason to go beyond the confines of the recognized exceptions. (See Rules 803(24) and 804(b)(5)). Still others appear in Article VI (Witnesses): Thus, a trial judge has discretion under Rule 609 in determining whether to admit certain prior crimes evidence to impeach a criminal accused.

Finally, a third theme in the Rules involves the abolition of common-law technicalities which amounted to pitfalls for the lawyer and obstructions for the factfinding process. Already noted is the abolition of the requirement that the cross-examiner "telegraph his punch" when confronting the witness with prior inconsistent statements; another example is the abolition of the "no eyewitness" requirement as the precondition for the receipt of habit evidence (Rule 406).

### *Should Wyoming Adopt the Rules?*

Obviously each lawyer concerned with litigation will have his own opinion; in due course the joint Committees studying the subject will reach a decision too; ultimately the Wyoming Supreme Court will have to come to a decision. But my own answer is an unqualified Yes, and for the following reasons:

Evidence law is little good to anybody if it is inaccessible, and Wyoming Evidence law is often worse than inaccessible:

On many questions it exists only in the minds of judges and the habits of lawyers. The Federal Rules would go far to cure this problem. They succeed admirably in achieving a middle ground between a creed and a compendium.<sup>9</sup> That is, the Rules are not so brief and general as to be of no use to anybody, but neither are they so lengthy, complex, and exhaustive as to erect obstacles to practical use and understanding. Like the Rules of Civil Procedure, the Rules of Evidence provide just enough specificity, rather than too much or too little in the way of detail.

Wyoming Evidence law must be researched through the digests or through general treatises, the latter being valuable only on the assumption that as the general law goes, so goes Wyoming law. The Rules would provide Wyoming not only with *law*, but also with an orchestrating principle under which the decisions of the Supreme Court would be grouped—a principle far more useful than the outline in the digests. Moreover, adoption of the Federal Rules would create instant precedents which would be of clear value, though not of binding effect, in Wyoming—the federal and state decisions construing the same language of the same Rules.

Evidence law, like other law, is not a static principle, but an evolving approach to recurrent problems. How would Wyoming decide new questions of Evidence where other jurisdictions have broken new ground? The Federal Rules of Evidence provide many direct answers. Better than the hit-and-miss pattern of decided cases, the Rules suggest at least a proper approach to other questions. And adoption of the Rules would mean establishment of a mechanism for answering still other questions as yet unforeseen.

And who but lawyers—practitioners, judges, and professors too—should formulate Evidence law? Should the legislature take up the subject? Does the bar want the principles of Evidence law to be frozen into statutory form in Wyoming?

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9. In this *Foreward* to the Model Code of Evidence, Professor Morgan attributed to Professor Maguire the remark that in framing a provisions to govern the receipt of evidence, "the choice is between a catalogue, a creed, and a Code." MODEL CODE OF EVIDENCE 13 (1942).

Does anybody really think the legislature will take up the task?<sup>7</sup>

*Departures from the Federal Model.*

By all indications, the two Committees presently studying the Federal Rules for possible adoption in Wyoming have already determined to keep departures from the federal model to a minimum. In my judgment, there are two major areas—privileges and presumptions—which call for changes, and a very few other rules which merit slight changes.

With respect to privileges and presumptions, there are two problems to consider. The first is whether the Wyoming Supreme Court has the *power* to promulgate rules governing these matters. While there can be no doubt of the power of the Court to promulgate rules of Evidence, that power is statutorily limited in that such rules may not “abridge, enlarge nor modify substantive rights.”<sup>10</sup> Most of Evidence law does not involve substantive rights, for the overriding purpose and effect of Evidence rules are to guide and safeguard the process by which facts are ascertained. This is true in most of the areas of Evidence law—judicial notice, relevancy, witnesses, opinions and expert testimony, hearsay, authentication, best and secondary evidence. In short, the areas covered by all the Federal Evidence Rules outside of Article III (Presumptions) and V (Privileges) may generally be described as nonsubstantive in character.<sup>11</sup>

But privilege rules do not exist principally for the purpose of safeguarding the factfinding process. Rather, such

10. See WYO. STAT. §§ 5-18 (empowering the Wyoming Supreme Court to “adopt, modify and repeal” rules governing “pleading, practice and procedure”), and 5-19 (expressly including “evidence” within the range of subjects which court-promulgated rules may govern, but also providing: “Such rules shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of the courts nor change the provisions of any statute of limitations.”) (1975).

11. There are some apparent exceptions to the pattern. Occasionally rules generally considered as governing aspects of relevancy appear to embody substantive policies. For example, the common rule which excludes evidence of subsequent repairs rests at least as much upon the substantive policy of encouraging such repairs as upon the notion that the fact of repairs is irrelevant on the question of negligence. Generally, however, the rule is considered to be one of relevancy. FED. R. EVID. 407 covers this subject, and is found in Article IV (Relevancy and Its Limits).

rules exist to protect certain relationships outside the courtroom whose importance to society is great enough to justify some curtailment of the factfinding process. While privilege rules might in a sense serve the interest of ultimate truth by conceding in effect that some kinds of testimony simply cannot be compelled, and that perjured testimony rather than truth is a likely product of forced disclosure in some instances,<sup>12</sup> nevertheless it is believed that the major impact of privileges in court is to impede the ascertainmmt of facts. In the *Erie* context, privileges are probably substantive;<sup>13</sup> in the intrastate context, privileges are probably substantive for the reasons suggested above, meaning that the legislature rather than the Court should decide the issue.

Presumptions too have a substantive aspect, for they enhance or fill out the description of substantive rights in much the same manner as do the rules allocating the burden of persuasion.<sup>14</sup> But the operation of presumptions, unlike matters of privilege, is a matter peculiarly ill-suited for the legislative process, and peculiarly within the competence of judges and lawyers.<sup>15</sup> While legislatures often enough *create* presump-

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12. See, e.g., Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109-10 (noting that European legal thought "seems to regard at least certain privileges as consistent with the goal of accurate fact-finding because they help avoid perjury") (1956).

13. See, e.g., *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555 n.2 (2d Cir. 1967) (state attorney-client privilege applies in diversity suit); *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 466 (2d Cir. 1962) (state physician-patient privilege applies in diversity suit); *Baird v. Koerner*, 279 F.2d 623, 632 (9th Cir. 1960) (state attorney-client privilege applies in federal summons enforcement proceeding). See also Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 545-47 (1956), and Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101, 117-24 (1956). The Congress did not directly address the question whether privileges were substantive for *Erie* purposes, but legislated a result which seems consistent with the view that privileges are substantive by enacting, in Federal Rule 501, a requirement that state-created privileges be applied "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision." And see H.R. REP. No. 93-650, 93d Cong., 1st Sess. 9 (1973) ("The proviso [of Rule 501 quoted above] is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie* . . . , a result in accord with current federal court decisions. [Citation to *Republic Gear Co.*, *supra*.] The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view . . . that this result is not mandated under *Erie*").

14. See Mueller, *supra* note 4.

15. The Wyoming Supreme Court has had occasion to speak out strongly in the subject of judicial control over court procedures. See *Holm v. State*, 404 P.2d 740, 743 (Wyo. 1965) ("Courts have inherent power to control

tions, seldom do statutes spell out the *operation* of presumptions. Far more typically, presumptions operate in the manner of judge-made tools for dealing with proof and implementing the purely substantive tenets of statutory and common law. For *Erie* purposes, the framers of the Federal Rules thought presumptions were substantive; for purely internal federal purposes—that is, outside the *Erie* context—They obviously did not think so.<sup>16</sup> The approach of the framers was sound: Presumptions should be considered as part of the law of “evidence” within the meaning of the Wyoming Enabling Act, regardless what their substantive character may be for purposes of the relationship between the central government and the States.<sup>17</sup>

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the course of litigation and to adopt suitable rules therefor. [Citations omitted] This means, of course, it is not within the power of the legislature to prescribe how courts shall perform their functions any more than courts can prescribe how the legislature or executive officers shall perform their functions.” Accordingly, a provision in a statute requiring courts in civil commitment hearings to receive “all relevant and material evidence” and “not to be bound by the rules of evidence” could be considered as unconstitutional.)

16. Thus, in the form proposed by the Advisory Committee and submitted by the Supreme Court to the Congress, Rule 301 provided that in civil cases “not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” 56 F.R.D. 183, 208 (1972). Regrettably, the Congress amended this provision, substituting a rule under which a presumption in such cases “imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.” See generally Muller, *supra* note 4. However, the committee reports accompanying the congressional modifications of the rule did not single it out as an aspect of substantive law. See H.R. REP. No. 93-650, 93d Cong., 1st Sess. 7 (1973); S. REP. No. 93-1277, 93d Cong., 2d Sess. 9-10 (1974); and H.R. CONF. REP. No. 93-1597, 93d Cong., 2d Sess. 5-6 (1974). The Advisory Committee also made clear its view that for *Erie* purposes presumptions were substantive, likening them to burdens of persuasion and citing in its Note to Rule 302 the Supreme Court decisions in *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939), and *Palmer v. Hoffman*, 318 U.S. 109 (1943), so holding, as well as the one Supreme Court decision in *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), which indicates that presumptions too are substantive for *Erie* purposes. See 56 F.R.D. 183, 211 (1972). As proposed by the Advisory Committee and transmitted by the Supreme Court to the Congress, and as enacted by the Congress, Federal Rule 302 requires that state law be applied to determine “the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision . . . .”
17. That the distinction between “substance” and “procedure” may be different for *Erie* purposes from what it is for other purposes has been implicitly recognized by the Wyoming Supreme Court, which has shown some inclination to read broadly the statutory rulemaking power. See *State v. District Court*, 399 P.2d 583, 585 (Wyo. 1965). And see *Hanna v. Plumer*, 380 U.S. 460, 464 (1965), construing broadly the mandate of the Rules Enabling Act, 28 U.S.C. § 2072 (1958).

With respect to privileges, this first hurdle—the question of the extent of the Court's *power*—can be avoided altogether. The Court could promulgate a close counterpart to Federal Rule 501, which says essentially that privilege law in Wyoming is determined by statute, and “by the principles of the common law as they may be interpreted . . . in the light of reason and experience.” In a purely formalistic sense, even such a rule prescribes substantive rights, if privileges be substantive, but since it would not actually change present practice, a rule of this sort probably would neither “abridge, alter, nor modify” such rights in the manner proscribed by statute.

If the Court were to leap rather than avoid the “power” hurdle—by deciding, unwisely in my opinion, that privileges are not substantive—then the further question remains whether Wyoming should adopt the privilege rules proposed by the Supreme Court and rejected by the Congress, and whether Wyoming should modify any of those rules in the manner recommended by the National Conference of Commissioners on Uniform State Laws, or make any other modifications. (I should point out here that two other states, New Mexico and Maine, did adopt extensive rules of privilege through court action, and both of those states have statutes similar to Wyoming's, barring court-promulgated rules affecting substantive rights.<sup>18</sup> It is not, in other words, wholly academic to consider the possibility of Court-promulgated privilege rules for Wyoming!)

If Wyoming were to adopt the privilege law contained in the Court-proposed federal rules, or in the Uniform Rules, the consequences would be threefold. First, the possibility of a common-law evolution of privilege law would be curtailed altogether, for Uniform Rule 501 makes it clear (as did

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18. See N.M. STAT. ANN. § 20-3-1 (1953) (providing that court-promulgated rules “shall not abridge, enlarge or modify the substantive rights of any litigant”), and N.M. STAT. ANN. §§ 20-4-501 to -513 (Supp. 1975) (setting out privilege rules which follow closely the November, 1972 Draft of the Federal Rules). And see ME. REV. STAT. ANN. tit. 4, § 8 (1964) (providing that court-promulgated rules “shall neither abridge, enlarge nor modify the substantive rights of any litigant”), § 9-A (Supp. 1975) (providing that the Supreme Judicial Court has power to promulgate rules of evidence), and MAINE RULES OF EVIDENCE 501-513 (tracking closely the November, 1972 Draft of the Federal Rules).

Court-proposed federal rule 501) that “no person has a privilege” not to testify unless “otherwise provided” by constitution, statute, or other specific rule. Second, adoption of the Uniform Rules on privileges would insure the existence, but simultaneously sharply limit the scope, of some eight different privileges. (The Court-promulgated federal rules included a ninth privilege—for required reports, under Court-promulgated rule 502—which is not in the Uniform Rules.) These are Lawyer-Client (Court-promulgated rule 503, Uniform Rule 502), Psychotherapist-Patient (Court-promulgated rule 504; Uniform Rule 503 would add Physician-Patient), Husband-Wife (Court-promulgated rule 505, Uniform Rule 504), Religious (Court-promulgated rule 506, Uniform Rule 505), Political vote (Court-promulgated rule 507, Uniform Rule 506), Trade Secrets (Court-promulgated rule 508, Uniform Rule 507), Secrets of State and Other Information (Court-promulgated rule 509, Uniform Rule 508), and Identity of Informer (Court-promulgated rule 510, Uniform Rule 509). Third, adoption of the Court-promulgated federal rules or the Uniform Rules would resolve some recurrent problems associated with privileges in general: How are they waived (Uniform Rules 510 and 511)? Can a claim of privilege be made subject to comment by judge or counsel, and can such a claim support an adverse inference by the jury (Uniform Rule 512)? (The answer to both of the latter questions is No, and the jury on request may be admonished on the latter point.)

But what a narrow Husband-Wife Privilege the Uniform Rules create! (The Court-promulgated federal rule is hardly any better.) Instead of the *two* interspousal privileges commonly recognized, the Uniform Rules (and the Court-promulgated federal rules) provide for only one; the version in the Uniform Rules is a hybrid one at that. The two privileges commonly recognized are (*i*) the confidential communications privilege, which allows a witness-spouse to refuse to disclose the substance of confidential interspousal communications, and enable a party-spouse to prevent the witness-spouse from doing so, and this privilege survives the death of the marriage

by divorce,<sup>19</sup> and (ii) the testimonial privilege, which enables a party-spouse to prevent a witness-spouse from testifying against him or her and enables the latter to refuse so to testify,<sup>20</sup> and this privilege exists only so long as the marriage exists. The first of these two privileges is commonly available in both criminal and civil proceedings, with certain exceptions, and the second only in criminal cases, again with exceptions.

But Uniform Rule 504 creates *only* a privilege for a criminal defendant to prevent his spouse from testifying as to confidential communications! On other subjects, such as what the witness-spouse saw the accused do, there is no privilege; in civil cases, there is no spousal privilege of any kind; if the marriage terminates, a party may not keep his erstwhile spouse from revealing all the confidences of the marriage in any proceedings. And Court-promulgated rule 505 creates only a testimonial privilege, available only in criminal cases; it provides no confidential communications privilege, and thus no privilege of any sort which survives the dissolution of the marriage.

It should also not be overlooked that the Uniform Rules narrowly define the Lawyer-Client Privilege in cases in which the client is a corporate entity (a consequence of the narrow definition of "representative of the client" contained in Uniform Rule 502(a)(2); the Court-promulgated counterpart contained no definition of "representative of a client" at all, leaving the whole problem open for resolution by case-law gloss).

In sum, before deciding that either the Uniform Rules or the Court-promulgated federal rules would improve the law of privileges in Wyoming, there is much to be considered. I doubt very much the wisdom of the handling of the Husband-Wife Privilege in both versions of the rules; whether the Lawyer-Client Privilege would be broad or narrow in connection with corporate clients should be of considerable concern

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19. McCORMICK, *Evidence* §§ 78-86 (2d ed. 1972).

20. *Id.* § 55.

to the bar. So should the question whether to have a Physician-Patient Privilege (as the Uniform Rules do, but the Court-promulgated rules do not).

With respect to presumptions, the Wyoming Supreme Court has authority to promulgate rules, but in my view the Court should not follow the federal model as to presumptions in civil cases. Rather than adopting Federal Rule 301, it should adopt Uniform Rule 301, under which presumptions affect the burden of persuasion rather than the burden of production.<sup>21</sup> On the question of presumptions in criminal cases, it might be well to delay adoption of any rule: Presently pending in Congress are two bills which would reform the United States Criminal Code and provide express guidance upon the operation of presumptions in criminal cases.<sup>22</sup>

There are a very few other areas in which Wyoming should consider departures from the federal model. Rule 405 should be amended to make it clear that in criminal homicide cases the accused may seek to prove that the victim was the first aggressor by introducing evidence of the character of the victim in the form of proof of specific belligerent acts. (As now written, Rules 404 and 405 appear to allow proof of the victim's character, but not in the form of proof of specific acts.) Thought should be given to expanding the scope of Rule 801(d)(1)(A), which as written allows the substantive use of prior inconsistent statements only where such statements were under oath and subject to penalty of perjury: A large number of states allow substantive use of prior inconsistent statements without this restriction;<sup>23</sup> the Supreme Court has held such a rule constitutional in criminal cases;<sup>24</sup> and in Wyoming, it seems that the "under oath" requirement would mean that the exception would have relatively little use,

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21. See Mueller. *supra* note 4.

22. See S. 1, 94th Cong., 1st Sess. 345-46 (1975), and H.R. 3907, 94th Cong., 1st Sess. 345-46 (1975).

23. See CAL. EVID. CODE § 1235 (West 1966), and Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L. J. 3, 35 (1975) (reporting that eleven states, and the Virgin Islands and the Canal Zone, permit substantive use of prior inconsistent statements of a witness who is available for cross-examination).

24. See, e.g., California v. Green, 399 U.S. 149 (1970); Nelson v. O'Neil, 402 U.S. 622 (1971).

since grand juries are not in common use in Wyoming, and grand jury proceedings are the most likely source of statements which would qualify under the exception as written. Some thought should be given to expanding the scope of judicial discretion to exclude evidence of prior criminal convictions offered to impeach the accused as a witness in a criminal case. Better than a no-discretion rule, Rule 609(a) would be better yet if the judge were empowered to exclude by the exercise of discretion *any* and *all* previous convictions, if under the circumstances the danger of prejudice appears greater than the probative value of the proof.

But these are small points. As a whole, the Federal Rules of Evidence represent a great achievement. As much as *rules* can, the Federal Rules hold out real promise as an aid to solving the problems of Evidence law. How well the promise will be realized can only be known with the passage of years, but the Rules on their face are so good that the test of time should not be required: They need a chance to work, and should be adopted forthwith.