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THE FORMER TESTIMONY HEARSAY EXCEPTION: A STUDY IN RULEMAKING, JUDICIAL REVISIONISM, AND THE SEPARATION OF POWERS

GLEN WEISSENBERGER†

Federal Rule of Evidence 804(b)(1), the former testimony hearsay exception, has been the subject of more divergent judicial interpretations than virtually any other provision of the Federal Rules of Evidence. Some courts have viewed the rule as valuing accuracy above all, and have admitted almost any relevant evidence. Other courts have identified fairness as the policy underlying the rule, and have admitted only evidence that does not deprive litigants of adversarial rights. Professor Weissenberger demonstrates that Congress intended fairness considerations to govern interpretations of rule 804(b)(1). He then calls on the Supreme Court to provide a definitive interpretation of the rule, in order to force lower courts to honor a congressional policy decision, and to resolve a conflict among the circuits.

I. INTRODUCTION

Enacted on January 2, 1975, to provide a comprehensive and uniform approach to evidentiary matters in the federal courts, the Federal Rules of Evidence[1] were the culmination of a rulemaking process which spanned more than a decade and which involved the Supreme Court and both houses of Congress.[2]

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1. Federal Rules of Evidence for United States Courts and Magistrates, Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1296. Signing the Act, President Gerald R. Ford stated: "I have approved H.R. 5463, a bill establishing for the first time in our history uniform rules of evidence on the admissibility of proof in Federal court proceedings." Presidential Statement, 11 WEEKLY COMP. PRES. DOC. 1 (January 3, 1975). The uniformity interest is not tantamount to static conformity. As stated in Federal Rule of Evidence 102:

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

FED. R. EVID. 102. It has been suggested that rule 102 provides an exception to the rule that statutes in derogation of common law are to be strictly construed. According to this theory, rule 102 encourages judicial discretion in evidentiary matters. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 102.1 (1981). For further discussion of rule 102, see *infra* notes 203-07 and accompanying text.

2. Chief Justice Warren instigated the enactment of the Federal Rules of Evidence in 1961 when he appointed a Special Committee on Evidence from the existing Advisory Committee to the Judicial Conference to consider the desirability and feasibility of a uniform code of evidence for the federal courts. In response to the affirmative recommendation of the Special Committee's 1963 Final Report, Chief Justice Warren appointed an Advisory Committee in 1965 to draft the Federal Rules of Evidence. Three drafts of the Rules were published and circulated for comment from the bench and bar between 1969 and 1973 before final promulgation by the Supreme Court and submission to

The Rules were promulgated by the Court on November 20, 1972,[3] and were transmitted to Congress on February 5, 1973.[4] Congress extended the effective date of the Rules and simultaneously conditioned their enactment on express congressional approval.[5] Thereafter, Congress proceeded to revise the Supreme Court's version of the Rules in significant areas, an action unprecedented in the recent history of the Rules governing federal courts.

Multiple contributions by the House, the Senate, and the Supreme Court in drafting, interpreting, and redrafting the Rules have resulted in divergent applications of rule 804(b)(1), the hearsay exception governing the admissibility of former testimony from unavailable declarants.[6] Rule 804(b)(1)[7] provides for the

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Congress. *See* 10 J. MOORE, FEDERAL PRACTICE §§ 10-15 (2d ed. 1976); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5006 (1977); *see also* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (discussing the decline of the Supreme Court's autonomy in the wake of Congress' entry into the rulemaking arena); Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write Into the Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979) (focusing on the question whether, or to what extent, a federal court is bound by congressional restrictions on the power of the courts to admit evidence); Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9 (1974) (analyzing and comparing the versions of the Rules proposed by Congress and the Court); Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemaking Power*, 1974 ARIZ. ST. L.J. 77 [hereinafter Comment, *Rulemaking*] (exploring the validity of "substantiveness" as a standard for evaluating the extent of the Court's rulemaking power); Comment, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059 (1975) [hereinafter Comment, *Powers*] (proposing an arrangement whereby the conflict surrounding Supreme Court promulgation of arguably substantive rules might be resolved, permitting the judiciary to promulgate procedural evidentiary rules, and the legislature to enact privilege rules).

3. 56 F.R.D. 183 (1973) (Douglas, J., dissenting). Justice Douglas dissented on the grounds that the Rules were outside the scope of the enabling act and that the Court was acting as "a mere conduit" between a committee of laymen and Congress. *Id.* at 185. For further discussion of the controversy surrounding the Supreme Court's promulgation of these rules, see *infra* notes 160-64 and accompanying text.

4. The Rules Enabling Act provided that the Rules would not become effective until the expiration of 90 days after submission to Congress. 28 U.S.C. § 2072 (1976).

5. Act of March 30, 1973, Pub. L. No. 93-12, 1973 U.S. CODE CONG. & ADMIN. NEWS (87 Stat.) 11.

6. For a discussion of courts' varied interpretations of the differences between the Supreme Court's and Congress' versions of rule 804(b)(1), see *infra* notes 115-43 & 153-54 and accompanying text. For a discussion of Congress' rulemaking authority to alter the Supreme Court's version of rule 804(b)(1), see *infra* notes 166-82 and accompanying text.

It should be noted that commentators disagree as to whether former testimony should be categorized as hearsay. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 254, at 760 (Cleary 3d ed. 1984) (views former testimony as an exception to the hearsay rule because of "[c]ross-examination, oath, the solemnity of the occasion, and in the case of transcribed testimony the accuracy of reproduction of the words spoken"); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(1)[01], at 804-5 (1984) (describes former testimony as "more reliable than many of the exceptions encountered in rule 803, since both the conditions of oath and cross-examination are satisfied"); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1370 (Chadbourn rev. 1974) (considers former testimony nonhearsay when initially there was an opportunity to cross-examine).

7. Rule 804(b)(1) provides:

> (b) Hearsay Exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceedings, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1). Unavailability is defined by rule 804(a) to include a witness' inability or

admission of certain forms of testimony given at prior proceedings despite the absence of the traditional safeguards which attend live testimony and which ensure accuracy and fairness.[8] Courts and commentators disagree as to which underlying policy consideration best justifies the allowance rule 804(b)(1) makes for the absence of the ideal testimonial conditions[9] of oath, observation of demeanor, and immediate cross-examination.[10] Some commentators lean toward an "expansive" approach to the admission of prior testimony, which would afford courts access to virtually all relevant information.[11] The "expansive" approach rests on the premise that evidentiary reconstructions of past events should be directed toward the exposition of accurate facts.[12] This position is in tension with the "restrictive" approach rooted in the common law, which emphasizes fairness to the individual litigant, focusing on the adversarial rights of parties.[13] The fairness considerations of the restrictive approach tend to protect

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refusal to testify based on: (1) claim of privilege; (2) persistent refusal despite a court order; (3) lack of memory; (4) death, physical or mental illness, or infirmity; or (5) absence, the circumstances of which render the proponent of his statement unable to procure his attendance. Hearsay is defined in rule 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

8. The traditional indicia of the reliability of testimony are: (1) that it was given under oath; (2) that the witness was physically present so that the court could observe his demeanor; and (3) that the adverse party had the opportunity to cross-examine the witness. G. WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 801.1 (1987); 5 J. WIGMORE, *supra* note 6, § 1362; *see* Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 550 (1972).

9. The oath, the presence of an opposing attorney, and the fact that the witness' testimony is being recorded verbatim by a reporter all contribute to the aura of formality around the taking of a deposition. In-court testimony has the additional attribute of the judge and jury observing the witness' demeanor within the courtroom setting. G. WEISSENBERGER, *supra* note 8.

10. Wigmore refers to cross-examination as "the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, *supra* note 6, § 1367; *see also In re* Paducah Towing Co., 692 F.2d 412, 418 (6th Cir. 1982) (fairness requires a meaningful opportunity to fully examine an adverse witness). For a full analysis of this concern in rule 804(b)(1), see 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(b)(1)[03].

11. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 74 (2d ed. 1987); C. MCCORMICK, *supra* note 6, § 256; 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(b)(1)[04]; *see also* Evans, *Article Eight of the Federal Rules of Evidence: The Hearsay Rule*, 8 VAL. U.L. REV. 261 (1974) (discussing generally the Rules of Evidence); Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. REV. 651 (1963) (discussing the "identity of parties" requirement); Martin, *supra* note 8, at 550 (discussing generally the former testimony exception).

12. Generally, courts within a civil-law system tend to value the interest of accuracy in finding ultimate facts more highly than considerations of fairness to the individual litigant. In the criminal jurisdiction context, this inquisitorial model may be compared to the accusatorial or adversarial system in common-law jurisdictions where individual litigants are responsible for collecting and presenting evidence. The dichotomy is relevant to this discussion as it reflects the placement of emphasis in evidentiary policy: on the discovery of "truth" or, in the alternative, on personal autonomy and fairness. *See* Certoma, *The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact*, 56 AUSTL. L.J. 288 (1982); Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123 (1974). For an evaluation of this premise in the context of the admission of extrinsic act evidence, see Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Evidence Rule 404(b)*, 70 IOWA L. REV. 579 (1985).

13. Under the common-law adversarial system, the determination of the admissibility and the weight of evidence are governed by a set of complex rules. The judge serves as an impartial moderator, interpreting the law and enforcing the procedural rules to ensure fairness. Neef & Nagel, *supra* note 12, at 126. The adversarial system is grounded in the theory that the "fairest decision can be obtained when the two parties to the immediate conflict argue in open court according to carefully prescribed rules and procedures." *Id.* Historically, the adversarial system has been closely related to the use of the jury, a legally untrained tribunal, as fact-finder. *See* Certoma, *supra* note 12, at 288;

an adversary, whereas an accuracy-dominant system based on the expansive approach may deprive a party of invaluable proof.[14] Proponents of the expansive approach are likely to view the courts as the finders of objective facts,[15] and proponents of the restrictive approach will view the courts as the arbiters of rights between the two parties in conflict.[16]

The potency of prior testimony evidence justifies the more restrictive approach to the admissibility of prior testimony. This more cautious position applies in the adversarial context in which the presentation of evidence is subject to tactical considerations and maneuvers of the attorneys pursuing their clients' best interests. An attorney examining or cross-examining a witness in a subsequent proceeding may adopt a different strategy than the attorney in a prior proceeding, though the issues litigated and the motives for cross-examination might betray no disaccord. In addition, the attorney in a prior proceeding might be comparatively less skilled or, worse yet, patently incompetent. Moreover, the attorney in the prior proceeding might consider the issue to which the witness is testifying so peripheral that she may not sufficiently test the witness' testimony.[17] From this perspective, it would appear unfair to allow the introduction of adverse testimony from a prior proceeding that a party in a subsequent proceeding had not personally had the opportunity to develop by direct, cross-, or redirect examination. The adversary process, under this restrictive view, gives a party his own day in court—not someone else's.

As amended and ultimately enacted by Congress, rule 804(b)(1) restricts the admission of former testimony to those instances in which a party or a party's "predecessor in interest" had an opportunity and a similar motive to

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see also infra note 38 and accompanying text (discussing the impact of the jury on the development of evidentiary rules). In criminal proceedings, the adversarial system provides, first, substantial protection to the accused by requiring that defendants be convicted when guilt is beyond a reasonable doubt, and second, that a fair trial requires the opportunity to rebut adverse evidence. *See* Michelson v. United States, 335 U.S. 469, 476 (1948). For a discussion of practices of subordinating accuracy to fairness that characterize the Anglo-American adversarial system of justice, see *infra* notes 26-32 and accompanying text.

14. It is possible that this would have been the result in the Johns-Manville asbestosis cases, *infra* notes 125-44 and accompanying text.

15. This perception reflects the policy considerations of the civil law inquisitorial system rather than the common-law adversarial model. *See supra* notes 12-13 and accompanying text (comparing the inquisitorial system with the accusatorial system).

16. This position reflects the traditional approach to common-law trials. When construing the "predecessor in interest" requirement of rule 804(b)(1), federal courts must recognize that judicial alteration of the adversarial system affects the personal autonomy of the parties. *See supra* notes 12-13 & *infra* notes 26-32 and accompanying text (discussing fairness as a predominant policy concern in common-law adjudication).

17. *See, e.g.*, Charles H. Demarest, Inc. v. United States, 174 F. Supp. 380, 389 (Cust. Ct. 1959) (discussing problems of possible inferior cross-examination in former case); *see also* Falknor, *supra* note 11, at 655-60 (discussing the right of confrontation in criminal cases). This concern was specifically addressed by the drafters of rule 804(b)(1) on the Hungate Subcommittee. Subcommittee members were concerned that a party might be "charged with the incompetence of some other party's lawyer, who did not know how to examine and botched the case." Mark-up Session No. 13-3, Federal Rules of Evidence, Subcommittee on Criminal Justice, House of Representatives, June 5, 1973, *transcribed in* Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335, 354-55 (1984) [hereinafter Mark-up Session]. Similarly, they feared a party would not be adequately protected if the prior case was inconsequential and issues relevant to the current party's case were therefore not raised. *See id.*

develop the testimony.[18] The version of rule 804(b)(1) promulgated by the Supreme Court of the United States and superceded by Congress, however, required only that some litigant at a former hearing have had a similar motive, interest, and opportunity to develop the testimony.[19] The difference between the Court's and Congress' versions largely depends upon the interpretation of the term "predecessor in interest." A more literal reading supports a restrictive application which reflects fairness values. A more figurative interpretation, by comparison, supports an accuracy-dominated conception of evidentiary rules.

This Article will demonstrate that by adding the term "predecessor in interest" to rule 804(b)(1), Congress sought to protect the interests of a party from the admission of prior testimony unless that party or a formal predecessor had enjoyed the opportunity to develop the adverse testimony in the prior proceeding.[20] Legislative history reveals that Congress elevated fairness values in civil adversarial proceedings above considerations of evidentiary accuracy.[21] Nevertheless, the "predecessor in interest" language has been the subject of extraordinary judicial manipulation since the enactment of the Federal Rules of Evidence in 1975.[22] This manipulation has resulted in court-made rules for admitting former testimony which clearly derogate from the fairness considerations embraced by Congress.[23]

This Article will begin with a discussion of the accuracy-fairness polarity in interpretation of rules governing the admissibility of evidence. It will then analyze the historical development of the former testimony exception, focusing on the interplay between considerations of fairness and accuracy in the evolution of the exception. This analysis will place in perspective Congress' recasting of the exception to conform it to its historical underpinnings. The discussion will also examine the modern development of the exception under the regime of the Federal Rules of Evidence. Finally, this Article will consider the respective roles of

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18. See *supra* note 7 for text of rule 804(b)(1) as enacted by Congress.

19. As promulgated by the Supreme Court, rule 804(b)(1) would have provided:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of another proceeding at the instance of, or against, a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

56 F.R.D. 183, 321 (1973).

20. The Hungate Subcommittee narrowed rule 804(b)(1) to apply only when prior testimony was introduced against the same party in the prior and subsequent proceedings. This narrowing of the rule was done at the prompting of Representative Mayne on June 5, 1973. At Mark-up sessions in Representative Mayne's absence, the "predecessor in interest" language was added so that the rule would be less rigid. The limited flexibility in the "predecessor in interest" requirement is illustrated by Representative Hungate's request for language broadening the same party requirement prior to the subcommittee's agreement upon the "predecessor in interest" language. *See* Mark-up Session, *supra* note 17.

21. *See infra* notes 91-114 and accompanying text (discussing legislative history of rule 804(b)(1)).

22. *See supra* note 1.

23. *See infra* notes 115-20 & 123-43 and accompanying text (cases where "predecessor in interest" language of rule 804(b)(1) has been expansively interpreted).

the legislature and the judiciary in reifying accuracy and fairness values in evidentiary rules.[24]

II. An Overview of Fairness and Accuracy as Normative Presumptions Inherent in the American Justice System

Principles of fairness, which entitle each litigant to an authentic opportunity to present and rebut evidence, are essential to the adversarial Anglo-American legal systems.[25] Similarly, policies that look to accuracy as a navigational star are significant to a system of litigation because they inspire a sense of confidence and legitimacy. But positing accuracy as an objective of an individual trial integrally involves a concept which might be labeled "historical truth," meaning the intelligible but logically unattainable vision of specific past events. As this author has argued before,[26] the concept of historical truth is most useful in evaluating a system of evidentiary rules in the aggregate of cases. In such an analysis, the concept operates as a fictional premise that, when coupled with intuitive notions of physical principles, behavioral patterns, and probability, provides a means of identifying the commonly used evidentiary term "probative value." In the individual case, however, historical truth is a useless control for testing accuracy because it creates an illusory promise of empirical testability that is in principle unattainable.[27]

Meaningless in individual cases, accuracy as an objective of our litigation

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24. *See infra* notes 97-102 and accompanying text (discussing Congress' intent as expressed during drafting of Rules) and *infra* notes 166-78 and accompanying text (demonstrating that Congress has ultimate authority for Federal Rules of Evidence).

25. *See supra* notes 12-13 (explaining fundamental values of adversarial system).

26. Weissenberger, *supra* note 12, at 585-86. The textual discussion that follows is derived from this earlier article. The illusiveness of seeking historical truth in the adjudication of disputes has been frequently recognized:

> The process of litigation is designed for the reconstruction of an event that occurred in the recent past. And for the most part, the rules by which a trial is conducted are supposed to enhance the accuracy of the synthetic fact. Of course, the success of this enterprise, while not unknowable, will always be shrouded in uncertainty.

Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 845 (1982); *see also In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) ("[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened."); J. FRANK, COURTS ON TRIAL 49-50 (1949) ("No means, then, have yet been discovered, or are likely to be discovered, for ascertaining whether or to what extent the belief of the trial judge about the facts of a case corresponds to the objective facts as they actually occurred . . . ."); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 219 n.53 (2d ed. 1982) ("Certainly the dominant trend among evidence scholars is to justify evidence rules with respect to only one ideal, the ideal of finding truth. Unfortunately, we know no sure way to do this . . . .").

27. Professor Davis has dismissed accuracy on precisely the same grounds:

> (1) Usually no one knows how to measure accuracy, so that talk about it is usually futile. (2) The long-accepted assumption is that the best test of accuracy or truth is to put the question through the trial process and treat the product as the truth. (3) American history and tradition strongly support "fair trial" as the best test of truth, and, whatever the objective facts may be, the courts properly choose to be bound by tradition, unless and until an adequate demonstration is made that some other test of truth is better. In the absence of such a demonstration, the courts refrain from discussing accuracy.

2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10:14, at 318 (2d ed. 1979).

system only has content in the aggregate of cases, and while this aggregate accuracy is not a useless concept, the idea of statistical accuracy is fundamentally at odds with the commonly held value in our system of fairness to individual litigants.[28] Fairness values traditionally have been recognized in our jurisprudence as a means of tempering a natural but primitive appetite for aggregate accuracy.[29]

Paramount in the Anglo-American perspective of a fair trial is the principle that, regardless of its probity, only evidence that may effectively be rebutted in court should be admitted.[30] The general proscription against admitting hearsay and the confrontation clause are vivid examples of our judicial system's safeguards of litigants' rights to counter adverse evidence.[31] While the concept of rebuttability possesses intuitive appeal, its prominence as an evidentiary policy may be traced to its rational, if not ineluctable connection to our societal decision to embrace an adversary system.[32] To conceive of a system as adversarial is to endorse procedural opportunities for adversarial and, presumably, adverse presentations of proof.

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28. *See supra* note 13 (explaining fundamental values of common-law adversarial system of justice).

29. The Federal Rules of Evidence, for example, explicitly provide that fairness must be carefully considered before evidence may be admitted. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration . . . ."); FED. R. EVID. 403 (evidence may be excluded because of "unfair prejudice"). The policies underlying the exclusion of character evidence that inferentially shows a person's conduct as conforming with a pattern of past behavior are based on fairness. *See* Weissenberger, *supra* note 12, at 591-614.

30. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192 (1960). The importance of rebuttability is particularly emphasized in criminal cases. *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *In re* Oliver, 333 U.S. 257, 273 (1948). The right to rebut evidence is also present in civil actions as exemplified by the right to cross-examine witnesses. Thus, direct testimony will be stricken if cross-examination cannot proceed because of unavailability of the witness once examination in chief has been completed. *See* C. MCCORMICK, *supra* note 6, § 19; 5 J. WIGMORE, *supra* note 6, §§ 1390-1394. As Wigmore explained, "[t]he [Anglo-American] belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test" forms the basis for the norm that probative evidence should be rejected if it cannot be rebutted by the adverse party. *Id.* § 1367, at 32.

31. The confrontation clause of the sixth amendment provides: "In criminal prosecutions, the accused shall have the right . . . to be confronted with witnesses against him . . . ." U.S. CONST. amend. VI. The right to cross-examine adverse witnesses "is implicit in the constitutional right of confrontation." Chambers v. Mississippi, 410 U.S. 284, 295 (1973). Thus, the guarantee of confrontation ensures the right to rebut adverse evidence. *See* Ohio v. Roberts, 448 U.S. 56, 78 (1980) (Brennan, J., dissenting); Davis v. Alaska, 415 U.S. 308, 315 (1974); California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring).

Hearsay evidence is generally excluded because it is deemed inherently unreliable. *See* C. MCCORMICK, *supra* note 6, § 245; G. WEISSENBERGER, *supra* note 8, § 801.1; 5 J. WIGMORE, *supra* note 6, §§ 1360-1363. Excludable evidence is by definition evidence which cannot be effectively rebutted by its opponent. *See* R. LEMPERT & S. SALTZBURG, *supra* note 26, at 595 ("[I]n some cases where the suspicion of inaccuracy is strong, it may be clear that only cross-examination would allow the jury to reach a *reasoned* judgment. If the declarant is unavailable for cross-examination, the evidence should be excluded."); *see also* 5 J. WIGMORE, *supra* note 6, § 1362 (discussing cross-examination as essential guarantee of reliability of evidence).

The Supreme Court has acknowledged that the confrontation clause and the hearsay rules protect the same values. *See* United States v. Inadi, 475 U.S. 387, 393 n.5 (1986); *Roberts*, 448 U.S. at 63-66; *Green*, 399 U.S. at 155.

32. *See supra* notes 12-13 (discussing common-law adversarial system of justice).

The United States Supreme Court has recently reaffirmed that fairness is a significant if not dominant policy underlying the former testimony hearsay exception.[33] The Court explained:

> [F]ormer testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.[34]

If fairness did not play a significant role in the admissibility of prior testimony, the unavailability of the declarant would not be required because this form of hearsay is universally regarded as supremely trustworthy and accurate when compared with other forms of hearsay.[35] Because former testimony is in actuality some other proceeding's evidence, and possibly some other litigant's evidence, it appears to be fundamentally fair to admit it only when better evidence is unavailable.

In summary, to be consistent with principles of accuracy, the admission of former testimony must be supported by some circumstantial indicia of reliability or procedural safeguards militating in favor of truthfulness. To be consistent with principles of adversarial fairness, the admission of former testimony hearsay must safeguard the litigant's opportunity to rebut the evidence.

III. HISTORICAL ANALYSIS OF FAIRNESS AND ACCURACY AS UNDERLYING POLICIES IN ADMITTING FORMER TESTIMONY

A. *Early Development of Evidentiary Rules*

Described as "a piece of illogical, but by no means irrational, patchwork,"[36] the earliest evidentiary rules developed in response to concerns for adversarial fairness.[37] It is apparent that fairness considerations were the predominant influence because early evidentiary rules were concerned less with the kinds of evidence a party could present and more with the identities of per-

33. United States v. Inadi, 475 U.S. 389 (1986).

34. *Id.* at 394 (citations omitted).

35. *See* C. MCCORMICK, *supra* note 6, § 278 (arguing that unavailability requirement should be abandoned for former testimony because of indicia of reliability inherent with this type of evidence). "Trustworthy" in this context applies to accuracy in the aggregate of cases. *See* text accompanying note 28.

36. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 509 (1898) (regarding all evidentiary rules).

37. *Id.* at 271. Evidentiary rules emerged as a creation of "experience rather than logic." *Id.* at 267. The rules ensured that even if relevant, evidence may not be admitted if contrary to the principles that ensured a fair trial to the litigants. *See id.* at 272.

sons who in fairness would be bound by such evidence.[38] The common-law adversarial system championed the axiom that a fair trial required each litigant to be responsible for the development of his own evidence, and consequently fairness principles of estoppel, rather than accuracy, justified the earliest receipt of evidence.[39] Accordingly, the most primitive basis for the admission of hearsay was the policy that a party would be estopped from objecting to evidence of statements for which he was responsible.[40] This policy supported the hearsay exception presently known as the party admission exception. Similarly, this seminal rationale evolved as a common basis for the rule that prior testimony of a nonparty witness would only be admitted against the party who was responsible for developing the testimony.[41] Consequently, an examination of the historical development of policies underlying the rules for party admissions provides a basis for understanding the origins of the former testimony exception. Most pertinently, it provides insight into the meaning and justification for binding a party to the hearsay of his predecessor in interest.

1. Admissions

Under contemporary law, out-of-court statements of a party,[42] when offered against the party responsible for the statement, are admissible because the declarant-party cannot object that such statements are not accompanied by the safeguards of oath, observation of demeanor, and cross-examination.[43] Consistent with this modern justification, party admissions were admitted at common law, not because of their trustworthiness, but because of fairness. A recital in a deed, the earliest form of party admission, was admitted as conclusive evidence

38. With the origin of the jury system in the sixteenth century, judges began to exercise increasing control over the kinds of evidence that could be produced in court. 9 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 131 (3d ed. 1927). There were concerns about presenting evidence that might be confusing or misleading to the jury. *Id.* at 127; J. THAYER, *supra* note 36, at 266. Additionally, evidentiary rules developed to ensure that parties would address issues defined in the pleadings. 9 W. HOLDSWORTH, *supra*, at 127. Because the jury was comprised of individuals deciding cases not from their own personal knowledge, but from facts presented in court, evidentiary rules were developed, at least in part, to promote rational jury decisions made without emotionally-provoked prejudice. *See* J. THAYER, *supra* note 36, at 266.

39. *See supra* notes 12-13 (discussing adversarial system's emphasis on litigants' responsibility to develop testimony).

40. For a discussion of the common-law party/privity rules for extrajudicial admissions exemplifying fairness and principles of estoppel, see *infra* notes 47-60 and accompanying text.

41. The rule also applies to privies of parties. For a discussion of the party/privity rules for admitting former testimony hearsay, see *infra* notes 64-75 and accompanying text.

42. Party admissions may be words, oral or written, or conduct of the party. *See* C. MCCORMICK, *supra* note 6, § 262, at 776; G. WEISSENBERGER, *supra* note 8, § 801.2.

43. *See* S. SALTSBURG & K. REDDEN, THE FEDERAL RULES OF EVIDENCE MANUAL 501 (3d. ed. 1982) (explaining that the "best justification" for this rule is that a party cannot complain that statements she made were not under oath nor subject to cross-examination). There has been considerable debate about the proper theoretical explanation for party admissions. Wigmore espoused a theory that admissions "satisfied" the hearsay rules. 4 J. WIGMORE, *supra* note 6, § 1048 (Chadbourn rev. 1972). Professor Morgan argued that admissions are admitted as evidence as an exception to the hearsay rule. Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 461 (1929). Professor McCormick stated that admissions are a nonhearsay product of the adversary system that were admitted without any need to demonstrate the trustworthiness which characterizes other hearsay exceptions. C. MCCORMICK, *supra* note 6, § 262.

against the person making the deed,[44] the common-law reasoning being that justice estopped the declarant from denying or altering the statement when it was later offered in court.[45] While such admissions were initially received as conclusive proof, they later evolved in the early jury system into evidence which was merely probative of the facts asserted.[46]

Because of fairness constraints, common-law courts did not initially extend rules of admissions to bind successors in privity with the declarant.[47] Nineteenth-century courts, however, began to admit recitals in a deed against the declarant as well as against those in privity with the declarant based upon the rationalization that the admission "ran with the land."[48] Consequently, an owner who succeeded to the property interest also succeeded to the obligations and liabilities encumbering the title to the property, including written statements by predecessors in privity. Common-law courts, however, were initially hesitant to bind a party to the oral statements of a predecessor because it was considered unfair to bind anyone, even a successor in interest, to a statement which he did not utter himself.[49] This reluctance to hold successors responsible for oral statements is traceable to a conclusion that the earliest development of evidentiary rules occurred within a judicial system that was predominantly responsive to interests concerned with the protection of real property.[50] During the earliest evolution of evidence principles, from the Middle Ages through the eighteenth century, all oral statements in regard to transactions involving the transfer and disposition of real property were viewed with great judicial suspicion.[51] This disfavor of oral statements ultimately manifested itself in the statute of frauds.[52]

While common-law courts originally applied the principles of admissions only to written statements of the immediate party attending transactions of real

44. 9 W. HOLDSWORTH, *supra* note 38, at 130; *see also* 4 J. WIGMORE, *supra* note 6, § 1080 (Chadbourn Rev. 1972) (discussing recital in deed as part of early origins of party admission).

45. 9 W. HOLDSWORTH, *supra* note 38, at 145. "In other words, [a party declaration] is an admission that creates so conclusive a presumption that no further evidence is admissible, even though the evidence could prove that the real truth was contrary to the presumption." *Id.* at 146.

46. 9 W. HOLDSWORTH, *supra* note 38, at 129-30.

47. *See* 4 J. WIGMORE, *supra* note 6, § 1080 (Chadbourn Rev. 1972); *see also* Beach v. Catlin, 4 Day 284, 295 (Conn. 1810) ("The declarations of one are never admitted to affect another who is not present and assenting to them . . . ."); Duckham v. Wallis, 5 Esp. 151 (1805) ("[admitting party declaration against non-party] would be making the declaration of a third person evidence to effect the plaintiff's title when that person was not on the record").

48. 9 W. HOLDSWORTH, *supra* note 38, at 150-51.

49. *See, e.g.*, Ford v. Gray, 91 Engl. Rep. 253 (1704) (holding that recital of release of lease in a deed is good evidence of such lease against lessor and those who claim under him, but oral declarations contrary to the interest of the estate may only be given in evidence against declarant); *see also supra* note 47 (citing other common-law courts refusing to admit declarations against nonparties).

50. *See* 9 W. HOLDSWORTH, *supra* note 38, at 148.

51. *See* 4 J. WIGMORE, *supra* note 6, § 1080 (Chadbourn Rev. 1972) (discussing perception held by many common-law courts that admissions constituted hearsay); *see also infra* notes 62-63 and accompanying text (discussing former testimony hearsay as especially suspect in the eyes of common-law judges).

52. *See, e.g.*, Gibblehouse v. Strong, 3 Rawle 436, 441-44 (Pa. 1832) (opponent of admissibility of declaration of predecessor against successor argued such oral evidence violated statute of frauds; in this case testimony to show creation of trust not intended to impair effect of written deed so admissible); *see also* 9 W. HOLDSWORTH, *supra* note 38, at 173-77 & 219-22 (discussing the prohibitions against admitting any oral evidence in interpreting or varying content of written instrument as inhibiting the development of oral evidence in trials).

property, courts gradually accorded admissions an extended application in the late eighteenth and nineteenth centuries.[53] By the middle of the nineteenth century, common-law courts widely accepted privity as a basis for admitting both oral and written statements of predecessors of a party. Principally derived from real property law, "privity" denoted four types of representative or successive relationships: "privity in blood, as between heir and ancestor; privity in representation, as between testator and executor . . .; privity in law, as between the commonwealth by escheat and the [intestate]; and privity in estate as between the donor and the donee, [etc.]."[54]

In order for a successor to be bound by his predecessor's oral or written statement, the declaration had to have been made at the time the predecessor held the interest. Moreover, only statements pertaining to the interest itself could be admitted.[55] Accordingly, declarations of joint obligors, obligees, or tenants were admissible against each other; declarations of predecessors in title were admissible against successors; declarations of transferors and mortgagors were admissible against transferees and mortgagees; and declarations of decedents were admissible against representatives, heirs, and next of kin.[56] Professor McCormick noted that the admission of these declarations was derived from property law: when a successor in title acquired a property interest, the successor was thought to accept the possibility that such declarations would be used against the successor as they could have been used against the predecessor in privity who made the statement.[57] Courts following the common-law rule described a successor as standing in the place of the predecessor,[58] and found it

53. 9 W. HOLDSWORTH, *supra* note 38, at 146.

54. *Gibblehouse*, 3 Rawle at 447.

55. *See* C. MCCORMICK, *supra* note 6, § 268; 4 J. WIGMORE *supra* note 6, § 1082 (Chadbourn Rev. 1972).

56. *See, e.g.*, Webb v. Martin, 364 F.2d 229, 232 (3d Cir. 1966) (statement of deceased admissible against administrator of estate, who was successor in interest); Estate of Fushanis v. Poulos, 85 Ill. App. 2d 114, 126, 229 N.E.2d 306, 310 (1967) (statements by decedent admissible against estate); Kennedy v. Oleson, 251 Iowa 418, 427, 100 N.W.2d 894, 899 (1960) (defendant's grantor had admitted knowledge of encroachment upon plaintiff's land; therefore, grantor's statements admissible against defendant); Liberty Nat'l Bank & Trust Co. v. Merchant's & Mfr.'s Paint Co., 307 Ky. 184, 189, 209 S.W.2d 828, 831 (1948) (declarations of former owner regarding boundary lines of property admissible against successor in interest); Padgett v. Lawrence, 10 Paige Ch. 170, 180 (N.Y. 1843) (acts and declarations of land owner admissible against one claiming title under or through land owner); Guy v. Hall, 7 N.C. (3 Mur.) 123 (1819) (declarations of vendor of negro slave admissible against vendee because vendor "is privy in estate, and in law, his declarations are those of the party claiming under him"); Greiner v. Commonwealth, 334 Pa. 299, 304, 6 A.2d 67, 69 (1939) (acts and declarations of land owner admissible against one claiming title under or through land owner); LaFuria v. New Jersey Ins. Co., 131 Pa. Super. 413, 417, 200 A. 167, 169 (1938) (in an action by husband and wife on fire insurance policy, statement by husband admissible against wife, who owned property with husband as tenants by entireties); *see also* C. MCCORMICK, *supra* note 6, § 268 (discussing declarations by joint tenants and predecessors in interest); 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 801(d)(2)(D)[01], at 801-229 (discussing common-law rule).

57. C. MCCORMICK, *supra* note 6, § 268; *see* 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 189, at 316 (16th ed. 1899) ("The ground upon which admissions bind those in privity with the party making them is, that they are identified in interest; and, of course, the rule extends no farther than this identity.").

58. *See, e.g.*, Padgett v. Lawrence, 10 Paige Ch. 170, 180 (N.Y. 1843) (declarations of those in possession of real estate may be used against those who subsequently derive title under declarant); Guy v. Hall, 7 N.C. (3 Mur.) 123, 124 (1819) ("his subsequent purchaser stands in his situation"). Wigmore explains that:

fair to use the privity relationship as a basis for admitting the predecessor's statements.[59] For example, in explaining the rationale for the privity rule for party admissions, a court reasoned that the same common-law estoppel principles supported both res judicata and the party admission exception.[60] While the analogy between this evidentiary rule and issue or judgment preclusion is strained because of notable differences in the two concepts, the shared estoppel foundation is apparent.

2. Former Testimony Hearsay Exception

The history of the former testimony hearsay exception closely parallels the evolution of party admissions, because the development of both exceptions is rooted in a judicial system designed to protect real property interests. As the hearsay rule and its exceptions unfolded during the seventeenth and eighteenth centuries,[61] numerous requirements for the application of party admissions and for prior testimony hearsay became intertwined. These included the requirement that the declarant be unavailable before his out-of-court statements would be admitted.[62] Unavailability of the declarant ultimately ceased to be a requirement for party admissions, but former testimony hearsay, as a less desirable form of evidence than in-court testimony, could only be admitted when the declarant could be shown to be unavailable.[63]

The underlying fairness policy for admitting prior testimony was expressed in an early common-law rule which required absolute identity of the parties and issues in the former and the instant litigation.[64] One English court explained the

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> This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it "cum onere"; and as the predecessor might have taken a qualified right, or sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another.

4 J. WIGMORE, *supra* note 6, § 1080, at 191 (Chadbourn Rev. 1972) (quoting 1 COWEN & HILL, NOTES TO PHILLIPS ON EVIDENCE No. 481, at 644 (1843)).

59. *See supra* note 56 (court decisions accepting admissions into evidence because of privity relationship). For further discussion of the common-law rule regarding declarations by privies, see C. MCCORMICK, *supra* note 6, § 268; 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 801(d)(2)(D)[01], at 801-227; 4 J. WIGMORE, *supra* note 6, §§ 1080-1087 (Chadbourn Rev. 1972).

60. Gibblehouse v. Strong, 3 Rawle 436, 448 (Pa. 1832). The court first quoted Starkie's Treatise in evidence in support of the principle of res judicata, then went on to state that upon this same principle

> executors and administrators, as also devisees, legatees, heirs, and next of kin are all bound by the promises, whether written or verbal, of their respective testators . . . and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates which have passed to them.

Id.

61. *See* 9 W. HOLDSWORTH, *supra* note 38, at 127; 4 J. WIGMORE, *supra* note 43, § 1080.

62. *See generally* 4 J. WIGMORE, *supra* note 6, § 1080 (Chadbourn Rev. 1972) (discussing tendency of common-law courts to interpret any out-of-court statement as suspect hearsay with no differentiation between party admissions and other hearsay exceptions).

63. *See* C. MCCORMICK, *supra* note 6, § 253 (discussion of unavailability); 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(a)[01] (same); G. WEISSENBERGER, *supra* note 8, §§ 804.2-.8 (briefly discussing same).

64. *See* 5 J. WIGMORE, *supra* note 6, § 1386.

reason for delimiting the admissibility of former testimony as follows:

> The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination shall not be used in the same way as if it were complete.[65]

Under the original common-law rule,[66] both parties to the former and subsequent suits were required to be the same, such that if the former testimony could not be received against one party, that party could not benefit by offering it against her adversary.[67] The early inflexible rule became tempered in much the same fashion as the party admission exception.[68] It was later refined to provide that former testimony could be admitted in a subsequent trial when the party against whom the former testimony was offered was the same party who had developed the original testimony.[69] In essence, it appeared fair to estop such a party from objecting to evidence developed by that party, and the absolute identity and mutuality of parties requirement was abandoned.

Additionally, consistent with the development of the party admission exception, the former testimony exception evolved to qualify the testimony developed by a predecessor of a party when such predecessor was a litigant in the prior suit. This doctrine was based on concepts of fairness and estoppel borrowed from the party admissions exception. Forcing a party to accept another litigant's cross-examination seemed unfair[70] unless there was only a nominal

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65. Cazenove v. Vaughn, 105 Eng. Rep. 2, 3 (1813).

66. The same rules were accepted in the United States in the eighteenth and nineteenth centuries. *See* C. MCCORMICK, *supra* note 6, § 278 (outlining the restrictive same party/same issue rules for admitting prior testimony); G. WEISSENBERGER, *supra* note 8, § 804.14 (briefly discussing same).

67. G. WEISSENBERGER, *supra* note 8, § 804.14; *see also* 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(b)(1)[04] (discussing mutuality requirements).

68. *See supra* notes 47-56 and accompanying text (discussing the evolution of the parallel rule that party declarations may be admitted against persons in privity with declarant).

69. *See, e.g.*, Rumford Chem. Works v. Hygienic Chem. Co., 215 U.S. 156, 159-60 (1909); Tappan v. Beardsley, 77 U.S. (10 Wall.) 427, 436 (1870); Rutherford v. Geddes, 71 U.S. (4 Wall.) 220, 224 (1866); Metropolitan St. Ry. v. Gumby, 99 F. 192, 198-99 (2d Cir. 1900); S.W. Anderson Co. v. Glenn, 43 F. Supp. 334, 338 (W.D. Ky. 1942); United States v. Aluminum Co. of Am., 1 F.R.D. 48, 49 (S.D.N.Y. 1938); All v. All, 250 F. 120, 133 (E.D.S.C. 1918); London Guar. & Accident Co. v. American Cereal Co., 251 Ill. 123, 131, 95 N.E. 1064, 1067 (1911); Oliver v. Louisville & N.R.R., 17 Ky. L. Rptr. 840, 841, 32 S.W. 759, 759 (1895).

70. *See* Lane v. Brainerd, 30 Conn. 565, 579 (1862). The *Lane* court reasoned:

> As that was a trial between different parties, having different rights, and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion, however identical the questions or some of them may have been with the questions which arise in this case.

Id. The rule, so fundamental that courts often deemed elucidation unnecessary, was expressed by the United States Supreme Court as follows:

> The depositions relied on by the appellant were properly ruled out, for the reason that they were taken without notice to defendants, in another suit to which defendants were not parties, and in which they had no right or opportunity to cross-examine the witnesses. Nor were the defendants in any manner privies to either party in the former suit, in which the depositions had been taken. This alone, it is well settled, is a sufficient reason for their exclusion.

Rutherford v. Geddes, 71 U.S. (4 Wall.) 220, 224 (1866).

change in parties, as when the parties were connected by privity, meaning they were privies in blood, property, or law, and held the same rights and protected the same interests.[71] It did not appear unfair to hold a party responsible for a previous litigant's examination or cross-examination of a witness when the party against whom the prior testimony was offered had succeeded to the position of the predecessor litigant conducting the examination or cross-examination in the prior action.[72] Consequently, the rule requiring privity between a predecessor in prior litigation and the party against whom the prior testimony is offered is traceable to the party admissions exception and its connection to principles of real property law.[73]

It is not surprising that common-law courts would look to privity as an exception to the rule that prior testimony could only be admitted against the party who had the opportunity to develop the original testimony. Through such a legal relationship the successor stood in the place of the predecessor and succeeded to all of the benefits and liabilities of that interest, including prior claims and attendant trial conduct concerning the interest.[74] Consequently, courts permitted not only the admission of the predecessor's own statements against the subsequent privy (an admission of a party's predecessor), but also the admission of testimony developed in a predecessor's litigation that pertained to the shared or transferred interest.[75] In contrast, the testimony developed by a stranger not standing in privity with the party in the subsequent trial would not qualify; to admit such evidence would bind a person who was not accountable for the development of the prior testimony and, therefore, would be "against natural

71. *See* Metropolitan St. Ry. v. Gumby, 99 F. 192, 198 (2d Cir. 1900) (discussing privity exception).

72. *See* McInturff v. Insurance Co. of N. Am., 248 Ill. 92, 95-98, 93 N.E. 369, 370-71 (1910) (discussing fairness of admitting former testimony when nominal change in parties).

73. Some common-law courts, drawing from normative presumptions of adversarial fairness, equated the rules for admitting prior testimony evidence with the rules for res judicata and collateral estoppel. *See Metropolitan St. Ry.*, 99 F. at 195; Charles H. Demarest, Inc. v. United States, 174 F. Supp. 380, 385-87 (Cust. Ct. 1959); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 43 (1982) ("A judgment in an action that determines interests in real or personal property . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself."). The rules for claim preclusion and issue preclusion are based on the principle that the party must have had a fair opportunity to try the issues at bar before he or his privies can be bound by the resulting judgments. *See* Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 45 (1964) (discussing the relationship between party and successor as close enough to assure successor had fair trial of interests). Thus, one court reasoned, the same fairness constraints that warrant the party/privity requirement for the preclusion of res judicata should also require that prior testimony evidence that would contribute to a judgment should also be admitted exclusively against the party who has had the opportunity to develop the testimony or his privies. *Demarest*, 174 F. Supp. at 389. "If [a party is not bound by res judicata,] it would seem to be strange if a party were, nevertheless, bound by the *record* (in the making of which neither he nor his privies participated) which led to the former adjudication." *Id. See generally* G. WEISSENBERGER, *supra* note 8, § 804.12 (discussing estoppel as underlying policy of former testimony exception). This analogy between prior testimony and res judicata and promissory estoppel has been criticized. *See* 5 J. WIGMORE, *supra* note 6, § 1388, at 118-19; *see also supra* note 60 and accompanying text (discussion of analogy between res judicata and party admissions).

74. *See supra* notes 57-59 and accompanying text (discussion of privity as denoting succession to benefits and liabilities of property interest in context of admissions).

75. *See* Bath v. Bathersea, 87 Eng. Rep. 487 (1794) (deposition may be read in subsequent trial against party "sheltering himself under the other's title"); *see also* Guy v. Hall, 7 N.C. (3 Mur.) 123, 124 (1819) (declarations are admissible against "such and all claiming under him").

justice."[76]

Fairness to the individual litigant was fundamental to the common-law adversarial system. This value was repeatedly expressed through the party/privity requirements of procedural and evidentiary rules: imposing evidence on a party, when that evidence is not attributable to the party or his predecessor in privity, was commonly perceived to be unfair.

B. *Recent Developments in Evidentiary Rules: The Trend Toward an Emphasis on Accuracy*

Throughout the late nineteenth and twentieth centuries, the party/privity rules of the party admission exception and the former testimony exception drew increasing criticism as courts and commentators began to emphasize accuracy as the ultimate goal of evidentiary rules. In the context of party admissions, Professor Morgan argued against the common-law rule because he thought that the privity relationship offered no guaranty of trustworthiness.[77] Professor Falknor, in contrast, found the common-law rule acceptable because of the analogous principles of representation in agency law. He argued that an agent's declarations are admissible against the principal simply because of the relationship between them, not because the declarations are more reliable than other hearsay; similarly, the declarations of predecessors in privity are admissible against their successors because of the relationship that manifests the shared interest.[78] Concern for trustworthiness, as expressed by Professor Morgan, ultimately prevailed over the emphasis on fairness, and none of the recent evidence codifications (the Model Code of Evidence, the Uniform Rules of Evidence, or the Federal Rules of Evidence) accept privity alone as a basis for admitting out-of-court statements of predecessors of parties.[79]

Similarly, the restrictive rule that prior testimony could only be admitted against the party who developed the testimony or his successor in privity was expanded because courts began to emphasize accuracy over fairness. The idea that binding a party to a stranger's cross-examination is unfair became subordinated to the need for accurate evidence.[80] The rule became liberalized

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76. 5 J. WIGMORE, *supra* note 6, § 1386 (quoting *Trials at Nisi Prius* 239 (1767) (Buller, J.) ("it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party")).

77. Morgan, *supra* note 43; Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937). Indeed, he was right, but the privity doctrine was never designed to ensure fairness. Even under modern principles, the party admission exception is justified by estoppel notions and not accuracy. *See* FED. R. EVID. 801(d)(2)(A) advisory committee's note.

78. Falknor, *Hearsay*, 1969 LAW & SOC. ORD. 591, 603-04.

79. *See* C. MCCORMICK, *supra* note 6, § 268; *see also* 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 801(d)(2)(D)[01], at 801-227 (further discussion of change in emphasis from fairness to trustworthiness). The Federal Rules of Evidence have retained the rule that admissions of an agent are admissible against the principal when the declarations relate to the agent's scope of employment. FED. R. EVID. 801(d)(2)(D). The explanation for this rule is that even without express authorization, the agent "speaks for" the principal when in the capacity of agent and his statements thus are trustworthy. *See* C. MCCORMICK, *supra* note 6, § 267; 4 J. WIGMORE, *supra* note 6, § 1078 (Chadbourn Rev. 1972).

80. *See* Falknor, *supra* note 11, at 655. Dean Falknor explains that if a prior cross-examination was "inept or inadequate," or was not performed at all, the present opponent's objection to admis-

primarily as a result of Dean Wigmore's influence. Dean Wigmore added a paragraph to the pertinent section of the 1899 edition of Greenleaf's treatise on evidence, proposing that when present and former parties are "so privy in interest" that they have the same motive for cross-examination, then the present opponent of former testimony has had a fair opportunity—at least fictionally—to cross-examine the witness.[81] He reiterated this theory in his own treatise, again emphasizing that identity of interest between the present and prior opponents of the testimony ensured the accuracy of the testimony and the fairness of its admission.[82] As a result of Wigmore's influence, courts began to accept a theory very similar to that of Morgan regarding party admissions, that is, "no magic" is reposed in a connection by blood, property, or law.[83] Courts and commentators reasoned that because the primary issue in achieving accuracy is the similarity of

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sion of the prior testimony would be "difficult to answer," that is "if the emphasis is upon the adversary character of a common law trial and the rules of evidence are envisaged as 'rules of fair play' . . . ." *Id.* He adds that if the emphasis is instead upon "achieving a just and correct result," and if the purpose of the evidentiary rules is to ensure accuracy, then the emphasis on identity of interest could be reasonable. *Id.*

The courts that have considered the fairness of admitting former testimony have stressed that the attorney who cross-examined the witness in the prior trial may not have used the approach preferred by the present opponent nor have been as thorough as the present opponent would like. *See, e.g.*, Charles H. Demarest, Inc. v. United States, 174 F. Supp. 380, 389 (Cust. Ct. 1959). Most courts recently have emphasized the need for identity of interest, along with the more fundamental idea that trials should, above all, be accurate. *See, e.g.*, Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322 (D.N.J. 1944) ("[t]he rules of evidence were designed to obtain the truth"); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 16, 160 S.W.2d 740, 742 (1942) ("[t]he ultimate purpose of any trial . . . is the ascertainment of truth—the accurate determination of the actual facts in the controversy").

81. 1 S. GREENLEAF, *supra* note 57, § 163a, at 278-79. Wigmore explains:

> As to the *parties*, all that is essential is that the present opponent should have had a fair opportunity of cross-examination; consequently, a change of parties which does not effect such a loss does not prevent the use of the testimony,—as, for example, a change by which one of the opponents is omitted or by which a merely nominal party is added; and the principle also admits the testimony where the parties, though not the same, are so privy in interest—as, where one was an executor or perhaps a grantor—that the same motive and need for cross-examination existed.

Id. Some courts were hesitant to interpret Wigmore's rule broadly. *See, e.g.*, McInturff v. Insurance Co. of N. Am., 248 Ill. 92, 95-96, 93 N.E. 269, 270 (1910) (stating that the majority of courts interpret Wigmore's paragraph in the Greenleaf treatise to mean that "a mere nominal change of parties is of no consequence provided the parties in the second action are so privy in interest with those on the former trial that the same motive and need for cross-examination existed").

82. 5 J. WIGMORE, *supra* note 6, § 1388, at 111. Wigmore acknowledges that it "seems fair" to insist that a person be satisfied with the cross-examination of testimony offered against her. He notes that a person must accept a prior cross-examination when the person is a privy in interest with the prior party, because their interests are the same. Wigmore concludes that "[t]he principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end." *Id.*

83. *See, e.g.*, Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322-23 (D.N.J. 1944). The *Mid-City* court reasoned:

> The similarity of the interest of each of the parties is closely associated with the question as to whether the issues involved in each of the two actions are identical. But conceivably it is not necessary that mutual or successive relationships, such as privity in law, privity in blood, or privity in estate, exist in order that there may be an identity of interest satisfying the requirement of the rules of evidence as to the right of cross-examination by an adverse party.

Id. at 322; *see also* Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 20, 160 S.W.2d 740, 745 (1942) ("the true test is one of identity of interest and not one of privity as that term is used in the law of property").

interests which motivates examination or cross-examination, former testimony should be admissible not only against the original party who developed the testimony and his successors in privity, but against anyone with sufficiently similar interests.[84] Once a commentator with the stature of Dean Wigmore redirected the analysis of the prior testimony exception, it was inevitable that it would become more liberalized.[85]

If the issue is framed to ask whether any significant accuracy is sacrificed by abandoning the absolute mutuality and privity requirements, the search for more helpful and useful evidence would naturally encourage the elimination of these strictures. Without question, the strictures add little or nothing to ensuring accuracy. But mutuality and privity were requirements never designed to ensure accuracy.[86] Rather, these requirements were imposed because it was recognized that former testimony possesses a potency and character lacking in other forms of admissible hearsay. As the Supreme Court has recently reaffirmed, prior testimony is a form of hearsay that seldom has independent evidentiary significance; its purpose is to replace live testimony when such testimony is unavailable.[87] Operating as a substitute for live testimony, prior testimony has the virtual force of an in-court witness, and thus its receipt is justifiably restrained when unfairness would result.

IV. LEGISLATIVE HISTORY OF RULE 804(B)(1)

At the time the Federal Rules of Evidence were enacted, the former testimony hearsay exception no longer required absolute mutuality,[88] requiring instead only that the parties and interests in the former and the present action be substantially the same.[89] The Supreme Court's advisory committee was cogni-

84. The Supreme Court of Missouri was one of the first courts to adopt Wigmore's views. *Bartlett*, 349 Mo. at 17, 160 S.W.2d at 743. In *Bartlett*, the husband of a woman injured in a bus accident brought an action for loss of her services; the wife later brought an action for her injuries. *Id.* at 15-16, 160 S.W.2d at 742. Testimony from the first trial was admitted in the second trial, despite the court's acknowledgement that there could have been differences in the cross-examination in the two cases, because the need for the testimony outweighed the unfairness of admitting the testimony against the second litigant. *Id.* at 17-18, 160 S.W.2d at 743-44. The court concluded that although the husband and wife were not privies, their interests were the same in their respective actions. *Id.* at 20-21, 160 S.W.2d at 745.

Numerous other courts followed this line of reasoning. *See, e.g.*, Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502, 503-04 (10th Cir. 1949); First Nat'l Bank in Greenwich v. National Airlines, Inc., 22 F.R.D. 46, 51-52 (S.D.N.Y. 1958); Rivera v. American Export Lines, 13 F.R.D. 27, 30 (S.D.N.Y. 1952); Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322-23 (D.N.J. 1944).

85. *E.g.*, Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322-23 (D.N.J. 1944); *see* C. MCCORMICK, *supra* note 6, § 256, at 765; 5 J. WIGMORE, *supra* note 6, § 1388.

86. *See supra* notes 62-64 and accompanying text (common-law courts very reluctant to admit hearsay; strict rules developed to ensure litigants' opportunities to rebut adverse testimony). For a discussion of rebuttability of evidence as a foundation of the adversarial system, see *supra* notes 30-32 and accompanying text.

87. United States v. Inadi, 475 U.S. 387, 394 (1986). For a discussion of this case, see *supra* notes 34-35 and accompanying text.

88. *See supra* note 67 and accompanying text (discussion of mutuality requirement for admitting prior testimony).

89. *See, e.g.*, Tug Raven v. Trexler, 419 F.2d 536, 543 (4th Cir.) (testimony given at Coast Guard proceeding admissible in later civil action where interests of prior and present parties "sub-

zant of the extant federal common-law status of the exception and, in essence, embraced the thinking of courts applying the relaxed formulation of the exception.[90] The version of the former testimony exception promulgated by the Supreme Court's advisory committee, however, was not adopted by Congress. Instead, Congress restructured the exception without a complete awareness and appreciation of its historical development, relying on the same intuitive assumptions which shaped the early development of the exception. Congress felt that unfairness would result from imposing former testimony on a party who was not responsible for its development. In such a situation a party might be compelled to face hearsay of an extraordinary character that it could not effectively rebut due to its unique potency. An examination of the legislative history of rule 804(b)(1) facilitates a proper interpretation of the exception.

A. *Interpreting the Committee Reports*

The version of rule 804(b)(1) that was promulgated by the United States Supreme Court would have allowed the admission of former testimony into evidence if the party against whom it was offered, or a person "with motive and interest similar," had the opportunity to develop the testimony.[91] This version would have permitted the admission of prior testimony without requiring privity between the litigant in the prior proceeding and the party in the subsequent proceeding.[92] The Supreme Court's version of the Rules, which reflected the views of the majority of cases and commentators,[93] was sent to Congress on February 5, 1973, under the Rules Enabling Act and would have become effective on July 1, 1973.[94] A bill requiring affirmative congressional approval of the Rules, however, halted the process.[95]

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stantially the same"), *cert. denied*, 398 U.S. 938 (1969); Baldwin-Montrose Chem. Co. v. Rothberg, 37 F.R.D. 354, 356 (S.D.N.Y. 1964) (court may order use of depositions and interrogatories taken in earlier action when "there are common questions of law or fact and a substantial identity of issue"); First Nat'l Bank in Greenwich v. National Airlines, 22 F.R.D. 46, 51 (S.D.N.Y. 1958) (former testimony admissible against present opponent when prior opponent had "same interest and motive in" cross-examination); Travelers Fire Ins. Co. v. Wright, 322 P.2d 417, 420-21 (Okla. 1958) (testimony of witnesses in prior criminal case in which one partner was defendant was admissible in later civil action brought by both partners); *see also* C. MCCORMICK, *supra* note 6, at 763-67 (explaining history of "identity of parties" requirement of former testimony exception); 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(b)(1)[04], at 804-85 (same); Annotation, 70 A.L.R.2D 494 (1960) (listing decisions on admissibility of former testimony in civil cases).

90. FED. R. EVID. 804(b)(1) advisory committee's note.

91. See *supra* note 19 for Supreme Court's version of rule 804(b)(1).

92. The advisory committee's note explains that the common law limited the admissibility of former testimony to those cases with a substantial identity of issues and parties between the earlier and later trials. Strict identity, or privity, was required between the party against whom the testimony was being offered and the party who had an opportunity to develop the testimony. The Supreme Court's version of the rule departed from this requirement "to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest." FED. R. EVID. 804(b)(1) advisory committee's note.

93. *See supra* notes 82-89 and accompanying text (explaining the majority rule at the time the Federal Rules of Evidence were proposed).

94. Under the Rules Enabling Act, the Federal Rules of Evidence would have become effective 90 days after the session began. 28 U.S.C. § 2072 (1982).

95. Act of March 30, 1973, Pub. L. No. 93-12, 1973 U.S. CODE CONG. & ADMIN. NEWS (87 Stat.) 11 (approved March 30, 1973).

During the process of congressional review of the Federal Rules of Evidence, the Special Subcommittee of the House Judiciary Committee, chaired by Representative William Hungate, modified rule 804(b)(1).[96] The Committee's report states:

> Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is where a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.[97]

Because of concerns about fairness, the House Committee designated one very narrow circumstance in which former testimony of a non-party could be admitted against that party in a civil case. This record of the Subcommittee mark-up sessions[98] reflects an unambiguous intent to require a formal relationship between the predecessor developing the testimony at the former hearing and the successor-party against whom the hearsay would be offered.[99] While it

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96. The House Committee on the Judiciary added the language in italics and omitted the bracketed portion of the rule:

> (1) Former Testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of *the same* or another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

See 56 F.R.D. 183, 321 (1973); Pub. L. No. 93-595, 88 Stat. 1926, 1942 (1975).

97. H.R. REP. NO. 650, 93d Cong., 2d Sess. 4 (1975), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7088.

98. The mark-up sessions of the Subcommittee were transcribed and published for the first time in a previous article by this author. *See* Weissenberger, *supra* note 17, at 353-65.

99. The House Subcommittee on Criminal Justice actually altered the language of the rule 804(b)(1) from the Supreme Court version to the current version. The Subcommittee discussed and amended this rule during mark-up sessions held in 1973. For a transcription of the tape recordings of the pertinent portions of the mark-up sessions, see Weissenberger, *supra* note 17, at 353-65. The Subcommittee's discussions of rule 804(b)(1) reveal its intent to limit the use of former testimony, based on fairness considerations. These excerpts exemplify this concern:

> Rep. Hungate: Now, 804(b)(1).
>
> Counsel: This again is just a draft to implement something that the subcommittee decided in principle and then asked us to come up with an appropriate draft.
>
> [The preceding session contained discussions about narrowing Rule 804(b)(1), especially in criminal cases; members' concerns about fairness to civil litigants also were expressed.]
>
> Counsel: Yes, the original rule said the parties to a prior hearing or deposition needed only to have "motive and interest similar to" the party against whom it was offered. Now this would say "if the party against whom it is now offered had an opportunity to develop the testimony by direct, cross or redirect." My recollection of Mr. Mayne's suggestion was that this might have been some nickel and dime lawsuit that they really did not pay much attention to when this issue was presented, and it just passed on. Whereas, now it is a key

is not clear whether the Subcommittee intended the relationship to be the strict equivalent of common-law privity, the Subcommittee manifestly contemplated a formal succession of interests. The mark-up session indicates an unmistakable intent to disqualify testimony developed by litigants who are merely affiliated or related to the party against whom the hearsay would be offered. Some formal, legal nexus (such as between a decedent and his personal representative) was expressly contemplated. The legal relationship or succession expressly contemplated demonstrates that the intended interpretation of "predecessor in interest" was not figurative or fictional, but rather formalistic and literal. This formalistic nexus is virtually identical to, if not absolutely the equivalent of, common-law privity. The House Subcommittee version was adopted by the House and ultimately passed by the Senate.[100]

The interpretation of rule 804(b)(1) becomes necessarily confused when the Report of the Senate Committee on the Judiciary is considered in light of the House Report. The Senate Report states that the committee found little difference between the Supreme Court and the House versions of the rule, and therefore the Senate deferred to the House and accepted its version of rule

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issue in a very important suit and these persons now concerned did not even have a chance in the other suit. I thought that was a pretty good argument.

. . . .

Counsel: If you wanted we could say, "If the party, or a successor," or whatever the language is—representative, is that what . . .

Rep. Mann: "Successor" would probably include substitution.

Counsel: Or "If, if the party or a successor in interest provided in Rule 32," etc.

Rep. Hungate: I do not think I would go back to that.

Counsel: What if you just said, "If the party against whom the testimony is now offered, or his predecessor in interest," something like that, "had an opportunity to develop . . . ." Is that the point that you had in mind?

[More discussion on successor/predecessor wording ensued.]

Rep. Mann: Well, I feel that the inclusion of the words, "a predecessor in interest," is going to cover ninety-eight percent of the cases . . . because I think they will turn out to be predecessors in interest. It is difficult to conceive of a representative also not being a predecessor in interest if it is the same party, even in a deceased situation. I would say that was a predecessor in interest.

. . . .

[Exchange between members and counsel clarifying that predecessor in interest would not apply to criminal cases.]

Counsel: [reading draft] "[I]f the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity to develop . . ." and so on.

Rep. Mann: Well, the real question then is, does the "predecessor in interest" encompass collateral parties, codefendants, coconspirators, which gets us back to motive and interest similar to those of the parties in the original suit.

Counsel: Well it is not intended to and you can put that in your Note.

[The committee concluded by accepting the predecessor in interest language.]

Mark-up Session No. 14-2, Federal Rules of Evidence, Subcommittee on Criminal Justice, House of Representatives, June 12, 1973, *transcribed in* Weissenberger, *supra* note 17, at 357-65.

During a July 1984 telephone interview with Thomas Hutchinson, counsel for the House Subcommittee on Criminal Justice since 1973, Mr. Hutchinson stated that the draft of the rule and accompanying report on rule 804(b)(1) was comprised of the comments of members during the mark-up sessions. Mr. Hutchinson added that the rule's drafts and accompanying reports were approved by Chairman Hungate to ensure that they accurately reflected the view expressed during the mark-up sessions before release in committee print. For a discussion of the value of these transcripts as a source of legislative history, see *infra* note 109 and accompanying text.

100. 4 J. WEINSTEIN & M. BERGER, *supra* note 6, at 804-8 to -9.

804(b)(1).[101] The committee reports generate inevitable interpretation problems because on a quick reading the Senate Report seems to minimize a significant alteration that, according to the House Report, was essential for ensuring fairness to the party against whom the former testimony would be offered. This policy of adversarial fairness was unambiguously reflected in the deliberations of the House Subcommittee during the process of redrafting rule 804(b)(1). Subcommittee members recognized the import of the advisory committee's version, but consciously elected to circumscribe the use of prior testimony in civil cases, believing that the Supreme Court's version of the rule did not adequately safeguard fairness to litigants.[102] Additionally, the Senate Report makes no reference to statements submitted by numerous commentators during the Senate Judiciary Committee's hearings on the Federal Rules of Evidence which highlighted the significant divergence between the House and Supreme Court versions of rule 804(b)(1).[103] Consequently, the Senate Report is incongruous with the fact that there was notice of the significance of the House alterations of rule 804(b)(1).

Rule 804(b)(1) is further subject to distortion because the House left the term "predecessor in interest" undefined. As a result, courts have been inconsistent in their interpretations of this language—at times to the point of ignoring it.[104] Initial interpretations of the language by commentators suggested that the "predecessor in interest" language denotes the "traditional rule," which at common law meant privity.[105] As Professor Lilly explains:

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101. S. REP. NO. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7074. The report states that "[a]lthough the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment." *Id.*

102. For an illustration of the specific fairness concerns of the drafters of rule 804(b)(1) as expressed during committee mark-up sessions, see Weissenberger, *supra* note 17, at 353-65.

103. *See Federal Rules of Evidence: Hearings on H.R. 5463 Before Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 53, 69-70 (1974), *reprinted in* 4 J. BAILEY & O. TRELLIS, THE RULES OF EVIDENCE LEGISLATIVE HISTORY AND RELATED DOCUMENTS (1980) (statement submitted by Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Council of the United States); *id.* at 127, 174-75 (critique submitted by H. Keatinger and J. Blanchard); *id.* at 215, 231-32 (article submitted with statement by F. Rothstein).

104. *See infra* notes 115-24 and accompanying text (cases interpreting predecessor in interest language of rule 804(b)(1)).

105. *See* 11 J. MOORE, MOORE'S FEDERAL PRACTICE § 804.04[02] (2d. ed. 1988); 4 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 804(b)(1)[04], at 804-89. Judge Weinstein points out, however, that cases decided since the enactment of rule 804(b)(1) tend to favor an expansive interpretation of this rule. *Id.* at 804-89 to -91. Professor McCormick had initially acknowledged that the "predecessor in interest" language reinstated the common-law privity requirement. Wilton & Campbell, *The Admissibility of Prior Testimony of Out-of-Court Experts*, 39 RUTGERS L. REV. 111, 124 n.62 (quoting C. MCCORMICK, MCCORMICK ON EVIDENCE § 256, at 77 (Supp. 1978)). Since the Wilton & Campbell article was written, however, the McCormick treatise has changed its position, now stating that Congress did not intend to require privity in civil application of rule 804(b)(1), apparently approving the broad judicial interpretation of the "predecessor in interest" language from *Lloyd*. *Id.* at 124. The McCormick treatise provides:

> Had it been intended to reinstate the outmoded concept of privity as developed at the common law, a statement to that effect could easily have been included, with unmistakeable meaning, but no such statement was made. The draftsmen at this point seemingly were searching for a suitable phrase to describe an acceptable substitute examiner, and they settled upon "predecessor in interest." In reality, of course, the key is that the prior exam-

> Although the phrase "predecessor in interest" (which the courts frequently use interchangeably with the phrase "persons in privity") has an exasperating inexactness about it, the expression generally refers to the predecessor from whom the present party received the right, title, interest or obligation that is at issue in the current litigation. For example, a decedent is a predecessor in interest to ("in privity with") both his personal representative and those, such as heirs and legatees, who take from him; so, too, is a grantor of property a predecessor to his grantee, as is a principal to his surety.[106]

Professor Lilly's interpretation of "predecessor in interest" is consistent with the House committee's overriding policy emphasis on fairness in modifying the advisory committee's version of rule 804(b)(1), which contained no such limitation. The common-law requirement of privity for the admission of former testimony was identified in the legislative history as "a further assurance of fairness."[107] Moreover, one commentator advised the Senate Judiciary Committee that the House version's "predecessor in interest" language signified a return to the common-law privity requirement.[108] Accordingly, interpreting the "predecessor in interest" language as requiring a formalistic legal nexus between the former party and the instant party is an appropriate and compelling mandate to a court's interpretation of rule 804(b)(1), considering the rule's legislative history and, most particularly, the House Committee Report.

B. *The Value of the Committee Reports*

Courts have found that committee reports are the "most reliable indicia of congressional intent."[109] Additionally, comments by committee members con-

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iner, however described, had "similar motive." As the court said in the leading, and virtually only, case construing the rule, "The previous party having like motive to develop the same testimony about the same material facts, is, in the final analysis, a predecessor in interest to the present party."

C. MCCORMICK, *supra* note 6, § 256, at 766-67 (footnotes omitted).

106. Lilly, *supra* note 11, at 288 (footnotes omitted). For additional discussion of "predecessor in interest" denoting privity at common law, see *supra* notes 56-59 & 72-75 and accompanying text (in contexts of party admissions and former testimony hearsay). *See also supra* note 99 (transcript of mark-up session, asserting that "predecessor in interest" should denote legal representation, such as personal representative of a deceased).

107. FED. R. EVID. 804(b)(1) advisory committee's note.

108. *See* 4 J. BAILEY & O. TRELLIS, *supra* note 103, at 69-70.

> The essential difference between the two versions is the House's substitution of the common law's "same party" or "predecessor in interest" test in place of the more simple "with motive and interest similar to those of the party against whom offered" test provided [by the Supreme Court].
>
> The position of the House represents a step backward and is needlessly . . . restrictive. It must be remembered . . . that the choice is not whether to insist upon production of the witness but rather whether anything at all is obtainable from that source . . . .
>
> The rule should be reinstated in the form submitted by the court.

Id.

109. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921); Mills v. United States, 713 F.2d 1249, 1252 (7th Cir. 1983) (citing United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980); Housing Auth. of Omaha v. United States Hous. Auth., 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973)), *cert. denied*, 464 U.S. 1069 (1984); *see also* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1984) (explaining value of reports of standing committees).

cerning the legislation in question are valuable in interpreting the enactment.[110] While the Senate in its report suggested that the House's change of the rule was not "great," the Senate acknowledged that a change was indeed made.[111] Regardless of whether the change was foreseeably great or minimal, alteration was certainly effected, and the rule as amended by the House was accepted by both chambers of Congress.

Courts have consistently held that it is reasonable to assume that the legislature has adopted the intent of a committee in regard to those parts of an enacted bill which were introduced by the committee.[112] Therefore, to interpret the rule correctly, courts should focus on the House committee's intent.[113] The House committee report reveals an express intent to narrow the Supreme Court's version of the rule to ensure fairness to the party against whom former testimony is offered. The committee's deliberations manifest a concern that unfairness will result if a party is unable to rebut former testimony, unless there is an identity between the party against whom the hearsay is offered and the party who developed the testimony, or at least some connection between the parties in the former and the instant proceeding. Consequently, the "predecessor in interest" language connoting privity, or a closely analogous formal connection between the former and the instant party, was specifically added to preserve fairness.[114] Any interpretation of rule 804(b)(1) that departs from a literal or

110. Courts have specifically looked to the views of members of the committee that holds congressional hearings on the proposed legislation. *See* United States v. Oates, 560 F.2d 45, 68-80 (2d Cir. 1977); United States v. Smith, 521 F.2d 968-69 n.24 (D.C. Cir. 1975); Pan Am. World Airways v. Civil Aeronautics Bd., 380 F.2d 770, 782 & n.14 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). With regard to the Federal Rules of Evidence, Chairman Hungate and Representatives Holtzman and Dennis, members of the House Subcommittee that drafted the Rules, have been viewed as authoritative sources of legislative history when interpreting specific rules. *See Oates*, 560 F.2d at 69-70 n.26, 71-73 (deferring to Chairman Hungate as well as Representatives Holtzman and Dennis as authorities); *Smith*, 521 F.2d at 968-69 n.24 (deferring to Chairman Hungate). Because the Subcommittee on Criminal Justice did the actual mark-up work on rule 804(b)(1), members' comments during the drafting process clarify its intended use. For an excerpt of pertinent parts of a rule 804(b)(1) mark-up session, see *supra* note 99.

111. S. REP. NO. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7074.

112. *See* Bindczyck v. Finucane, 342 U.S. 76, 83 (1951) (Court viewed committee amendment as ultimately passed by Congress persuasive indicia of congressional intent); Advance Mach. Co. & Consumer Prod. Safety Comm'n, 510 F. Supp. 360, 365 n.4 (D. Minn. 1981) (same). *See generally* 2A N. SINGER, *supra* note 109, § 48.06 (discussing persuasiveness of congressional committee reports).

113. Lloyd v. Am-Export Lines, 580 F.2d 1179, 1190-91 (3d Cir. 1978) (Stern, J., concurring), *cert. denied*, 439 U.S. 969 (1978).

114. For the text of the House Report, see *supra* text accompanying note 97.

The final House version of rule 804(b)(1), ultimately passed by the Senate, *see supra* note 101 and accompanying text, followed nationwide circulation and comment on the Committee Prints of June 28, 1973, and October 10, 1973. The predecessor in interest language of rule 804(b)(1) and the fairness policies embodied in the subcommittee report remained unaltered throughout the drafting process. Rule 804(b)(1) in the committee print of June 1973 stated:

> Hearsay exceptions—the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom*

formalistic application of the "predecessor in interest" language is therefore contrary to demonstrable legislative mandate.

V. JUDICIAL INTERPRETATION OF RULE 804(B)(1)

Judicial interpretation of rule 804(b)(1) has been significantly influenced by the 1978 case, *Lloyd v. American Export Lines.*[115] In *Lloyd* the United States Court of Appeals for the Third Circuit reviewed the legislative history of rule 804(b)(1), and after quoting the Congressional reports, cited the Senate Report's interpretation of the rule, saying, "We, too, fail to see a compelling difference between the [the House version and the Supreme Court version]."[116] The court construed the "predecessor in interest" language in rule 804(b)(1) as requiring only a "sufficient community of interest" between the prior litigant and party against whom the hearsay is offered.[117] The *Lloyd* court rationalized its holding by stating, "We strive to avoid interpretations that are wooden or mechanical, like obsolete common-law pleadings, and to favor those that facilitate the presentation of a complete picture to the fact-finder."[118] Discounting the fairness policy, the court concluded its analysis of rule 804(b)(1) by asserting that

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the testimony is now offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination.

(The words in brackets are the Court's version; italicized words are the subcommittee's changes). The committee print of October 1973 stated:

> Hearsay exceptions—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> Former testimony—testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of *the same or* another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

115. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

116. *Id.* at 1185.

117. *Id.* at 1185-86. Judge Aldisert's definition of "interest" bears quoting:

> Roscoe Pound has taught us that interests in law are "the claims or demands or desires which human beings, either individually or in groups or associations or relations, seek to satisfy . . . ." The interest implicated here was a claim or desire or demand which Alvarez as an individual, and the Coast Guard as a representative of a larger group, sought to satisfy, and which has been recognized as socially valid by authoritative decision-makers in our society.

Id. at 1186. Compare Judge Aldisert's definition with the definition of "interest" from Black's Law Dictionary, as quoted in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980):

> Black's Law Dictionary (5th ed. 1979) defines "predecessor" as "the correlative of 'successor,' " . . . and defines "successor in interest" as follows:
>
> One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a "successor in interest." In case of corporations, the term "successor in interest" ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

Id. at 1253 n.79 (quoting BLACK'S LAW DICTIONARY 1283-84 (5th ed. 1979) (citations omitted)).

118. *Lloyd*, 580 F.2d at 1186.

"[u]nder these circumstances, the previous party having like motive to develop the testimony about the same material fact is, in the final analysis, a predecessor in interest to the present party."[119] In this case, the "predecessor in interest" language acquired a fictional meaning.

While numerous federal courts have followed the *Lloyd* reasoning and construction of rule 804(b)(1) and have concluded that the "predecessor in interest" language of the rule should be interpreted broadly,[120] judicial interpretations of rule 804(b)(1) have been far from uniform. Some courts have emphasized that Congress intended rule 804(b)(1) to be strictly construed because of fairness considerations.[121] Other courts have not specifically focused on the legislative history of rule 804(b)(1) or expressly followed *Lloyd*, but have excluded prior testimony evidence on the basis of absence of the appropriate motive.[122] Other

119. *Id.* at 1187. In a separate concurring opinion, Judge Stern pointed out that the court's decision reduced the "predecessor in interest" language of rule 804(b)(1) to surplusage. *Id.* at 1190-91 (Stern, J. concurring). Judge Stern urged that the testimony on this case could have been admitted without rewriting rule 804(b)(1) under the residual hearsay rule, rule 804(b)(5). *Id.* at 1190, 1192 (Stern, J., concurring). Judge Stern's conclusion that rule 804(b)(5) would have been an appropriate basis for admission is questionable. *See infra* notes 145-52 and accompanying text (discussion of impropriety of using residual hearsay exception rule when another evidentiary rule is directly applicable).

120. *See, e.g.*, Dykes v. Raymark Indus., 801 F.2d 810, 815-16 (6th Cir. 1986) (deposition taken in another asbestos trial admissible against defendant in present litigation because of similarity of motive to cross-examine deponent), *cert. denied*, 107 S. Ct. 1975 (1987); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1294-95 (6th Cir. 1983) (same), *cert. denied*, 467 U.S. 1253 (1984); Lerner v. Seaboard C. L. R.R., 594 F. Supp. 963, 968 (S.D.N.Y. 1984) (deposition taken in prior railroad negligence case admitted in another case arising out of same accident because passenger/plaintiff in first action deemed predecessor in interest to passenger/plaintiff in later action); Carpenter v. Dizio, 506 F. Supp. 1117, 1123-24 (E.D. Pa. 1981) (former testimony admissible because community of interest between examination of witness in prior criminal proceedings and present civil action), *aff'd*, 673 F.2d 1298 (3d Cir. 1981).

121. *See, e.g.*, *In re* Paducah Towing Co., 692 F.2d 412, 418 (6th Cir. 1982) (former testimony not reliable if witness not adequately cross-examined; admission of former testimony unfair when opposing party or predecessor in interest did not have meaningful opportunity to cross-examine); *In re* Screws Antitrust Litig., 526 F. Supp. 1318, 1319 (D. Mass. 1981) ("[T]he plain language of the congressionally-approved words, 'predecessor in interest,' coupled with the clearly expressed intent of the House of Representatives forestalls the complete rejection of the House's intent and the acceptance of rule 804(b)(1) as the Supreme Court originally submitted it."); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1245-55 (E.D. Pa. 1980) (Congress concerned with fairness; when prior testimony offered against one co-defendant on basis of prior examination of witness on behalf of different co-defendant, potentially conflicting interests and litigation strategies come into play), *rev'd on other grounds sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986) (Court did not consider evidentiary issues); *In re* IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110, 112-13 (N.D. Cal. 1978) (former testimony from three cases not admissible against company which was not a party to them and not represented by predecessor in interest); *In re* Master Key Antitrust Litig., 72 F.R.D. 108, 109 (D. Conn. 1976) (version adopted by Congress "severely restricts" evidence that original Supreme Court version would have admitted).

122. *See* Hannah v. Overland, 795 F.2d 1385, 1390-91 (8th Cir. 1986) (deposition taken in criminal action at which county prosecutor was present excluded from subsequent civil action against city and individual police officers because of dissimilar motivation to develop testimony; issue of whether prosecutor was predecessor in interest to city and police officers not reached); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1160-61 (4th Cir. 1986) (in action of pipefitter who was exposed to processed asbestos products, proper to exclude deposition testimony from prior action regarding hazards of raw asbestos to plant workers because dissimilar motivation to develop testimony due to unique health hazards of each case); Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 752-53 (8th Cir. 1980) (former testimony not admissible because similar motive to cross-examine not shown); Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1329 (7th Cir. 1979) (former testimony not admissible because crucial issue in present trial was not issue in prior action);

courts have concluded that former testimony may be admitted when a substantial identity of issues existed in the two actions, coupled with a similar motive and meaningful opportunity to cross-examine the witness.[123] Focusing primarily on the similar motive criterion of rule 804(b)(1) has led some courts to ignore the "predecessor in interest" prerequisite altogether in admitting prior testimony.[124]

Conflict among the federal courts concerning the admission of prior testimony is illuminated by examining the many rationales employed to admit depositions from prior actions in the Johns-Manville asbestosis litigation. Several of the asbestosis cases addressed the issue of the admissibility of depositions of Dr. Kenneth Smith, a Johns-Manville employee until 1966, who died in 1977.[125] Dr. Smith's depositions tended to establish prior notice to Johns-Manville of the dangers of exposure to asbestos long before the danger was publicly acknowledged. In some of the cases in which rule 804(b)(1) was applied, the interpretation of the "predecessor in interest" language was not at issue because the party against whom the deposition was offered in the subsequent proceeding, Johns-Manville Products Corporation, had been present and represented when Dr. Smith's deposition was originally taken. In these cases the only question was whether Johns-Manville had a similar interest and motivation to develop the testimony in both the prior and subsequent proceedings.[126]

In cases in which Johns-Manville was not the party against whom the Smith deposition was offered, courts have split on whether or not to adopt

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Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495, 498-99 (D. Del. 1983) (testimony of government witness in criminal trial of union president inadmissible in civil trial against employer and union president, because, although owner and union president were alleged co-conspirators, union president did not share same motive in cross-examination as employer because defense not same as that of owner); *In re* Sterling Navigation Co., 444 F. Supp. 1043, 1046 (S.D.N.Y. 1977) (former testimony not admissible because given at nonadversarial hearing when present issues had not been joined).

123. *See, e.g.*, Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455, 1460-60 (8th Cir. 1986) (in indemnity action between supplier and seller of barge equipment arising out of barge accident, proper to admit testimony from prior action against barge owner; barge owner was predecessor in interest to seller of barge part because it had similar motive to develop testimony which sought to prove that third party had caused accident); DeLuryea v. Winthrop Laboratory, 697 F.2d 222, 226-27 (8th Cir. 1983) (deposition taken for 1959 workers' compensation claim admissible in present products liability action because testimony related to an issue relevant to both actions and opposing party had opportunity to cross-examine); Murray v. Toyota Motor Distrib., Inc., 664 F.2d 1377, 1379 (9th Cir.) (per curiam) (in automotive dealer's action against distributor and importer for antitrust violations, deposition testimony from another action against defendants was admissible because defendants at prior trial had similar, although not "identical," motive to cross-examine witness), *cert. denied*, 457 U.S. 1106 (1982); Bailey v. South Pac. Transp. Co., 613 F.2d 1385, 1390 (5th Cir.) (per curiam) (former testimony "fits neatly" within rule 804(b)(1)'s requirements because prior action involved same factual dispute and presented same motive for cross-examination), *cert. denied*, 449 U.S. 836 (1980).

124. *See infra* notes 133-43 (discussing cases that have eliminated the separate "predecessor in interest" criteria of rule 804(b)(1) exclusively in favor of similar motive to develop testimony criteria).

125. *See, e.g.*, Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1294 (6th Cir. 1983) (describing Dr. Smith's employment at Johns-Manville, nature of his notice to company of asbestos hazards, action/parties present when deposition taken), *cert. denied*, 467 U.S. 1253 (1984); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 385-86 (E.D. Pa. 1982) (same), *aff'd*, 760 F.2d 481 (3d Cir. 1985); *In re* Related Asbestos Cases, 543 F. Supp. 1142, 1144-48 (N.D. Cal. 1982) (same).

126. *See Neal*, 548 F. Supp. at 385-86; *Related Asbestos Cases*, 543 F. Supp. at 1147-48.

Lloyd's expansive interpretation of rule 804(b)(1)'s "predecessor in interest" language and admit Dr. Smith's deposition. For example, the United States District Court for the Northern District of Illinois reviewed the legislative history of rule 804(b)(1) and concluded that fairness policies expressed by Congress required a narrow construction of the rule.[127] The court, however, rejected the notion that Congress intended a requirement of corporate privity when it inserted the "predecessor in interest" language in the rule.[128] In this case, a subsidiary of Johns-Manville was defending against a product liability claim,[129] and the court, while not embracing the "community of interest" rationale of *Lloyd*, admitted Dr. Smith's depositions because it was "eminently fair" to admit testimony, elicited under cross-examination by Johns-Manville lawyers on behalf of one Johns-Manville subsidiary, against other Johns-Manville entities.[130] The court avoided holding that the subsidiary in this litigation was the successor of Johns-Manville Products because of uncertainties regarding the significance of name changes of the company's subsidiaries.[131] Focusing on the centralization of key facets of Johns-Manville's operations, the court concluded that, for purposes of the rule, there was but one de facto corporate entity; thus "even the strictest reading of the 'predecessor' language [was] met."[132] The particular facts of the case make the result defensible in the context of the legislative mandate of rule 804(b)(1).

By contrast, in *Clay v. Johns-Manville Sales Corp.*[133] the United States Court of Appeals for the Sixth Circuit interpreted the rule expansively and held that Dr. Smith's deposition could be admitted against co-defendant Raybestos-Manhattan, Inc., another asbestos manufacturer, although Raybestos had not been present during the deposition in the prior proceeding.[134] Adopting the *Lloyd* rationale, that court ruled that Johns-Manville, as an asbestos manufacturer like Raybestos, had a "similar motive" to cross-examine the witness and make objections to the testimony when the deposition was taken; thus Johns-Manville was fictionally Raybestos's predecessor in interest.[135]

Clay's acceptance of the *Lloyd* reasoning effectively erased the "predecessor in interest" language from rule 804(b)(1) for cases heard in the Sixth Circuit, as two asbestos cases subsequent to *Clay* have acknowledged. In *Murphy v. Owens-Illinois, Inc.*[136] the court refused to admit Dr. Smith's deposition wholly on the basis of the similar motive requirement. The deposition was offered against the

127. *In re* Johns-Manville/Asbestosis Cases, 93 F.R.D. 853, 856 (N.D. Ill. 1982).

128. *Id.*

129. *Id.* at 855.

130. *Id.* at 856.

131. *Id.* The Johns-Manville entities are "separate legal entities" in a workers' compensation context, *see In re* Johns-Manville/Asbestosis Cases, 511 F. Supp. 1229, 1234 (N.D. Ill. 1981), but are "successors in interest to J-M Products for purposes of the Dr. Smith depositions." *Johns-Manville/Asbestosis Cases*, 93 F.R.D. at 856.

132. *Johns-Manville/Asbestosis Cases*, 93 F.R.D. at 855.

133. 722 F.2d 1289 (6th Cir. 1983), *cert. denied*, 467 U.S. 1253 (1984).

134. *Id.* at 1294-95.

135. *Id.* at 1295.

136. 779 F.2d 340, 340-44 (6th Cir. 1985).

defendant company whose successor had been present when the deposition was originally taken.[137] The court reasoned that, as Owens-Illinois had sold its interest in asbestos manufacturing years before Dr. Smith's notice to Johns-Manville about the dangers of the product, its motive in cross-examining a witness would have been dissimilar to that of a company manufacturing asbestos at the time of Dr. Smith's notice.[138] Although the *Murphy* court construed rule 804(b)(1) to exclude the prior testimony, the court did state in dictum that the two-part criteria for rule 804(b)(1) had been "collapsed" into one test by *Clay* and *Lloyd*: whenever a similar motive to develop the testimony is found, the former party is a predecessor in interest to the present party and prior testimony may be admitted.[139]

A 1986 case, *Dykes v. Raymark Industries, Inc.*,[140] reaffirmed the one-part *Clay* test for prior testimony under rule 804(b)(1), and admitted Dr. Smith's deposition against a co-defendant asbestos producer which had not been present at the deposition.[141] The *Dykes* court stressed that "[w]e do not view our decision in *Clay* as establishing the admissibility of Dr. Smith's deposition for all purposes in all asbestos cases,"[142] but placed the burden upon the defendant to demonstrate the dissimilar motive in cross-examination between the present and former parties when objecting to the former testimony.[143] Because defendant did not clearly demonstrate this dissimilar motive to the trial court, the admission of Dr. Smith's deposition was upheld.[144]

The United States Court of Appeals for the Fifth Circuit, in an effort to resolve the troublesome task of interpreting the "predecessor in interest" language of rule 804(b)(1), chose to circumvent both *Lloyd* and congressional intent. In *Dartez v. Fibreboard Corp.*[145] the Fifth Circuit ruled that Dr. Smith's deposition was properly admitted against two co-defendants who had not been present at the deposition. The court avoided any interpretation of the "predecessor in interest" language by admitting the testimony under Federal Rule of Evidence 804(b)(5), one of the residual or "catchall" exceptions to the hearsay

137. *Id.* at 344 n.4.

138. *Id.* at 344. The court noted that Owens-Illinois had sold its asbestos division in 1958, and that portions of Dr. Smith's testimony dealt with knowledge about asbestos hazards after that date. The court agreed with defendant that its successor, who was present at the deposition of Dr. Smith, would not want to develop testimony about industry standards and knowledge at the time Owens-Illinois had an interest in the asbestos business. *Id.*

139. *Id.* at 343. "This court has, in effect, collapsed the two criteria into one test in *Clay*. The *Clay* court adopted the position of *Lloyd v. American Export Lines, Inc.*" *Id.* For a discussion of *Lloyd*'s interpretation of "predecessor in interest," see *supra* notes 116-18 and accompanying text.

140. 801 F.2d 810 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1975 (1987).

141. *Id.* at 815-16. The court explained that the predecessor in interest language was not meant to be limited to a "legal relationship," but is also to be determined by the similar motive criteria of the rule. *Id.* at 816.

142. *Id.* at 816.

143. *Id.* at 817. The present party should articulate "precisely what lines of questioning they would have pursued" had they been a party in the former action. *Id.*

144. *Id.*

145. 765 F.2d 456 (5th Cir. 1985).

rule.[146]

The *Dartez* case exemplifies a "near miss" situation, which has been defined as one in which evidence "appears to fall within a category encompassed in one of the specified hearsay exceptions, such as former testimony or business records, but which failed to meet the precise requirements of the specific exception."[147] Courts have expressly held it improper to use rule 804(b)(5) in circumstances in which another established hearsay exception is directly applicable.[148] The legislative history of rule 804(b)(5) reveals that the residual hearsay exceptions are to be used only for hearsay not circumscribed by the express exceptions.[149] Consequently, whenever a potential use of hearsay was specifically

146. *Id.* at 462. Rule 804(b)(5) and its identical counterpart, rule 803(24), the residual hearsay exception which is not conditioned on the unavailability of the declarant, provide:

> OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponents intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24), 804(b)(5).

147. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1262-64 (E.D. Pa. 1980), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 301-03 (3d Cir. 1983), *rev'd on other grounds sub nom.* Mitsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (Court did not consider evidentiary issue).

148. Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495, 498 (D. Del. 1983); *Zenith Radio Corp.*, 505 F. Supp. at 1262-64. For a discussion of whether rule 804(b)(5) can be used in place of rule 804(b)(1) to admit transcripts of grand jury testimony in subsequent criminal trials, see Weissenberger, *supra* note 17, at 340-52; *see also* United States v. Vigoa, 656 F. Supp. 1499, 1506 (D.N.J. 1987) (district court rejected admission of grand jury testimony under rule 804(b)(5) because former testimony could not have been properly admitted under rule 804(b)(1)). The *Vigoa* court emphasized that the residual hearsay exception should be used to admit hearsay only under very narrow circumstances, and *not* when the admission of hearsay would undermine the policy manifested by existing rules. *Id.* The court asserted that to admit the grand jury testimony under rule 804(b)(5) would impermissibly subvert the fairness policies incorporated into rule 804(b)(1). *Id.* at 1505.

149. The residual hearsay exceptions were changed dramatically during the course of congressional review of the Supreme Court's version of the rules. The rules were intended to be used sparingly, but to provide judges with a device for admitting hearsay in situations unanticipated by the other exceptions, yet bearing similar guarantees of trustworthiness. FED. R. EVID. 803(24) advisory committee's note. The Supreme Court approved the draft of the rules submitted by its advisory committee and transmitted the draft to Congress on February 5, 1973. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973). The House Subcommittee on Criminal Justice, however, viewed the residual exceptions as providing judges with too much discretion in admitting hearsay, thus undermining the purpose of the Federal Rules of Evidence in providing for certain and predictable hearsay rules. *See* H.R. REP. NO. 650, 93d Cong. 2d Sess. 5-6, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079. The Senate Judiciary Committee acknowledged the House's concern; nonetheless, it reinstated a revised version of the residual exceptions to be used with caution to cover unanticipated situations in which existing hearsay exceptions would not apply. S. REP. NO. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7065-66. The Senate Report explains:

> The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.

contemplated but consciously rejected in the Rules' overall design, using the residual exceptions to resurrect that rejected class of hearsay and render it admissible is in derogation of its intended exclusion elsewhere in the Rules. The Senate Judiciary Committee explained:

> First, [the hearsay statement] must have 'equivalent circumstantial guarantees of trustworthiness.' Second, it must be offered as evidence of a 'material fact.' Third, the court must determine that the statement 'is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts . . . . Fourth, the court must determine that *'the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.'*[150]

The residual exceptions, then, are to be applied in a manner which will not subvert the policy considerations supporting the hearsay rule and its specified exceptions.[151] Before the residual exceptions are applied in a "near-miss"

Id. at 7066. The Conference Committee subsequently agreed in pertinent part with the Senate's version of the residual exceptions, but restricted it further by adding a requirement that the opposing party be given adequate notice of the proponent's intent to request that hearsay be admitted under one of the residual exceptions. H.R. CONF. REP. NO. 1597, 93d. Cong., 2d Sess. 11-13, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7105-06. The conferees' version was ultimately adopted by both houses of Congress. For text of the final version of rules 803(24) and 804(b)(5), see *supra* note 146.

150. S. REP. NO. 1277, 93d Cong., 2nd Sess. 19-20 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7066 (emphasis added).

151. Clause (C) of the residual exceptions demands that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." FED. R. EVID. 803(24), 804(b)(5). Professor Sonenshein explains this requirement:

> A reasonable interpretation of clause (C) requires that the admission of hearsay not be inconsistent with the interests of justice. While this standard should be viewed flexibly, the additional requirement that the proffer not undermine the spirit or letter of the other Federal Rules of Evidence should be viewed more stringently. Thus, if the admission of the hearsay under the residual exception runs afoul of some other Federal Rule, the other rule should control to exclude the hearsay. Where Congress has specifically addressed an issue in another rule, the more general language of the residual exceptions must give way. Otherwise, litigants will be able to circumvent the particularized requirements envisioned by Congress.

Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 900-01 (1982).

Courts have also held that the residual hearsay exceptions are to be used sparingly and not where another rule applies. *See, e.g., In re* Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985) (legislative history indicates rule 804(b)(5) to be used only under exceptional circumstances; evidence inadmissible under rule 803(5) also inadmissible under residual exception); Robinson v. Shapiro, 646 F.2d 734, 742-43 & n.6 (2d Cir. 1981) (noting that Congress did not want the residual exceptions to "swallow" other exceptions); United States v. Metz, 608 F.2d 147, 157 (5th Cir. 1979) (statement inadmissible under rule 804(b)(3) inadmissible under rule 804(b)(5)), *cert. denied*, 449 U.S. 821 (1980); United States v. Kim, 595 F.2d 755, 763-66 (D.C. Cir. 1979) (absence of factors making telex trustworthy under rule 803(6) also render it inadmissible under rule 803(24)); Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495, 498 (D. Del. 1983) ("where there is a specific hearsay exception applicable to a clearly defined category of evidence such as former testimony, but the evidence fails to satisfy the requirements of the specific exception, the evidence should not be admitted under the residual exception"); Electroglas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 103 (N.D. Cal. 1980) (statement cannot be admitted under rule 804(b)(5) when specifically excluded by another exception); *see also* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). *See generally* G. WEISSENBERGER, *supra* note 8, § 804.32 (discussing stringent requirements for residual hearsay exceptions).

situation, it is necessary to ask whether the policies of the "nearly-missed" exception will be excessively compromised. In some cases, a court may justifiably resolve a near-miss situation in favor of admissibility under the residual exception without frustrating the discernable policy of the pertinent express exception, because most hearsay exceptions embody only an accuracy policy. As long as the hearsay offered pursuant to the residual exception is no less reliable than that admitted pursuant to the "nearly-missed" express exception, the hearsay system is not compromised. Whatever the appropriate "near-miss" resolution may be with regard to accuracy-based hearsay exceptions, the analysis assumes different dimensions in regard to the former testimony exception, which delimits admissibility on the basis of fairness. In this context, the "near-miss" analysis must respect the conscious policy decisions reflected in rule 804(b)(1), and deny admission under the residual exceptions.[152]

The asbestosis cases vividly illustrate not only conflicts among the federal courts concerning the proper interpretation of rule 804(b)(1), but also the competing interests of fairness and accuracy. Cases admitting former testimony under the broad rationale of *Lloyd* and *Clay* concentrate on the probative value and utility of the testimony to be admitted. These cases involve sympathetic plaintiffs seeking judicial relief for serious injuries and deaths, and admission of prior testimony crucial to determining the asbestos manufacturer's liability. Consequently, ignoring the "predecessor in interest" provisions of rule 804(b)(1) may seem understandable and even compassionate. Yet, overly elastic interpretations of rule 804(b)(1) undermine fundamental values of the adversary system of litigation, and may ultimately have an undesirable impact on other litigants. For example, in *Lerner v. Seaboard Coast Line Railroad Co.*[153] the district court for the Southern District of New York admitted depositions taken by a different plaintiff in a prior suit which exonerated defendant railroad company for the same accident. The plaintiff in the former trial was fictionalized as a predecessor in interest to the plaintiff in the second trial even though the second plaintiff had no opportunity to cross-examine the witnesses, and no relationship existed between the plaintiffs other than the common nucleus of facts related to the train accident.[154]

In some courts, judicial liberalization of rule 804(b)(1) has effectively replaced Congress' rule with the version originally proposed by the Supreme Court. Such judicial initiative in generously admitting prior testimony evidence is strongly supported by many commentators, but raises difficult questions concerning the degree to which judicial power can vary the explicit mandate of statutorily enacted rules. This issue is addressed in the next section of this Article.

152. *See supra* note 148 and accompanying text (discussing requirement that hearsay admitted under rule 804(b)(5) must not undermine existing rules).

153. 594 F. Supp. 963 (S.D.N.Y. 1984).

154. *Id.* at 968.

VI. SEPARATION OF POWERS AND THE FEDERAL RULES OF EVIDENCE

This Article has sought to demonstrate that the congressional amendments to rule 804(b)(1) are, indeed, a departure from the Supreme Court's version, and that the "predecessor in interest" language of the enacted version of rule 804(b)(1) reflects a distinct divergence in policy when compared to the superceded version originally submitted by the Supreme Court.[155] Similarly, this Article has endeavored to show that courts have applied rule 804(b)(1) in contravention of the manifest legislative intent. In a very real sense Congress' rulemaking authority is tested when courts apply rule 804(b)(1) in a manner that conflicts with express legislative mandate.[156] Congress' vast authority to promulgate procedural and evidentiary rules for the federal courts is well settled,[157] and consequently courts may not freely substitute the Supreme Court's proposed version of rule 804(b)(1) in preference to Congress' version without some defensible justification. As recently stated by the Supreme Court, the Federal Rules of Evidence are a "legislative enactment" to be construed by the "traditional tools of statutory construction."[158]

The final section of this Article will examine whether any justification exists for federal courts' violation of the well-established principle that the federal judiciary must follow legitimately enacted procedural rules. There are only two plausible justifications. First, one can argue that Congress exceeded its authority when it enacted the Federal Rules of Evidence, and rule 804(b)(1) in particular. Second, one can argue that federal courts possess the delegated authority to engage in case-by-case evidentiary rulemaking in derogation of express legislative enactments of procedural rules. Each of these possible justifications will be evaluated.

A. *The Rulemaking Power of Congress and the Courts*

When the Supreme Court promulgated the Federal Rules of Evidence,[159] serious questions were raised about the Court's authority to prescribe the Rules.[160] The Rules were promulgated pursuant to congressional enabling authority granting the Supreme Court the power to prescribe rules governing the practice and procedure of the federal courts, provided that such rules did not

155. For a discussion of the policies underlying the Supreme Court's version of rule 804(b)(1) compared to Congress' amended version, see *supra* notes 92-113 and accompanying text.

156. For a discussion of courts broadly interpreting the predecessor in interest language of rule 804(b)(1) in conflict with the express intent of Congress, see *supra* notes 115-23 & 133-43 and accompanying text.

157. *See infra* notes 168-76 and accompanying text (discussing Congress' rulemaking power stemming from both article I and article III of the Constitution).

158. Beech Aircraft Corp. v. Rainy, 57 U.S.L.W. 4043, 4046 (Dec. 12, 1988) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)).

159. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972). The Rules were to take effect 90 days after submission to Congress, pursuant to an enabling act granting the Supreme Court the power to prescribe rules governing the practice and procedure of the federal courts. *See* 28 U.S.C. § 2072 (1970). The Rules were also promulgated under statutes. *See, e.g.*, 18 U.S.C. §§ 3402, 3771, 3772 (1970) (criminal practice and procedure). The Rules were to take effect ninety days after submission to Congress. 28 U.S.C. § 2072 (1976).

160. Comment, *Powers*, *supra* note 2, at 1059-60.

"abridge, enlarge or modify any substantive right."[161] Critics examined the rules closely to guard against the possibility that the Court had exceeded its authority under the Enabling Act by prescribing certain rules which were outside the scope of "practice and procedure."[162] The privilege provisions in particular were scrutinized to determine if they were substantive rules and, as such, beyond the Court's rulemaking power.[163] Also, arguments were advanced that the promulgation of a code of evidentiary rules by the Supreme Court violated constitutional proscriptions against giving advisory opinions, because "judicial power" only entitled courts to determine evidentiary rules in the context of adjudicating individual disputes.[164] These issues became moot, however, when Congress intervened in the process with legislation stipulating that the Rules of Evidence would not take effect until they were expressly approved by Congress.[165] Once Congress asserted its rulemaking authority and reviewed, amended, and ultimately enacted rules promulgated by the Supreme Court's advisory committee, the issue became solely one of whether such congressional action was a legitimate legislative function.

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161. 28 U.S.C. § 2072 (1976).

162. *See* Comment, *Powers*, *supra* note 2, at 1059-60. Justice Douglas dissented from the Supreme Court's order promulgating the Rules, alleging that the Court could make rules only on a case-by-case basis. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185 (1972). Critics offered four objections to the Supreme Court's version of the Rules of Evidence. The Rules were criticized for not recognizing applicable state substantive law in areas such as privileges. The article on privilege was criticized by those who wanted either to extend or to limit the protection of privileged relationships. There were objections to the liberalization of the hearsay exceptions. Some of the rules regulating the procedure for admitting and excluding evidence were criticized, such as the rules concerning the scope of cross-examination, the power of the judge to comment on the evidence, and the adjudication of preliminary facts. 21 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5006, at 106-07.

163. *See* Comment, *Powers*, *supra* note 2, at 1059-60. Privilege rules are arguably substantive because they promote social policy rather than regulating court procedure. They stem from the legislature's policy decision to protect certain interpersonal relationships, even at the expense of leaving the truth uncovered in some lawsuits. *Id.* at 1072-73; *see* Sibbach v. Wilson & Co., 312 U.S. 1 (1941). In *Sibbach* the Court stated that the test for differentiating between substance and procedure "must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14. Commentators generally conclude that most rules of evidence are procedural under the *Sibbach* test because they involve the orderly conduct of judicial business. *See* Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79, 101-08, 114-15 (1961); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435 (1957); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 651 (1957); Comment, *Powers*, *supra* note 2, at 1069-70.

164. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185 (1973) (Douglas, J., dissenting).

165. Pub. L. No. 93-12 (Mar. 30, 1973). Prior to Congress' intervention in the promulgation of the evidence rules, the Supreme Court established rules of procedure without congressional modification. The authority to establish such rules was sometimes characterized as "judicial rulemaking pursuant to legislative delegation and subject to Congressional veto." 4 C. WRIGHT & O. MILLER, FEDERAL PRACTICE AND PROCEDURES § 1001, at 6 (1982). The Rules of Civil and Criminal Procedure were reported to and approved by Congress; however, the Supreme Court's drafts of these rules were not revised. Moore & Bendix, *supra* note 2, at 36-38. Congress altered significantly the Supreme Court's version of the Federal Rules of Evidence. *See* Martin, *supra* note 2, at 168-69. "In spite of the substantial flexibility retained in the structure of the Federal Rules, it is clear that the purpose of many of the changes made by Congress was to require the exclusion of evidence that would have been admissible under the rules prescribed by the Supreme Court." *Id.* at 169. Thereafter, Congress enacted the Rules on January 2, 1975. Pub. L. No. 93-595 (Jan. 2, 1975).

Power over procedure is not expressly granted either to the Court or to Congress by the Constitution. While article III of the Constitution does give federal courts the power to decide "cases" and "controversies,"[166] Congress wields vast power over the courts. This power is apparent in Congress' recognized authority to create the lower courts,[167] to provide for their jurisdiction,[168] and to provide for the appellate jurisdiction of the Supreme Court.[169] Because there are no express constitutional provisions addressing the prescription of rules of procedure for the federal courts, it is necessary to look to several sources to determine Congress' ultimate authority to make procedural rules. In 1924 Professors Frankfurter and Landis argued that any conclusions about rulemaking authority are necessarily dependent upon an historical analysis of the exercise of the authority to make procedural rules, because there are no abstract analytical lines separating the procedural rulemaking powers of the courts and Congress.[170] Several commentators have demonstrated that Congress has widely exercised its authority to prescribe rules for the federal courts since its initial legislation creating the inferior federal courts.[171] History thus belies any contention that Congress' role in reviewing, redrafting, and enacting the Federal Rules of Evidence constituted a novel and unwarranted assertion of rulemaking authority.[172]

Historically, many legislative acts have delegated authority for procedural matters to the Court,[173] but Congress also has exercised its own authority and

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166. Article III describes "the judicial power" as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

167. U.S. CONST. art. III, § 1.

168. *See* Sheldon v. Sill, 49 U.S. 441, 448-49 (8 How. 1850) (Congress having power to establish inferior federal courts may determine limits of their jurisdiction); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-55 (1975) (asserting that Congress' power to prescribe rules for federal courts' jurisdiction derives from its article III powers).

169. U.S. CONST. art. III, § 2. The Supreme Court has acknowledged that Congress has sweeping powers to limit the appellate jurisdiction of the Supreme Court. *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (while appeal was before Supreme Court, Congress repealed act giving Court appellate jurisdiction in habeas corpus matter).

170. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017-18 (1924).

171. *See id.* at 1018-19 (demonstrating that Congress has legislated a vast range of evidentiary and procedural matters for the federal courts since 1789); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1466-74 (1984) (detailing the history of Congress' active role in procedural rulemaking).

172. *See, e.g.*, Moore & Bendix, *supra* note 2, at 9-10 (suggesting that Congress' role in amending the Federal Rules of Evidence was not only ill-advised, but a departure from its historical role of deference to the courts for rulemaking).

173. *See supra* note 165 (explaining that prior to Federal Rules of Evidence, Congress frequently delegated rulemaking authority to the courts).

has acted affirmatively with regard to procedural rulemaking.[174] The broad constitutional powers granted to Congress under the "necessary and proper" clause[175] and Congress' power to regulate jurisdiction of the lower federal courts[176] historically have justified congressional prescription of rules for the federal court system.[177] Moreover, the lower federal courts are statutorily created by Congress, and Congress obviously restricted the power of these federal trial and appellate courts to originate or alter any rules of procedure.[178] From this perspective, and considering the history of congressional enactments of procedural and evidentiary rules, "[one is] enabled to appreciate the intent and the extent of the dynamic power specifically conferred by the Constitution upon Congress when authorized 'to constitute Tribunals inferior to the Supreme Court.' In truth, these courts live and move and have their being through the legislation of Congress."[179] Indeed, the Supreme Court has expressly and specifically acknowledged the supremacy of Congress' power to make procedural rules.[180]

Congress' actions with regard to the Federal Rules of Evidence are entirely consistent with its frequent exercise of the power to enact procedural rules. Nevertheless, most commentators agree that the constitutional power to make rules of court procedure is neither exclusively legislative nor judicial.[181] They conclude that the Supreme Court possesses the power to promulgate procedural rules subject to the authorization and limits established by Congress. Similarly, Congress' ability to legislate matters that directly affect a coordinate branch of government is not unrestricted: succinctly stated, "Congress cannot impede the functioning" of the courts in the process of adjudicating disputes.[182] Whether Congress exceeded its authority to prescribe rules of court practice in enacting

174. *See generally* Beale, *supra* note 171, at 1436-39, 1466-68 (detailing congressional action pertaining to court procedure).

175. U.S. CONST. art. 1, § 8, cl. 18. "Congress shall have the power to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

176. *See supra* notes 166-68 and accompanying text (discussing jurisdictional powers of Congress under article III).

177. Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941).

178. Beale, *supra* note 171, at 1473-74. Professor Beale explains that commencing with the statutory creation of the lower federal courts, Congress has established certain procedural rules, including the delegation of authority to the courts to promulgate other rules. But Congress has always exercised overriding authority to regulate procedural matters. Thus, these legislative enactments left the lower courts with minimal ancillary authority, the scope of which must be determined by examining the provisions of the legislative acts. *Id.*; *see also* Frankfurter & Landis, *supra* note 170, at 1018-20 (attributing to Congress the power to prescribe procedural rules through its power to establish federal courts).

179. Frankfurter & Landis, *supra* note 170, at 1020.

180. *See* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power."); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts"); *see also* Funk v. United States, 290 U.S. 371, 381-82 (1933) (Congress has ultimate authority over evidentiary and procedural rules in federal courts; only in absence of legislation may courts engage in case-by-case rulemaking).

181. *See, e.g.*, Comment, *Rulemaking*, *supra* note 2, at 83; Comment, *Powers*, *supra* note 2, at 1067.

182. *See* Comment, *Powers*, *supra* note 2, at 1067.

the Federal Rules of Evidence, and rule 804(b)(1) in particular, may be determined only by an examination of the possibility that Congress' enactment of the Rules encroaches upon the implied powers of the judiciary branch. Such judicial powers are the only conceivable limitation on Congress' rulemaking authority.

The federal courts' inherent rulemaking power arguably is implicit in the grant of "the judicial power" to the Supreme Court.[183] Implied powers of the executive[184] and legislative[185] branches of the government have been recognized as necessary for the effective implementation of the powers expressly granted to those branches; similarly, the judiciary holds implied, ancillary powers necessary to carry out its business which are immune from interference by either of the other coordinate branches.[186] Not known for equivocation, Dean Wigmore once contended that federal courts hold inherent power to make procedural rules, granted exclusively to them under the "judicial power" clause of article III. According to Wigmore, any congressional enactments of evidence rules are therefore void.[187] Wigmore's extreme position, however, does not comport with the historical fact that the Supreme Court has long expressly recognized and acquiesced to Congress' ultimate authority over the practice and procedure of the federal courts.[188]

It has also been suggested that while Congress may have vast authority to enact evidentiary and procedural rules for the federal courts, certain procedural rules, such as the power to punish for contempt, are so necessary for the proper adjudication of cases that they are exempt from any interference by Congress.[189] It follows, according to this theory, that the courts may have a constitutionally based inherent authority to prescribe certain rules, arguably including evidentiary rules, but only if those rules are *necessary* for the proper functioning of the courts. In an imaginative article, Professor Martin has taken the position that the federal courts are supreme over Congress regarding some of the Rules of Evidence, including rule 804(b)(1), because those rules exemplify the kind of evidentiary control indispensable to a court's functioning, especially with regard to the need for consistency.[190] Consequently, according to Martin, the courts can ignore Congress' version of rule 804(b)(1) in favor of the Supreme Court's

183. *See* Beale, *supra* note 171, at 1468-70 (1984); Martin, *supra* note 2, at 179-81; Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928); Comment, *Rulemaking*, *supra* note 2, at 82 (citing R. HARRIS, THE JUDICIAL POWER OF THE UNITED STATES 153 (1940)).

184. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 704 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

185. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-03 (1819).

186. *See* Beale, *supra* note 171, at 1470-73; Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause"*, 36 OHIO ST. L.J. 788, 796-99 (1975).

187. Wigmore, *supra* note 183, at 277.

188. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts").

189. *See* Beale, *supra* note 171, at 1469; Martin, *supra* note 2, at 185-86 (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227-29 (1821)).

190. Martin, *supra* note 2, at 181-83.

version.[191] Professor Martin's premise is questionable because the very purpose of the Federal Rules of Evidence is to create uniformity which was previously lacking in evidentiary rules in the federal courts. Moreover, Professor Martin's unconventional argument that "indispensible" rules may be ignored in complete disregard of congressional intent[192] is at odds with the frequently expressed position of the Supreme Court that federal courts may engage in case-by-case rulemaking only in the absence of congressional provisions to the contrary.[193]

Martin's arguments do not comport with the mainstream view that the courts may have the power to determine some rules of procedure, but that Congress has retained and exercised the power to supersede them and prescribe its own rules.[194] Indeed, while the Supreme Court has recognized that courts have some inherent rulemaking powers, it has construed them very narrowly and found them to exist only when absolutely necessary for order and decorum in court.[195] The nonexclusive nature of these judicial powers is confirmed by the fact that the Supreme Court has upheld the constitutionality of congressional enactments regulating federal courts' powers to punish for contempt.[196]

The foremost case in which the Supreme Court voided a congressional act because it encroached on judicial functions is *United States v. Klein*.[197] In *Klein*, post-Civil War legislation was held to be unconstitutional because it essentially dictated the manner in which judges should decide specific cases by requiring judges to assess certain evidence as conclusive proof of the fact in question.[198]

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191. Martin, *supra* note 2, at 179. According to Martin, evidence rules are part of the inherent judicial power because they are "indispensable to the exercise of the power." *Id.* at 182. Martin argues that there must be consistency in the rules for "consistent 'lawful' results." *Id.* Historically, principles governing the admissibility of evidence largely have been judicial creations. *Id.* Furthermore, if evidence rules were formulated outside the courts, they "could be fashioned [in a way] that would prevent courts from . . . deciding controversies." *Id.* at 183. Martin concludes that those rules that affect only the conduct of the decision-making process at trial are inherent in the judicial power. Accordingly, Congress' alterations do not intercede the Court's draft of those rules. *Id.* at 195.

192. Martin, *supra* note 2, at 193.

193. *See* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant act of Congress."); *see also* Gordon v. United States, 344 U.S. 414, 418 (1953) ("In the absence of specific legislation, questions of this nature [necessity of production of written statements in possession of government] are governed 'by the principles of the common law as they may be interpreted by the courts of the United States . . . .'" (citation omitted)); Funk v. United States, 290 U.S. 371, 379 (1933) (stating that with regard to competency of witnesses, federal courts are bound by common law if Congress has not provided otherwise).

194. 10 J. MOORE, *supra* note 2, at 87.

195. Beale, *supra* note 171, at 1469.

196. Michaelson v. United States, 266 U.S. 42, 64-66 (1924) (upholding Congress' authority to pass legislation limiting the contempt powers of federal judges under the Clayton Act); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1873) (upholding constitutionality of the Act of March 2, 1831, Congress' initial legislation restricting federal courts' powers to punish for contempt). The Supreme Court has deferred to Congress as the authority for prescribing modern civil and criminal contempt statutes. 18 U.S.C. §§ 401-402 (1982); *see In re* McConnell, 370 U.S. 230, 233-34 (1961) (Congress intended federal courts to construe § 401 narrowly; purpose is to limit courts' contempt power.)

197. 80 U.S. (13 Wall.) 128, 146-48 (1871). The *Klein* court stated that when Congress forbids courts to give proper effect to evidence, it "has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

198. In 1868 President Johnson issued a general pardon for former speakers of the Confederacy,

Certainly, it cannot be reasonably argued that the congressionally enacted Federal Rules of Evidence restrict a judge's ability to decide a case to such an extent. Moreover, since the federal courts did function adequately for many years without a code of evidentiary rules,[199] it is difficult to suggest that a set of rules, much less a specific hearsay rule such as rule 804(b)(1), is so essential to a court's ability to adjudicate disputes between parties that Congress exceeded its constitutional authority when it enacted the rule.

There is no convincing support for the contention that rule 804(b)(1) and the other Federal Rules of Evidence represent an excessive exercise of legislative authority over the federal courts. In the context of the Federal Rules of Evidence, Congress elected to exercise its ultimate authority over the courts by interrupting the Court's rulemaking process and altering certain rules, including rule 804(b)(1). Consequently, Congress' legitimate exercise of its constitutional power cannot be ignored when courts interpret rule 804(b)(1).

B. *Statutory Authorization of the Court's Case-by-Case Rulemaking Authority*

Congressionally enacted statutory provisions delegating rulemaking authority to the courts must be considered as the only other possible source of authority for a departure from a formalistic interpretation of rule 804(b)(1). Alternatively stated, congressionally authorized latitude in the interpretation of rules arguably may justify courts' disregard of Congress' express mandate.

Federal judges may use their discretion in formulating rules of procedure if Congress has granted such authority. Throughout the history of the courts, Congress has granted such authority to the federal courts, provided that such procedural rules are not in conflict with established rules of the Supreme Court and acts of Congress.[200] For example, the Federal Rules of Civil Procedure contain specific provisions for rulemaking by the courts.[201] In contrast, the Federal Rules of Evidence are more restrictive, and except where expressly provided by an evidence rule, there is no authority for court-made reconstruction of evidentiary rules.[202] As a result, unless there is a specific express grant of latitude applicable to rule 804(b)(1), judges are not at liberty to use their discretion to depart from a literal application of the "predecessor in interest" requirement of that rule.

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allowing them to obtain compensation for lands abandoned to federal troops during the Civil War. Congress subsequently passed legislation which required the Court of Claims and the Supreme Court to treat the fact that the individual had accepted the pardon as conclusive evidence that he had supported the rebellion, but to ignore the pardon in determining whether he satisfied the requirement of loyalty to the United States. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 39-40 (1978).

199. *See* Comment, *Rulemaking*, *supra* note 2, at 83 (explaining that the Court's rulemaking power is dependent on congressional grant because such power is not important to the integrity of the judicial function, as demonstrated by the facility with which the Court had operated without making rules governing procedure in federal courts).

200. *See, e.g.*, Judiciary Act of 1793, 1 Stat. 333; 28 U.S.C. § 2071 (1982).

201. *See* FED. R. CIV. P. 83. "[I]n cases not provided for by these rules, the district courts may regulate their practice in any manner not inconsistent with these rules." *Id.*

202. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5199, at 222; Beale, *supra* note 171, at 1488.

A number of commentators have suggested that evidence rule 102, "Purpose and Construction," provides statutory authority for discretion in interpretation and application of all evidence rules.[203] While it does not appear that a district or circuit court has specifically applied rule 102 as a rationale for substituting individual judgment for the express language of rule 804(b)(1), rule 102 has been used as a basis for disregarding the literal application of other rules of evidence.[204] Finding authority in rule 102 to disregard the express language of other evidence rules is highly questionable. Congressional deliberations concerning the Federal Rules of Evidence clearly demonstrate that, except in narrowly defined situations, federal judges should not exercise discretion to the point of ignoring the literal mandate of the rules.[205] The more appropriate analysis suggests that rule 102 should be used in conjunction with rules specifically and expressly authorizing judicial discretion, latitude, or judgment,[206] or in cases in which an evidentiary determination is needed that cannot be decided from a literal application of any existing rule.[207]

The most defensible position is that Congress has expressly legislated *against* case-by-case rulemaking, that is, judicial revisionism, as evidenced by Congress' clear intent to continue as the final authority for evidentiary rulemaking in the federal courts. Congress amended rule 402, the general rule authorizing the admission of relevant evidence, to read: "[E]xcept as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pursuant to statutory authority*

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203. *See, e.g.*, Moore & Bendix, *supra* note 2, at 12-13; 1 S. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 102[01], at 102-6 to -7 (1986). Federal Rule of Evidence 102 reads: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

204. S. SALZBURG & K. REDDEN, *supra* note 43, at 14 (citing United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977), and United States v. Batts, 558 F.2d 513 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978)).

205. House deliberations on the Rules of Evidence indicate concern for uniformity among the circuits. It was the understanding of House members that courts might effect their own rules in areas not covered by the federal rules, but would not be able to "hold adversely to the codified rules of evidence." 120 CONG. REC. 2,1413-14 (1974).

The following excerpt is illustrative:

> Mr. HUTCHINSON. But so far as the codification itself is concerned it would not be possible legally for a judge in any court to provide a rule of evidence at variance with this modification. So far as the codification reaches, it will be uniform throughout the country.
>
> Mr. SMITH of New York. I would say to the gentleman that is correct. In many of the rules that we have proposed, the judges have a certain amount of discretion as to whether to allow evidence in or out depending upon the cases as outlined in the codified rule.
>
> *It would be my answer that a judge would not be able to hold adversely to the codified rules of evidence and that the only way those could be changed would be through further legislation. In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be subject to further legislation for amendment.*
>
> Mr. HUTCHINSON. I thank the gentleman very much for his responses.

Id. (emphasis added).

206. 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 3, at 7 (1977) (citing the catchall hearsay exceptions, rules 803(24) and 804(b)(5), as examples).

207. *See* S. SALZBURG & K. REDDEN, *supra* note 43, at 14. The authors state that if judges use rule 102 to disregard a specific rule, the entire notion of a uniform set of evidentiary rules is undermined. *Id.*

. . . ."[208] Congress added the emphasized phrase to the version of rule 402 submitted by the Court "[t]o accommodate the view that the Congress should not appear to acquiesce in the court's judgment that it has authority under the existing Rules Enabling Act to promulgate Federal Rules of Evidence."[209] As a further assurance of its continued role in evidentiary rulemaking Congress preempted the act under which the Supreme Court promulgated the Rules of Evidence in 1972.[210] The new enabling act allows Congress to have "veto power" over any amendment to the Federal Rules of Evidence within 180 days after submission by the Supreme Court.[211] Moreover, it mandates affirmative congressional enactments of rules affecting privileges.[212]

Congress has made abundantly clear that case-by-case rulemaking by the federal courts is inappropriate in the absence of specific legislation that so provides. Moreover, the Supreme Court has acknowledged Congress' plenary role in evidentiary rulemaking since the enactment of the Federal Rules of Evidence.[213] Accordingly, rule 804(b)(1) is inappropriately undermined when courts engage in independent rulemaking by ignoring the rule's legislative mandate and express language. To paraphrase Justice Jackson's concurrence in the *Steel Seizure Case*,[214] federal courts like those in *Lloyd*[215] or *Clay*[216] are at their "lowest ebb" of constitutional authority when they ignore congressional modifi-

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208. FED. R. EVID. 402 (emphasis added).

209. HOUSE COMM. ON JUDICIARY, FED. RULES OF EVIDENCE, H.R. NO. 650, 93d Cong., 1st Sess. (1974), *reprinted in* 1974 U.S. CONG. & ADMIN. NEWS 7075, 7081.

210. *See supra* notes 161-64 (discussing Rules Enabling Act, 28 U.S.C. § 2072).

211. 28 U.S.C. § 2076 (1976). This enabling act for the Federal Rules of Evidence provides:

> The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect.

Id. The Conference Committee Report explains that, while there should be a continued role for the Supreme Court in promulgating amendments to the Federal Rules of Evidence, Congress maintains the authority to amend any rule submitted to it by the Court or to install changes on its own. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7107. The House and Senate Judiciary Committees sought to clarify the roles of the Court and Congress with regard to the Federal Rules of Evidence, thus providing the impetus for this rules enabling act. *See* H.R. REP. NO. 650, 93d Cong., 2d. Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7081, 7091-92; S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted* in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7069-70.

212. 28 U.S.C. § 2076 (1976).

213. *See* United States v. Abel, 469 U.S. 45, 49 (1984). In deferring to Congress for questions regarding the Federal Rules of Evidence, Justice Rehnquist stated, "We [the Court] are in truth merely a conduit when we deal with . . . the Federal Rules of Evidence." *Id.*

214. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

215. Lloyd v. American Export Lines, 580 F.2d 1179 (3d. Cir.), *cert. denied*, 430 U.S. 969 (1978). For a discussion of this case, see *supra* notes 115-19 and accompanying text. For examples of other cases following *Lloyd*, see *supra* note 120.

216. Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983), *cert. denied*, 476 U.S.

cations of an evidentiary rule.[217]

Although this Article has concluded that courts should not interpret the "predecessor in interest" language of rule 804(b)(1) expansively, this Article does not suggest that Congress' construction of the rule reflects ultimate enlightenment. Numerous scholars and jurists argue against interpreting rule 804(b)(1) formalistically because such a construction inhibits the fact-finding process.[218] Moreover, Congress' role in drafting the Federal Rules of Evidence has been soundly criticized.[219] As one commentator stated: "The need for flexibility, the superior execution of the court and the advisory committee, and the desirability of regulating court procedure in an orderly fashion, free of the turmoil of the political arena, all suggest that regulation of federal practice is better left to the Court."[220] Nevertheless, Congress' action with regard to rule 804(b)(1) was reasoned. Congress simply elevated policies of fairness over a prevailing trend toward accuracy and restored the exception to its prior historical status. Such action was defensible in light of the origin of the exception in the fairness principles of estoppel. Because the rule was enacted pursuant to the legitimate legislative powers of Congress, it cannot be revised or ignored on a case-by-case basis by the courts.

VII. CONCLUSION

Resolution of the conflict between the judicial and legislative branches, as well as the divergent policies advanced by the conflicting interpretations of rule 804(b)(1) among the circuits, is best accomplished by the Supreme Court. Treatment by the Court would result in a definitive interpretation of the rule. As demonstrated by this Article, the predictable interpretation by the Court would be a literal, formalistic application of the rule. Moreover, as developed in the last section of this Article, inferior courts would be directed to respect legislative rulemaking authority in applying rule 804(b)(1).

A definitive interpretation of rule 804(b)(1) may illuminate the need for

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1253 (1984). For a discussion of this case, see text accompanying notes 132-34. For a discussion of cases following the *Clay* rules, see *supra* notes 136-43 and accompanying text.

217. *Youngstown Sheet*, 343 U.S. at 637-38 (Jackson, J., concurring). In the context of implied powers of the President, Justice Jackson wrote, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. Similarly, courts could engage in individual rulemaking, if a specific rule provided for such judicial discretion. *See, e.g.*, FED. R. EVID. 403. In contrast, Justice Jackson proclaimed, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Youngstown Sheet*, 343 U.S. at 637-38. In regard to rule 804(b)(1), then, an expansive interpretation contrary to the explicit language of the rule is not sustainable.

218. For examples of proponents of liberal application of rule 804(b)(1), see C. MCCORMICK, *supra* note 6, § 256; 4 M. WEINSTEIN & M. BURGER, *supra* note 6, ¶ 804(b)(1)[04]; 5 J. WIGMORE, *supra* note 6, § 1388.

219. *See* Comment, *Powers*, *supra* note 2, at 1079 (arguing that the judiciary should promulgate procedural rules and the legislature should control federal privilege rules); *see also* Moore & Bendix, *supra* note 2, at 38 (contending that court procedure is best regulated by the judiciary); Comment, *Rulemaking*, *supra* note 2, at 98 (same).

220. Comment, *Rulemaking*, *supra* note 2, at 98.

amendment. Although time-consuming and complex, the joint judicial and legislative process of rulemaking is the most appropriate mechanism for amendments to this rule of evidence, because a change that re-establishes the original version submitted by the Court would de-emphasize the fairness attributes of the American system of adversarial adjudication. Such a change in fundamental policies requires careful scrutiny by jurists and legislators at the highest levels.

An implicit premise of this Article is that procedural and evidentiary rules embody and reflect the fundamental policies that a society has chosen to guide its system of justice. If these rules are inconsistent with underlying, widely accepted values, the integrity of the adjudicatory process is in tension. This tension is manifested in conflicting judicial interpretations which, if the issue is of sufficient moment, must be reconciled by the Supreme Court, and possibly, by legislative reevaluation.