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## Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-hard Doctrine

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**FEDERAL RULE 44.1 AND THE “FACT”  
APPROACH TO DETERMINING FOREIGN  
LAW: DEATH KNEEL FOR A  
DIE-HARD DOCTRINE**

*Arthur R. Miller*

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# FEDERAL RULE 44.1 AND THE "FACT" APPROACH TO DETERMINING FOREIGN LAW: DEATH KNELL FOR A DIE-HARD DOCTRINE

*Arthur R. Miller\**

## I. INTRODUCTION

THE phenomenal expansion of international trade, communication, and travel following World War II has been accompanied by a steady increment in the number of lawsuits with international aspects that have been commenced in American courts. Many of these cases have raised problems of serving process and other documents in a foreign country, procuring testimony and tangible evidence abroad, proving foreign law or foreign official records, and enforcing judgments rendered beyond our shores. Unfortunately, in this country the wholly domestic lawsuit has been the traditional template for federal and state procedural systems and little attention has been paid to litigation requiring American courts and counsel to interact with their counterparts and officials in other lands. As a result, it frequently has been impossible to adjust existing domestic procedures to the needs of American litigants and the demands of foreign legal systems.<sup>1</sup>

Responding to a call for reform by the American Bar Association and a strong presidential recommendation to the same effect, Congress, in 1958, established the Commission and Advisory Committee

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The author formerly was the Associate Director of the Columbia Law School Project on International Procedure and one of the draftsmen of the Uniform Interstate and International Procedure Act. Thus, it is necessary to intone the boilerplate caveat that the opinions expressed in this article are those of the author and do not necessarily reflect the views of any of the groups with which he was associated during the development of Federal Rule of Civil Procedure 44.1 and the Uniform Act.

A note of gratitude is extended to Professor John J. Cound of the University of Minnesota Law School for his comments on an earlier draft of this document. The extensive research assistance of Linda Silberman, a second-year student at the University of Michigan Law School, and the valuable help of Prudence C. Beatty and Herman Kaufman, second- and third-year students at the University of Michigan Law School respectively, also must be acknowledged.

1. The status of international judicial assistance in the United States as of 1961 is described in SMIT & MILLER, *INTERNATIONAL CO-OPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES* (Milan, 1961); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961). See also Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953); *Symposium: Pre-Trial and Trial Techniques in International Litigation*, A.B.A. SEC. INT'L & COMP. L., PROCEEDINGS 34 (1959).

on International Rules of Judicial Procedure,<sup>2</sup> to which a distinguished group of judges, governmental officials, scholars, and practitioners were appointed. Between 1958 and 1966, the Commission collaborated with the Advisory Committee on Civil Rules of the Judicial Conference of the United States and the National Conference of Commissioners on Uniform State Laws and received the drafting and research assistance of the Columbia Law School Project on International Procedure. These labors have produced a complete revision of the federal schema for international judicial assistance and led to the adoption of the Uniform Interstate and International Procedure Act as a model for the states.<sup>3</sup>

One important facet of the post-war proliferation of international litigation is a correlative increase in the number of lawsuits in which the law of a foreign country is germane, either because it governs the rights and liabilities of the parties under the relevant conflict-of-laws principles or because it bears on a particular issue or issues in a case otherwise controlled by domestic law.<sup>4</sup> Examination of the legislative and judicial treatment given the pleading, proof, and appellate review of foreign-law and a perusal of the decisions delineating the consequences of failing to prove alien law, reveal an enormous disparity in approach to these matters and a tenacious retention of archaic dogma by American courts that is inconsistent

2. Act of Sept. 2, 1958, 72 Stat. 1743.

3. These reforms are outlined in Commission on International Rules of Judicial Assistance, *Fourth Annual Report*, H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963); Miller, *International Co-operation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069-73 (1965). Particular aspects of the recent changes are discussed in 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 184.1 (Wright ed. 1961 Supp. 1966); 2A *id.* § 693; 2 MOORE, *FEDERAL PRACTICE* ¶ 4.45 (2d ed. 1966); 4 *id.* ¶¶ 28.03-.08; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (pts. 1-2) 77 HARV. L. REV. 601, 635-37, 801, 811-14 (1964); Leflar, *Act 101—Uniform Interstate and International Procedure Act*, 17 ARK. L. REV. 118 (1963); Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965); Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264 (1962); Smit, *The Uniform Interstate and International Procedure Act Approved by the National Conference of Commissioners on Uniform State Laws: A New Era Commences*, 11 AM. J. COMP. L. 415 (1962); Comment, *Judicial Notice and Deposition Practice in International Litigation*, 1966 DUKE L.J. 512; Comment, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony*, 62 MICH. L. REV. 1375 (1964). As of this writing, the Uniform Act has been enacted in three jurisdictions. See ARK. STAT. ANN. §§ 27.2501-07 (Supp. 1965); OKLA. STAT. tit. 12, §§ 1701.01-1706.04 (Supp. 1966); V.I. CODE ANN. tit. 5, §§ 4901-43 (Supp. 1965). The Judicial Council of Massachusetts has recommended the adoption of the Act, 41 Mass. Jud. Council (Pub. Doc. 144) 8-20 (1965), as has the Michigan Law Revision Commission, 1 MICH. LAW REV. COMM'N REP. (1967).

4. The words "foreign law" or "alien law" are used in this article to refer to the law of a foreign country unless otherwise indicated. Because many state courts treated the pleading and proof of the law of sister states and foreign countries similarly until

with current trends in civil procedure. The cases also leave little doubt that the process of establishing foreign law often has proven to be tortuous and frustrating for both bench and bar.

The objective of this article is to analyze Federal Rule of Civil Procedure 44.1, which was developed as part of the reforms of the last decade and became effective on July 1, 1966,<sup>5</sup> and to assess its capacity to rationalize the process of determining foreign law in the federal courts. What follows is an excursion through the past doctrine and into the probable future treatment of foreign law in the federal courts, an exploration of the interrelationship between the new Rule and other phases of federal civil procedure, and an analysis of the prospect that the Rule's effectiveness may be partially emasculated by supervening policies inherent in our federal system. Although the primary focus of this article will be on foreign law in the federal courts, the substantial identity between Federal Rule 44.1 and Article IV of the Uniform Interstate and International Procedure Act, coupled with the probability that states with a procedure patterned after the Federal Rules of Civil Procedure will adopt Rule 44.1 in the near future,<sup>6</sup> renders the following discussion relevant to state practice as well.

## II. THE PRECURSORS OF FEDERAL PRACTICE

### A. *Common-Law Doctrines*

Anglo-American courts and commentators historically have characterized a foreign-law issue as a question of fact to be pleaded and proved as a fact by the party whose cause of action or defense depends upon alien law.<sup>7</sup> Statements to this effect began to appear with

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recently, and because some states continue to do so, citations to state cases dealing with the determination of questions of sister-state law have been included when they seemed applicable to the foreign-country situation as well.

5. The text of the Rule is as follows:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.

The court's determination shall be treated as a ruling on a question of law.

The text of Federal Rule of Criminal Procedure 26.1, which also became effective on July 1, 1966, is identical except that the words "notice in his pleadings or other" in the first sentence of Rule 44.1 have been omitted from the criminal rule because there are no pleadings in criminal cases.

6. Arizona adopted Rule 44.1 at the same time it became effective on the federal scene. See generally Frank, *Arizona and the Federal Rules*, 41 F.R.D. 79 (1966).

7. See generally 3 BEALE, *CONFLICT OF LAWS* § 621.2 (1935); 1 CHITTY, *PLEADING* \*221 (1809); DICEY, *CONFLICT OF LAWS* 1107-16 (7th ed. 1958); *RESTATEMENT, CONFLICT OF LAWS* §§ 621-23 (1934); SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 13-17 (1959); STUMBERG, *CONFLICT OF LAWS* 175 (3d ed. 1963); WESTLAKE, *PRIVATE INTERNATIONAL LAW* §§ 413-14 (1859); 1 WHARTON, *EVIDENCE* §§ 300-16 (1877); 9 WIGMORE, *EVIDENCE* § 2573 (3d ed. 1940); 3 WOODDESON, *LAW OF ENGLAND* \*309 (1794).

regularity in the eighteenth-century English cases<sup>8</sup> and became so embedded in the literature by the following century that reiteration of the dogma during the past one-hundred years has taken on a pavlovian quality. Despite its prevalence, the fact theory's genesis never has been isolated or its *raison d'être* satisfactorily explained. Professor Beale suggested that its roots are to be found in the early English view that the only legal issue before a court was the domestic law relevant to the case, which logically required all else to be characterized as fact.<sup>9</sup> This explanation seems plausible inasmuch as English courts, in contrast to their continental counterparts, routinely declined to take jurisdiction over lawsuits having foreign incidents until well into the seventeenth century.<sup>10</sup> This abstemious philosophy was a natural product of the high degree of jurisprudential isolation afforded by the English Channel, the concept that trial by jury required trial *per pais*, which called for a jury whose members were drawn from the vicinage where the facts occurred and theoretically had no cognizance of matters beyond their own locale, and the insistence that all causes fit within the existing, highly stylized forms of action.<sup>11</sup> By the time "foreign" issues finally were granted entree to the inner sanctum of English justice, the long history of equating "law" with "English law" may well have so obscured the difference between questions involving foreign events or transactions, which are traditionally factual matters, and issues concerning the municipal law of another country that the courts simply classified all foreign elements in a case as questions of fact.

Despite its uncertain origin and the highly unsettled character of the English practice of determining alien law during the American colonial and revolutionary periods, the fact theory of foreign law was embraced by the courts in this country without re-examination.<sup>12</sup> American adherence to the common-law conception of

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8. See *Male v. Roberts*, 3 Esp. 163, 170 Eng. Rep. 574 (K.B. 1800); *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774); *Fremoult v. Dedire*, 1 P. Wms. 429, 24 Eng. Rep. 458 (Ch. 1718); *Foubert v. De Cresseron*, 1 Show. 194, 1 Eng. Rep. 130 (H.L. 1698). These cases are discussed at text accompanying notes 235-40 *infra*. Current English practice is described in 15 HALSBURY'S LAWS OF ENGLAND ¶¶ 597-603 (3d ed. Simonds 1956).

9. See 3 BEALE, CONFLICT OF LAWS § 621.1 (1935).

10. See Sack, *Conflicts of Laws in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS 342 (1937).

11. *Ibid.*

12. Note, *Judicial Notice of Foreign Law*, 18 VAND. L. REV. 1962, 1971-74 (1965). To the extent that the fact theory is discernible in England at all during the colonial period, it appears to have been designed primarily for situations involving the law of foreign countries. Yet, in this country it also has been applied to cases involving the law of sister states. The absurdity of perpetuating the common-law theory in the twentieth century is commented on in *Hammond Motor Co. v. Warren*, 113 Kan. 44,

foreign law cannot be rationalized in the same terms as have been offered for the English experience because foreign causes of action never have been viewed as anathema in this country and our jury institution never has been concerned with the jurors' testimonial qualifications or tied to notions of fact-venue; most probably our incorporation of the common-law view of foreign law simply represents blind obedience to entrenched attitudes. On the other hand, a concatenation of factors can be suggested for our perpetuation of the English view of foreign law: the enormous size of the United States; its ingestion during the nineteenth century of several large land masses having cultural and legal frameworks radically different from those found in the original Union—events that reinforced the tendency of state court judges to characterize the law of a sister state as foreign; the nation's relatively long isolation from other legal systems; the philosophy of state sovereignty, generated during the colonial and confederation periods and never completely eradicated; and an admixture of by-products of the polity's federal character.<sup>13</sup> On a more mundane but highly pragmatic level, until recently it has been difficult, and most librarians have been reluctant, to procure foreign-law materials in this country. Even today, extensive foreign-law libraries exist only in the important commercial and legal centers, so that foreign legal materials are not readily available in substantial areas of the nation.<sup>14</sup> As recently as 1958, a federal district judge in the Eastern District of New York remarked that despite his discretion to take judicial notice of foreign law under a New York statute, he did not have sufficient research facilities to justify departing from the traditional reliance on counsel for a comprehensive presentation on the foreign-law issue.<sup>15</sup>

The fact that this judge did not feel obliged to resort to one of the fine foreign-law collections a few miles from his courthouse suggests that access to foreign-law material was not the sole inhibition operating on him. It may betray an understandable feeling of inadequacy or insecurity with regard to issues of foreign law and an unwillingness to venture beyond the perimeter established by the proof presented by counsel, which, if widespread, also contributes to the continued vitality of the fact theory. Although we expect judges

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46, 213 Pac. 810, 811 (1923), and in Hartwig, *Congressional Enactment of Uniform Judicial Notice Act*, 40 MICH. L. REV. 174, 176-78 (1941). See also 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940).

13. See Comment, *Conflict of Laws—Judicial Notice of Foreign Law*, 30 MICH. L. REV. 747 (1932).

14. See generally SCHLESINGER, *COMPARATIVE LAW* 31-41 (2d ed. 1959).

15. *Telesphore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958).



to be conversant with the law of their own, and perhaps related, jurisdictions, we cannot expect them to be familiar with the substance, let alone the nuances, of the jurisprudence of every state, territory, and country throughout the world. As Mr. Justice Holmes stated in *Diaz v. Gonzalez*,<sup>16</sup> referring to the law of a civil-law jurisdiction:

When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.<sup>17</sup>

Even accepting the premise that issues of foreign law create difficulties of a different magnitude than those caused by issues of domestic law, what analytic or administrative advantage is served by cloaking this difference in the trappings of the conclusory law-fact dichotomy? It is submitted that there is none and that the fact characterization of foreign law is a misnomer. "Foreign law may be called a juridical fact with only one quality to differentiate it from domestic law, namely, that while judges are supposed to know the domestic law, they are not supposed to know the foreign law."<sup>18</sup>

If the fact theory represented only a perversion of nomenclature, it would be of little consequence. Similarly, if a judicial pronouncement that an issue of foreign law raises an issue of fact was simply a euphemism for the notion that counsel bear the responsibility for demonstrating the content of foreign law because judges cannot be expected to divine alien law on their own, the exercise in semantic alchemy could be tolerated. Unfortunately, however, the role of the fact theory has not been a passive one; the courts have become so entranced by the catechism that it has drastically affected the judicial treatment accorded foreign-law issues.

One of the primary derivatives of the common-law characterization of foreign law is that a party who relies on such law must plead it.<sup>19</sup> The syllogistic basis for this proposition is self-evident. If foreign

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16. 261 U.S. 102 (1923).

17. *Id.* at 106. See also *Pittsburgh, C., C. & St. L. Ry. v. Austin's Adm'r*, 141 Ky. 722, 728, 133 S.W. 780, 783 (1911), *rev'd on rehearing on other grounds*, 143 Ky. 70, 135 S.W. 413 (1911); Husserl, *The Foreign Fact Element in Conflict of Laws*, 26 VA. L. REV. 243 (1940).

18. Wachtell, *The Proof of Foreign Law in American Courts*, 69 U.S.L. REV. 526, 535 (1935).

19. See, e.g., *Hempstead v. Reed*, 6 Conn. 480 (1827); *Louisville, N.A. & C. Ry. v.*

law is a fact and facts must be pleaded, then foreign law must be pleaded. Several early decisions even insisted that pertinent foreign statutory material be pleaded *in haec verba*.<sup>20</sup> Although a modicum of uncertainty on the point still exists, it probably is unnecessary to include a verbatim transcript of foreign statutes and court decisions when pleading in a jurisdiction in which the common-law rules regarding foreign law persist.<sup>21</sup> Nonetheless, in these jurisdictions and in many that have adopted code pleading, a skillful statement is still required. Otherwise, a foreign-law statement might fall prey to a demurrer or to the code motion to dismiss for pleading evidence, when too much has been set forth, or for failure to state a cause of action, when too little has been pleaded.<sup>22</sup> In jurisdictions that take a permissive attitude toward the demands of code pleading formulae or that have adopted the Federal Rules of Civil Procedure or some variant of the "notice" theory of pleading, the technical pitfalls of pleading foreign law have been ameliorated or entirely eliminated.

At common law, proof of the written law of a sister state or foreign country generally required the introduction in evidence of a properly certified or exemplified copy or an official publication of the applicable law;<sup>23</sup> oral testimony concerning written law was unacceptable.<sup>24</sup> This practice was believed required by the best-evidence

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Shires, 108 Ill. 617 (1884); *Bean v. Briggs*, 4 Iowa 464 (1857); *Walker v. Maxwell*, 1 Mass. 104 (1804); *Moe v. Shaffer*, 150 Minn. 114, 184 N.W. 785 (1921), 18 A.L.R. 1194 (1922); *Gibson v. Chicago G.W. Ry.*, 225 Mo. 473, 125 S.W. 453 (1910); *McKnight v. Oregon S.L.R.R.*, 33 Mont. 40, 82 Pac. 661 (1905); *Sultan of Turkey v. Tiryakian*, 213 N.Y. 429, 108 N.E. 72 (1915); *Peck v. Hibbard*, 26 Vt. 698 (1854). See also Annot., *Manner and Sufficiency of Pleading Foreign Law*, 134 A.L.R. 570 (1941).

20. See, e.g., *Holmes v. Broughton*, 10 Wend. 75, 78 (N.Y. 1833). Statutory relief from stringent pleading requirements was afforded in some states at a comparatively early date. See N.Y. Laws 1848, ch. 312.

21. See SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 13, 32 (1959), and cases cited therein. *But see* *Record Truck Line, Inc. v. Harrison*, 109 Ga. App. 653, 137 S.E.2d 65 (1964), *modified on other grounds*, 220 Ga. 289, 138 S.E.2d 578 (1964) (dictum); *McDonald v. Bankers Life Ass'n*, 154 Mo. 618, 55 S.W. 999 (1900); *Martin Bros. v. Nettleton*, 138 Wash. 102, 244 Pac. 386 (1926); *Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238 (1897); *McKenzie & Sarabia, The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 351, 361 (1956). See also *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931).

22. *Compare* *Equitable Life Assur. Soc'y v. Brandt*, 240 Ala. 260, 198 So. 595 (1940), and *Argentine Airlines v. Aircraft Dynamics Corp.*, 9 Misc. 2d 272, 170 N.Y.S.2d 600 (Sup. Ct. 1957), *with* *Meijer v. General Cigar Co.*, 73 N.Y.S.2d 576 (Sup. Ct.), *modified*, 273 App. Div. 760, 75 N.Y.S.2d 536 (1947).

23. See, e.g., *Robinson v. Clifford*, 20 Fed. Cas. 1001 (No. 11948) (C.C.D. Pa. 1807); *Owen v. Boyle*, 15 Me. 147 (1838). Proper authentication often was a condition on the copy's admissibility.

24. See, e.g., *Kenny v. Clarkson*, 1 Johns. 385 (N.Y. 1806); *Clegg v. Levy*, 3 Camp. 166, 170 Eng. Rep. 1343 (K.B. 1812); *Millar v. Heinrick*, 4 Camp. 155, 171 Eng. Rep. 50 (C.P. 1815); *Boehtlinck v. Schneider*, 3 Esp. 58, 170 Eng. Rep. 537 (C.P. 1799). *But cf.* *Ganer v. Lady Lanesborough, Peake* 25, 170 Eng. Rep. 66 (K.B. 1790).

rule and deviation from it was permitted only when an authenticated copy of the foreign law could not be obtained.<sup>25</sup> Unwritten laws, customs, and usages could be established by testimony of persons conversant with the relevant foreign law, custom, or usage, or, if available, by reports of proceedings before the out-of-state tribunals.<sup>26</sup> By the close of the nineteenth century, the technique of introducing a copy of an applicable statute or code provision and using expert testimony to establish its meaning had become common.<sup>27</sup> Some courts, however, continued to hold oral testimony insufficient.<sup>28</sup>

Another radiation of the common-law fact theory was the use of the rules of evidence to restrict the modes of proving foreign law.<sup>29</sup> On innumerable occasions, excessive amounts of time and money were expended by counsel to obtain copies of statutes and judicial decisions and to put expert testimony in a form that would satisfy the technical rules of admissibility. Moreover, much judicial energy was dissipated in refining the rules of evidence so that they could be applied to the proof of foreign law.<sup>30</sup> The fact characterization of

25. See *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 238 (1804); *Charlotte v. Chouteau*, 25 Mo. 465 (1857); *Chanoine v. Fowler*, 3 Wend. 173 (N.Y. 1829); *State v. Twitty*, 9 N.C. (2 Hawks) 441 (1823); *Phillips v. Gregg*, 10 Watts 158 (Pa. 1840); *Dougherty v. Snyder*, 15 Serg. & Rawle 84 (Pa. 1826).

26. See, e.g., *Kermott v. Ayer*, 11 Mich. 181 (1863). The distinction between proof of written and unwritten foreign law is set out in *Newsom v. Adams*, 2 La. 153 (1831); *Raynham v. Canton*, 20 Mass. (3 Pick.) 293 (1825); *People v. Lambert*, 5 Mich. 349 (1858); *Phillips v. Gregg*, *supra* note 25; *Woodbridge v. Austin*, 2 Tyler 364 (Vt. 1803); *Millar v. Heinrick*, 4 Camp. 155, 171 Eng. Rep. 50 (C.P. 1815). See generally *Ennis v. Smith*, 55 U.S. (14 How.) 400 (1852); STORY, CONFLICT OF LAWS §§ 640-42 (1st ed. 1834).

27. See *The Sussex Peerage*, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844); 3 BEALE, CONFLICT OF LAWS § 621.5 (1935); STORY, CONFLICT OF LAWS §§ 641-42 (1st ed. 1834). See also *Barkman v. Hopkins*, 11 Ark. 157 (1850); *Greasons v. Davis*, 9 Iowa 219 (1859); *Wachtell, The Proof of Foreign Law in American Courts*, 69 U.S.L. REV. 526, 537-40, 580-85 (1935). Expert testimony on an issue of foreign law always has been subject to cross-examination. Moreover, the courts have exercised considerable discretion in determining the qualifications of expert witnesses and the extent to which their opinions, whether controverted or not, should be honored. See, e.g., *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950); *Barber v. International Co. of Mexico*, 73 Conn. 587, 599-600, 48 Atl. 758, 763-64 (1901); *H. T. Cottam & Co. v. Comision Reguladora del Mercado de Henequen*, 149 La. 1026, 90 So. 392 (1921); *Hall v. Costello*, 48 N.H. 176 (1868); *Masocco v. Schaaf*, 234 App. Div. 181, 254 N.Y. Supp. 439 (1931). See also GRAVESON, CONFLICT OF LAWS 399-401 (4th ed. 1960); *Spaeth v. Kouns*, 95 Kan. 320, 148 Pac. 651 (1915); *Central Consumers Co. v. Ralston*, 202 Ky. 94, 259 S.W. 67 (1923). An expert did not have to be a lawyer if he possessed other qualifications. See *French v. Lowell*, 35 Mass. (18 Pick.) 34 (1836) (dictum); *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57 (1905). See generally *Sommerich & Busch, The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 147-53 (1953).

28. See *Robertson v. Staed*, 135 Mo. 135, 36 S.W. 610 (1896); *Russian Reinsurance Co. v. Stoddard*, 211 App. Div. 132, 207 N.Y. Supp. 574 (1925), *rev'd on other grounds*, 240 N.Y. 149, 147 N.E. 703 (1925). *But see* STARRIE, EVIDENCE \*176.

29. See 1 TAYLOR, EVIDENCE § 41 (3d ed. 1858).

30. See, e.g., *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U.S. 221 (1903); *Pierce v. Indseth*, 106 U.S. (16 Otto) 546 (1882).

foreign law occasionally was carried to the extreme of leaving foreign-law issues to the jury for determination, thereby increasing both the effort devoted to the presentation of evidence on such issues and the possibility of reversible error.<sup>31</sup> Interjection of the jury caused considerable uncertainty and confusion because it was not clear whether the jury's province was to determine the content of foreign law or merely to resolve conflicts in the testimony concerning its substance.<sup>32</sup> The absence of a sharp demarcation between the role of the trial judge and that of the jury probably reflected a desire to preserve the court's competence as an interpreter of legal materials while continuing to utilize the jury's assumed expertise on matters of credibility.<sup>33</sup>

The fact characterization also complicated the process of reviewing trial-court findings on foreign-law issues. Many appellate courts went to the extreme of transmogrifying their attitudes toward re-examining findings of fact and held that the trial court's resolution of a testimonial conflict regarding foreign law was conclusive unless against the clear weight of the evidence or not supported by any substantial evidence.<sup>34</sup> If the relevant foreign statutes and judicial opinions were introduced at trial, however, some courts held that their construction and interpretation were subject to plenary re-

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31. See *Brackett v. Norton*, 4 Conn. 517 (1823); *Ingraham v. Hart*, 11 Ohio 255 (1842). See also Keffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 674 (1950). The ultimate extension of the fact theory probably is the thought that a mistake of foreign law is a mistake of fact. See WILLISTON, *CONTRACTS* § 1592 (rev. ed. 1937); cf. *Banco Nacional de Cuba v. Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961); *Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. 448 (K.B. 1802).

32. See *Bock v. Lauman*, 24 Pa. 435 (1855). Cases submitting foreign law to the jury in the latter context appear to have been more numerous. See *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N.E. 947 (1909); *Harrison v. Atlantic C.L. Ry.*, 168 N.C. 382, 84 S.E. 519 (1915); *Hite v. Keene*, 149 Wis. 207, 134 N.W. 383 (1912), modified on rehearing on other grounds, 149 Wis. 207, 135 N.W. 354 (1912); *Hooper v. Moore*, 50 N.C. 136 (1857). See also Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 27 (1957); Annot., *Determination of Question Relating to Foreign Law as One of Law or of Fact*, 34 A.L.R. 1447 (1925).

33. Most jurisdictions have now made foreign law an issue for the court by statute or judicial decision. See, e.g., *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N.E. 97 (1906), 20 HARV. L. REV. 575 (1907); Current Legislation, *Judicial Notice of the Law of Foreign States*, 20 COLUM. L. REV. 476 (1920); Comment, *Conflict of Laws—Judicial Notice of Foreign Law*, 30 MICH. L. REV. 747, 748-49 (1932). The question of jury trial is considered further at text accompanying notes 231-92 *infra*.

34. See, e.g., *Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695 (1950); *Hawi Mill & Plantation Co. v. Finn*, 82 Cal. App. 255, 255 Pac. 543 (Dist. Ct. App. 1927); *Wylie v. Cotter*, 170 Mass. 356, 49 N.E. 746 (1898); *Ames v. McCamber*, 124 Mass. 85 (1878); *Hansen v. Grand Trunk Ry.*, 78 N.H. 518, 102 Atl. 625 (1917); *Banco Minero v. Ross & Masterson*, 106 Tex. 522, 172 S.W. 711 (1915). See also Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 319-24 (1958). Most state decisions have not permitted an issue of foreign law to be raised on appeal for the first time. See, e.g., *Emanuel v. Feierman*, 202 Cal. App. 2d 552, 20 Cal. Rptr. 883 (Dist. Ct. App. 1962); *Donahue v. Dal, Inc.*, 314 Mass. 460, 50 N.E.2d 207 (1943).

view.<sup>35</sup> In general, a reviewing court's pronouncements on the content of a foreign country's law were not accorded precedential weight in subsequent cases in the same forum.<sup>36</sup>

This sketchy panorama of the common-law treatment of foreign law suffices to demonstrate that the fact theory had ramifications far beyond the limits of the historical and administrative justifications offered for it. It is apparent that in an attempt to minimize the burden that issues of foreign law imposed on the trial judge and to maximize the assistance rendered by counsel, the common law constructed a procedural microcosm based on an equation between "foreign law" and "fact." Over the years, the resulting pastiche became so entangled in detail and so fertile a field for adversarial machinations that it actually exacerbated the difficulties inherent in proving foreign law. The original objective of the equation became mired in a morass of technicalities and ultimately was lost in the conclusory assertion of epithets that had the sole virtue of being harmonious with the fact characterization of foreign law.

### B. *Modification of Common-Law Doctrines*

The initial legislative deviation from the common-law view of foreign law appears to have occurred in 1840 when Connecticut enacted a statute permitting "the reports of the judicial decisions of other states and countries . . . [to] be judicially noticed . . . as evidence of the common law of such states or countries, and of the judicial construction of the statutes or other laws thereof."<sup>37</sup> Since 1848, Mississippi has provided that foreign law shall be noticed in the same way as if the question arose under local law.<sup>38</sup> Following the publication in 1898 of Professor Thayer's *Preliminary Treatise on Evidence*, in which the author advocated a widened application of judicial notice,<sup>39</sup> dissatisfaction with the common-law treatment of foreign law became more vociferous and a movement for "re-

35. See, e.g., *Bank of China, Japan & the Straits, Ltd. v. Morse*, 168 N.Y. 458, 61 N.E. 774 (1901); *Tarbell v. Grand Trunk Ry.*, 96 Vt. 170, 118 Atl. 484 (1922). *But see* *Saloshin v. Houle*, 85 N.H. 126, 155 Atl. 47 (1931), which discusses the fact-law classification of foreign-law issues and recognizes that it is as much the duty of the judge to pass upon issues of foreign law as it is to pass upon issues of domestic law.

36. See Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1034-35 (1941); Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 324-28 (1958). *But see* *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965), in which the court relied heavily on a discussion of Greek law in an earlier case.

37. See *Lockwood v. Crawford*, 18 Conn. 361, 370 (1847). The present version of the Connecticut statute is CONN. GEN. STAT. REV. §§ 52-163, -164 (1960).

38. MISS. CODE 1848, ch. 60, art. 10. The present text of the statute is found in MISS. CODE ANN. § 1761 (1956). See generally *Floyd v. Vicksburg Cooperage Co.*, 156 Miss. 567, 126 So. 395 (1930).

39. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 277-312 (1898).

form" developed. It bore fruit in Professor Thayer's own state in 1926, when Massachusetts enacted a statute requiring that judicial notice be taken of the law of foreign countries.<sup>40</sup> The following year the California courts were given power to take judicial notice of the law of sister states.<sup>41</sup>

In 1936, the Uniform Judicial Notice of Foreign Law Act was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association.<sup>42</sup> The Uniform Act's judicial-notice provision applies only to the law of sister states and thus is a less drastic departure from common-law practice than was the Massachusetts statute of a decade earlier. Moreover, the act does not expressly apostatize the common-law pleading requirement but merely provides that "reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."<sup>43</sup> The court is authorized to do independent research "as it may deem proper" and to call upon counsel for assistance in establishing the law.<sup>44</sup> However, section 4 of the act, which restricts the party's presentation to "admissible evidence," preserves some of the defects of the common-law approach and appears to be inconsistent with the court's power to do independent research. Only section 5 deals directly with the law of foreign countries and it simply states that such law "shall be an issue for the court." The Commissioners' Notes make the section's objective abundantly clear: "we do want to make the foreign law determinable by the judge, not the jury, thus changing the absurd old common law."<sup>45</sup> The Uniform Act has been adopted in a majority of the States and the Virgin Islands.<sup>46</sup> Although several states have construed or modified it in ways that perpetuate certain

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40. See MASS. GEN. LAWS ch. 233, § 70 (1956).

41. See Cal. Stat. 1927, ch. 62, p. 110. See also Laws of Missouri 157 (1927) (judicial notice of sister-state law). Missouri now has the Uniform Judicial Notice of Foreign Law Act. See Mo. REV. STAT. §§ 490.070-.120 (1959). In 1957, California amended its judicial-notice statute to authorize notice of the law of a foreign country. Cal. Stat. 1957, ch. 249. In 1965, as part of a general revision of its law of evidence, California again amended its judicial-notice statute to leave the matter within the trial court's discretion except when requested to take judicial notice by a party who gives notice to each adverse party and furnishes the court with sufficient information to enable it to take judicial notice. CAL. EVID. CODE §§ 452-56 (effective Jan. 1, 1967). Although the 1957 and 1965 California statutes appear to be mandatory, in practical effect they are permissive. See *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries*, 1 CALIF. LAW REV. COMM'N I-1, I-14, I-19 (1957).

42. 9A UNIFORM LAWS ANN. 569 (1965). See also Annot., *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2d 1437 (1952).

43. See *Revlett v. Louisville & N.R.R.*, 114 Ind. App. 187, 51 N.E.2d 95 (1943).

44. See *In re Hunter's Estate*, 125 Mont. 315, 236 P.2d 94 (1951).

45. 9A UNIFORM LAWS ANN. 318, 329 (1957). See also *Franzen v. Equitable Life Assur. Soc'y*, 130 N.J.L. 457, 33 A.2d 599 (Sup. Ct. 1943).

46. Oklahoma and the Virgin Islands appear to have repealed the Uniform Judicial Notice of Foreign Law Act by implication by enacting the Uniform Interstate and International Procedure Act.

common-law practices, such as the pleading requirement,<sup>47</sup> the Act has upgraded the process of determining foreign law in many jurisdictions. Moreover, a number of states have enacted legislation similar to the Uniform Act<sup>48</sup> and more than a dozen states have gone further and adopted statutes that either authorize or require judicial notice to be taken of the law of foreign nations.<sup>49</sup> The strict common-law practice or something comparable to it continues to prevail in only a handful of states.<sup>50</sup>

47. See N.J. Laws 1941, ch. 81, § 1, at 193; S.C. CODE ANN. § 26-62 (1962); WASH. REV. CODE § 5.24.040 (1963). See also *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955). The New Jersey statute was amended in 1960, N.J. Laws 1960, ch. 52, § 48, to make reasonable notice an alternative to pleading. N.J. REV. STAT. § 2A:82-27 (Supp. 1966); see *In re Damato's Estate*, 86 N.J. Super. 107, 206 A.2d 171 (Super. Ct. 1965). See generally Rafalko, *Pleading, Proving and Obtaining Information on Foreign Law*, 43 U. DET. L.J. 95, 101-09 (1965); Comment, *Judicial Notice of Foreign Law*, 38 Wash. L. REV. 802 (1963).

48. 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940); see *Boswell v. Rio De Oro Uranium Mines, Inc.*, 68 N.M. 457, 460-61, 362 P.2d 991, 994 (1961).

49. ARK. STAT. ANN. § 27.2504 (Supp. 1965); CAL. EVID. CODE §§ 310-11, 450-60 (effective Jan. 1, 1967); CONN. GEN. STAT. REV. §§ 52-163, -164 (1960); KAN. GEN. STAT. ANN. § 60-409 (1964); MASS. GEN. LAWS ch. 233, § 70 (Supp. 1956); MICH. COMP. LAWS §§ 600.2114, .2118 (1962); MISS. CODE ANN. § 1762 (1956); N.J. REV. STAT. § 2A:82-27 (Supp. 1966); N.Y. CIV. PRAC. L. & R. 4511; N.C. GEN. STAT. § 8-4 (1953); OKLA. STAT. tit. 12, §§ 1704.01-.03 (Supp. 1965); VA. CODE ANN. § 8-273 (1957); W. VA. CODE ANN. § 5711 (1961) (*semble*). See also V.I. CODE ANN. tit. 5, §§ 4926-28 (Supp. 1966); SCHLESINGER, *COMPARATIVE LAW* 130 (2d ed. 1959). In Maryland the court may take judicial notice of the law of any jurisdiction that is "based upon the common law of England." MD. ANN. CODE art. 35, § 47 (1957). A very broad construction was given this statute in *Reisig v. Associated Jewish Charities*, 182 Md. 432, 34 A.2d 842 (1943) (judicial notice of Palestinian law during period of British mandate).

The New York experience with judicial notice statutes is interesting. Between 1944 and 1963, New York was one of the jurisdictions in which the courts had discretion to take judicial notice of the law of a sister state or foreign country. N.Y. CIV. PRAC. ACT § 344-a; see Saxe, *New York Extends Judicial Notice to Matters of Law*, 28 J. AM. JUD. SOC'Y 86 (1944). Since 1963, rule 4511 of the Civil Practice Law and Rules requires a New York court to take judicial notice of the law of all jurisdictions within the United States, including its territories, but leaves judicial notice of the law of foreign countries to the trial judge's discretion, except when "a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it." The New York provision also permits the court to consider any material, "whether offered by a party or discovered through its own research," and expressly leaves the determination of foreign law to the judge. See generally 5 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶¶ 4511.03-.04 (1966). The New York provision is very similar to UNIFORM RULES OF EVIDENCE 9-10 (1953) and the new California Practice. N.Y. CIV. PRAC. L. & R. 3016(e), also enacted in 1963, requires the "substance" of a foreign country's law to be pleaded. This new formula is intended to liberalize the pleading requirement in that state. See 3 WEINSTEIN, KORN & MILLER, *op. cit. supra*, ¶¶ 3016.13-.17; 5 *id.*, ¶ 4511.05. A retrogressive construction of N.Y. CIV. PRAC. L. & R. 3016(e) and 4511 is suggested in Sommerich & Busch, *Judicial Notice of Law Under New Civil Practice Law and Rules*, N.Y.L.J., Dec. 17, 18, 1962, p. 4, col. 1. The debate over the statute's interpretation may now be academic because of the forward-looking and commendable decision in *Gevinson v. Kirkeby-Natus Corp.*, 26 App. Div. 2d 71, 270 N.Y.S.2d 989 (1966).

50. SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF*, app. C (1959) lists seven states in which the "common law prevails" and one state, Louisiana,

The trend toward judicial notice of foreign law was accompanied by the adoption in 1920 of the Uniform Proof of Statutes Act,<sup>51</sup> which gives prima facie evidentiary effect to foreign publications printed with "the authority of" or "commonly recognized in" the courts of a foreign jurisdiction. This Uniform Act has been enacted in twenty states and the Virgin Islands; similar legislation exists in many other jurisdictions.<sup>52</sup> In addition, several states extend prima facie evidentiary effect to volumes containing foreign judicial opinions as well as to foreign statutory materials.<sup>53</sup> Still another group of statutes permits judicial notice of special classes of foreign written law and its construction.<sup>54</sup> Although primarily intended to eliminate the need for authentication of copies of foreign legislative materials, these acts also facilitate proof of the law's content.

Unfortunately, many state statutes have not succeeded in overcoming the common-law conception of foreign law; for example, state courts frequently have taken the position that judicial-notice statutes do not affect pleading requirements.<sup>55</sup> In *Greiner v. Freund*,<sup>56</sup> a New York appellate court rejected the plaintiff's request that judicial notice be taken of Austrian law and affirmed the dismissal of his complaint, characterizing its failure to set forth the substance of the applicable passages of Austrian law as a "complete disregard of the requirement of the plain and concise statement of material facts. . . ."<sup>57</sup>

Adherence to common-law precepts despite statutory modification has been discernible outside New York. The Massachusetts judicial-notice statute, which is mandatory in tone, has been ren-

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in which the "common law prevails" except for the Uniform Proof of Statutes Act. In point of fact, there is legislation in each of the seven named states that deviates in one or more respects from common-law practice and Louisiana enacted the Uniform Judicial Notice of Foreign Law Act after the publication of the book.

51. 9B Uniform Laws Ann. 401 (1957).

52. See, e.g., MINN. STAT. § 599.02 (1957). The Virgin Islands appears to have repealed the Uniform Proof of Statutes Act by implication when it enacted the Uniform Interstate and International Procedure Act.

53. N.Y. CIV. PRAC. L. & R. 4511(d).

54. See, e.g., CAL. CORP. CODE § 6602.

55. See, e.g., *Greear v. Paust*, 202 Minn. 633, 279 N.W. 568 (1938).

56. 286 App. Div. 996, 144 N.Y.S.2d 766 (1955).

57. *Id.* at 997, 144 N.Y.S.2d at 767. *But cf.* *Pfleuger v. Pfeuger*, 304 N.Y. 148, 106 N.E.2d 495 (1952) (Pennsylvania law); *Olson v. Kilian*, 203 Misc. 847, 119 N.Y.S.2d 94 (Sup. Ct. 1953) (Ontario statute). The difficulties of pleading foreign law were compounded by the formalism of code pleading, which resulted in considerable time and energy being devoted to the classic question whether the pleading set out the desired "facts" or contained "conclusions" or "evidence." See, e.g., *Meijer v. General Cigar Co.*, 73 N.Y.S.2d 576 (Sup. Ct.), *modified*, 273 App. Div. 760, 75 N.Y.S.2d 536 (1947). See also *Andretto Bank A.G. v. Goodbody & Co.*, 15 Misc. 2d 395, 181 N.Y.S.2d 343 (Sup. Ct. 1958).



dered permissive in application by a judicially imposed requirement that counsel direct the court's attention to the relevant portions of foreign law before it will be noticed.<sup>58</sup> To generalize, the accumulated experience in New York, Massachusetts, and other states during the first half of this century indicates that judicial notice has not been taken, regardless of statutory language, unless the parties furnish the court a reasonable amount of information about the foreign law. What constitutes a sufficient quantum of information to activate the court seems dependent on the esoteric quality of the foreign law in issue and the level of the trial judge's self-confidence.

The explanation for the tenacity with which the courts have retained the primeval attitude toward foreign-law issues probably lies in (1) a continued judicial reluctance to engage in the often difficult process of ascertaining alien law, (2) the fear that the average trial judge cannot be fully entrusted with the job but must be given the fullest possible assistance of counsel, and (3) a refusal to believe that the proof-of-foreign-law statutes require a departure from the traditional modes of pleading and proof or that they represent an attempt to establish a degree of equality between the proof of domestic and foreign law.<sup>59</sup> These inhibitions are exemplified by the following dictum from *Arams v. Arams*<sup>60</sup> concerning the effect of New York's first judicial-notice statute:

[I]f cases can be decided according to whatever law the judge sees fit to apply and is able to discover by his own private researches undisclosed to the parties, then much that hitherto has been regarded as essential to the right to pronounce judgment—the raising of an issue determinable by reference to the law of a specified place, and an opportunity to know what the deciding tribunal is considering and to be heard with respect to both law and fact—would seem to have been abolished. I am unwilling to assume that a power so contrary to the plainest principles of fair dealing and due process of law was intended or has been conferred. . . .

I think this new enactment was intended merely to dispense with certain formalities respecting the manner in which the law of the State or country, whose law is first appropriately invoked and determined to be applicable, may be brought to the attention of the court by the parties, and, in case they omit something pertinent, to give the judge the right to make further researches in order to supplement or round out what the parties have presented so as to make an

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58. See *Kynch v. Trustees of New York, N.H. & H.R.R.*, 320 Mass. 339, 69 N.E.2d 575 (1946); *Hanson v. Hanson*, 287 Mass. 154, 191 N.E. 673 (1934); 32 MASS. L.Q. No. II, at 20 (1947). See also Comment, *Judicial Notice and Deposition Practice in International Litigation*, 1966 DUKE L.J. 512, 517-23.

59. See *Mangrelli v. Italian Line*, 208 Misc. 685, 144 N.Y.S.2d 570 (Sup. Ct. 1955).

60. 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

accurate determination as to what the law of that State or country really is. In short, the enactment was intended as a safety valve against miscarriages of justice due to mistake, and not as a charter to every judge to apply whatsoever law he likes and can find. . . .<sup>61</sup>

This oft-quoted passage from *Arams* completely ignores the possibility that the statute was intended to recast the basic methodological premises for proving foreign law. Regrettably, *Arams* has given succor to those who believe that judicial notice of foreign law places too great a research burden on the court and is unfair to the litigants because it does not guarantee early formal notice that an issue of foreign law is present and does not provide any restraint on the court's unsupervised independent investigations.<sup>62</sup>

The saturnine judicial experience under the first generation of statutes dealing with the proof of foreign law suggests the propriety of re-examining the assumption that judicial notice is the most efficacious technique for the determination of alien law. One's uncertainty as to the workability of the judicial-notice method is reinforced by a perusal of the secondary literature, which indicates that the subject has generated a debate of considerable intensity among numerous protagonists. The leading critic of the common-law approach condemns it as "over-expensive, time-consuming, cumbersome and often confusing."<sup>63</sup> Arguing that foreign-law experts are costly, biased, and insufficiently instructive, and that the technical rules of evidence prevent a full elaboration of the issues, he goes beyond the judicial-notice technique and advocates court-appointed

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61. *Id.* at 330-31, 45 N.Y.S.2d at 253-54.

62. For example, in *Matter of Mason*, 194 Misc. 308, 86 N.Y.S.2d 232 (Surr. Ct. 1948), the court refused to undertake any research into Italian banking regulations. See also *Sonnesen v. Panama Transp. Co.*, 298 N.Y. 262, 82 N.E.2d 569 (1948); SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 64-69 (1959). In *Southwestern Shipping Corp. v. National City Bank*, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958), however, the court took judicial notice of Italy's foreign exchange laws.

Generally ignored is the actual holding in *Arams*:

Where the complaint alleges facts which fairly may be assumed to create an obligation under the law of any civilized country, the plaintiff need not specifically allege the law of the State or country in which the things relied upon as giving rise to the asserted obligation took place, considerations of justice and convenience making it proper in such cases to cast upon the defendant the burden of showing, if that be the fact, that the law of such State or country is contrary to that assumption; but where the complaint alleges facts which do not make it reasonably certain that any civilized country would regard them as creating the asserted obligation, the plaintiff must allege the law of the State or country in which the things relied upon as giving rise to such obligation took place, considerations of justice and convenience making it proper in such cases to cast that burden upon the plaintiff. . . .

182 Misc. at 335, 45 N.Y.S.2d at 257.

63. Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 66 (1954). See also 9 WIGMORE, *EVIDENCE* § 2573 (3d ed. 1940); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941).

experts who will be compensated initially by the government and ultimately by the losing party.<sup>64</sup> On the other side, two of the most vocal defenders of traditional notions sum up their views as follows:

Honesty requires admission on the part of bench and bar alike of relative unfamiliarity with the laws of civil code countries and of other foreign jurisdictions. Our law imposes no duty upon lawyer or judge to know the laws of other jurisdictions. Under such circumstances, "initiative" could well become rashness, and although well meaning, could easily be disastrous to the rights of the parties.

On the other hand, our present system of proving foreign law offers a practical procedure whereby a judge may familiarize himself with the relevant details of a foreign system of laws by playing the part of audience and then inquisitor, while the foreign law experts are exposed to the truth-searching effects of direct and cross-examination. It is a fact that many a trial judge operating under present procedures does use the parties or their advocates as his assistants in establishing the content of the law.<sup>65</sup>

Given this intransigence on basic issues, it is not surprising that the developments over the past half-century have been somewhat eclectic, producing a hybrid of common-law and statutory techniques and a rather ambivalent judicial application of the latter.

The debilitation of the judicial-notice provisions is unfortunate, inasmuch as many of the more vituperative broadsides issued by animadvertisers of the statutory developments miss the mark. In the context of determining foreign law, judicial notice is not utilized as a device to exclude proof of a fact assumed to be within the court's knowledge, but rather is employed to simplify proof by permitting the use of approximately the same procedures as are available for ascertaining domestic law.<sup>66</sup> Thus, judicial notice of foreign law does not encourage an unthinking extension of the assumption of judicial omniscience as to certain facts or act as a substitute for proof; it is merely a shorthand description—perhaps an unfortunate one—for rationalizing the process of proving foreign law. This distinction was articulated in the Ninth Annual Report of the Judicial Council of the State of New York:<sup>67</sup>

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64. See Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957).

65. SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 120-21 (1959). See also Drachsler, *Judicial Initiative in the Proof of Foreign Law*, A.B.A. SEC. INT'L & COMP. L., PROCEEDINGS 126 (1956); McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 31 TUL. L. REV. 353 (1956); Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23 (1957).

66. See Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 MINN. L. REV. 439, 466 (1928). See also McCORMICK, *EVIDENCE* § 326 (1954); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

67. 9 N.Y. JUD. COUNCIL REP. 267 (1943).

Rather than a dispensation from the *need* of proof, a dispensation from technical *rules* of proof is intended by the proposed extension of the doctrine [of judicial notice]. It is submitted that although rules of evidence serve their purpose well when ordinary facts are being proved to a lay jury, they unduly hamper the court when it seeks to determine the rule of law (whether it be a "foreign" law or a local ordinance) applicable to a case. Under the proposed new section [N.Y. Civ. Prac. Act § 344-a], the courts will be enabled to proceed directly to the determination of applicable rules of law, instead of wasting time, money and effort on such collateral questions as whether the rules of evidence have been satisfied and the "proof" of such law has been properly made.<sup>68</sup>

Furthermore, the fear that judicial-notice statutes permit a court to surprise the litigants with a decision based upon its own private research seems more apparent than real. As will be developed more fully at a later point,<sup>69</sup> except in the most unusual circumstances, a court would be remiss if it did not apprise the parties of the result of its research and offer them a chance to refute it or introduce further material; a failure to do so might even constitute reversible error.<sup>70</sup> As long as a proper judicial respect for the adversary system can be assumed, it is difficult to perceive any objection to widening the scope of the court's investigation into the substance of foreign law.

These were the premises of the authors of the Uniform Interstate and International Procedure Act, which, in conjunction with Federal Rule of Civil Procedure 44.1, represents a second-generation deviation from the common-law fact theory and presages a new chapter in the history of proving foreign law. Article IV of the new Uniform Act was drafted on the assumption that judicial attitudes regarding the character of foreign law have matured and that the fear of the difficulties of ascertaining foreign law has substantially abated. Consequently, it abandons both the common-law fact theory and the somewhat schizoid practice under the judicial-notice statutes in favor of an isotopic relationship between the determination of foreign law and the determination of domestic law. The act substitutes a reasonable-notice requirement for the former pleading prerequisite, widens the scope of inquiry to permit examination of everything relevant to the foreign-law issue, allows the court to do its own research, leaves the determination of foreign law to the

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68. *Id.* at 272.

69. See text accompanying notes 186-90 *infra*.

70. See Wyzanski, *A Trial Judge's Freedom and Responsibility*, 7 RECORD OF N.Y.C.B.A. 280, 294-95 (1952). See also SCHLESINGER, *COMPARATIVE LAW* 142 (2d ed. 1959).

court, and authorizes plenary review on appeal. Article IV of the Uniform Act is reinforced by article V, which is a modernization and expansion of the Uniform Proof of Statutes Act that attempts to minimize the formality and detail involved in proving foreign official records.<sup>71</sup> In almost all respects, the new practice under Federal Rules of Civil Procedure 44 and 44.1 will parallel that under the Uniform Interstate and International Procedure Act. Although the new act's relative youth and the lack of experience under it prevent confident appraisal of its future, it is worth noting (after disclaiming any design to engage in self-directed encomiums or panegyrics), that several recent state cases completely reject the fact-theory dogma<sup>72</sup> and seem to confirm the judgment of the act's draftsmen that the time is ripe for a *volte-face* regarding the fact characterization of foreign law.

### C. Consequences of Failing To Establish Foreign Law

The problem of affixing consequences to a failure to establish the applicable foreign law is of sufficient magnitude to warrant brief independent treatment. Because this facet of determining foreign law lies in the penumbral area between conflict of laws and evidence, it has proven to be an extraordinarily complex question, and a uniform judicial treatment of the subject has not emerged in the United States.<sup>73</sup> With only a few exceptions,<sup>74</sup> the problem has not

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71. Article V of the Uniform Interstate and International Procedure Act eliminates the need for certification of the authority of the attesting official and permits chain certification of the attested copy. Chain certification allows a consular official to issue his certificate on the basis of his knowledge concerning a signature appearing on any certificate in a chain of certificates beginning with the certificate relating to the original attestation and proceeding up the authentication hierarchy; each official in the chain certifies the signature on the preceding certificate. The act also provides the court with discretionary power to admit a document that is uncertified, although attested, or a summary of the record rather than a copy. This provision represents a departure from the common-law rule and numerous statutes, which require a literal copy of the record. Section 5.03 of the act is a modification of the Uniform Proof of Statutes Act and provides an alternative, simplified method for proving the written law and the executive, legislative, and judicial acts of any jurisdiction. Finally, article V expedites proof of the lack of any record and preserves a number of other methods for proving foreign official records.

72. See *Prudential Ins. Co. v. O'Grady*, 97 Ariz. 9, 396 P.2d 246 (1964); *Choate v. Ransom*, 74 Nev. 100, 323 P.2d 700 (1958); *Gevinson v. Kirkeby-Natus Corp.*, 26 App. Div. 2d 71, 270 N.Y.S.2d 989 (1966). In *Gevinson*, Presiding Justice Breitel commented: "non-forum law is not and never was a question of fact except in an artificial procedural sense. Today, all such non-forum law in this State and in most States is treated as if it were a question of law in the court of first instance and on appellate review." 26 App. Div. 2d at 74, 270 N.Y.S.2d at 993.

73. See generally Sommerich & Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 138-44 (1953); Annot., *Presumption as to Law of Foreign Countries*, 75 A.L.R.2d 529 (1961). Professor Currie has suggested that much of the judicial confusion is attributable to the fact theory, which he believes caused

been dealt with in the judicial-notice statutes and neither the Uniform Interstate and International Procedure Act nor Federal Rule of Civil Procedure 44.1 expressly purports to come to grips with it. The abbreviated discussion in the next few pages is designed merely to complete the statement of the historical antecedents of current attitudes toward foreign law and to set the stage for later analysis<sup>75</sup> of what may prove to be one of the most perplexing aspects of the new federal practice.

In an apparent minority of American jurisdictions (the number undoubtedly was larger when the common-law view of foreign law commanded greater allegiance from American judges), a plaintiff's failure to prove foreign law is equivalent to an inability to establish a cause of action under domestic law and requires dismissal of his complaint, usually on the merits.<sup>76</sup> Courts in these jurisdictions also will strike a defense based on foreign law unless it is shown to be cognizable under the relevant law.<sup>77</sup> These Draconian consequences are a natural outgrowth of the formerly pervasive vested-rights or territorial philosophy of conflict of laws<sup>78</sup> and, more directly, the progeny of the United States Supreme Court's decision in *Cuba R.R. v. Crosby*,<sup>79</sup> in which an employee's action against his employer for personal injuries sustained in Cuba was dismissed because Cuban law was not established. In his opinion for the Court, Mr. Justice Holmes said:

With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . That, and that alone, is the foundation of their rights.

[T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-

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the question of the consequences of a failure to establish the law of the jurisdiction referred to under a choice-of-law rule to be "ceded by the domain of conflict of laws to the domain of evidence." Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 970-77 (1958).

74. E.g., CAL. EVID. CODE § 311(a) (effective Jan. 1, 1967); N.J. STAT. ANN. § 2A:82-27 (Supp. 1965).

75. See text at notes 306-31 *infra*.

76. See, e.g., *Rositski v. Rositski*, 329 Mo. 662, 46 S.W.2d 591 (1931); *Riley v. Pierce Oil Corp.*, 245 N.Y. 152, 156 N.E. 647 (1927).

77. See *Aslanian v. Dostumian*, 174 Mass. 328, 54 N.E. 845 (1899) (dictum). See also *Dainese v. Hale*, 91 U.S. 13 (1875); McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 308 (1952).

78. See 1 BEALE, CONFLICT OF LAWS § 5.2 (1935); 2 *id.* § 377.2; RESTATEMENT, CONFLICT OF LAWS §§ 1, 378-79 (1934). The effect of the recent changes in conflicts doctrines on the consequences associated with a failure to prove foreign law are discussed at text accompanying notes 320-31 *infra*.

79. 222 U.S. 473 (1912).

founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.<sup>80</sup>

The *Crosby* approach is most commonly applied when the foreign cause is statutory—wrongful-death actions, for example—or the foreign law is not based on the common law.<sup>81</sup> It is rarely employed when the law of another common-law jurisdiction is involved.<sup>82</sup>

One of the most questionable applications of the vested-rights theory appears in *Walton v. Arabian American Oil Co.*,<sup>83</sup> which involved a tort action instituted by an Arkansas plaintiff against a Delaware corporation in a New York federal court. The lawsuit was dismissed at the close of the plaintiff's case because he was unwilling, and perhaps unable, to prove the law of Saudi Arabia, the adventitious locale of the accident. On appeal, the Second Circuit felt bound by New York law, which placed the burden of proving foreign law on the plaintiff, and affirmed the dismissal, although Judge Frank's opinion expressed considerable displeasure with the result. Further discussion of *Walton*, which has achieved the status of a *cause célèbre* among comparativists and conflicts *cognoscente*, will be deferred to a later point.<sup>84</sup>

The harsh effects of either a dismissal on the merits or the striking of a defense for failing to establish alien law have been avoided in most states by employing one of a series of judicially created presumptions that reject the assumption that a default in proof demonstrates that the asserted right of action or defense does not exist under foreign law. The effect of these presumptions is to permit the court to decide the case on its merits<sup>85</sup> and, in theory, their goal is to enable a court to reach the same result that would have

80. *Id.* at 478-79.

81. See Annot., *Presumption as to Law of Foreign Countries*, 75 A.L.R.2d 529, 532-34 (1961). See also *Whitford v. Panama R.R.*, 23 N.Y. 465 (1861).

82. See *Langdon v. Young*, 33 Vt. 136 (1860).

83. 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956), 43 IOWA L. REV. 125, 32 N.Y.U.L. REV. 377 (1957).

84. See text accompanying notes 109-12, 325-28 *infra*.

85. See generally 3 BEALE, *CONFLICT OF LAWS* §§ 622A.1-23.1 (1935); SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 75-80 (1959); CURTIE, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 977 (1958); KALES, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401 (1906); von Moschzisker, *Presumptions as to Foreign Law*, 11 MINN. L. REV. 1 (1926); WACHTELL, *The Proof of Foreign Law in American Courts*, 69 U.S.L. REV. 526, 580, 585-88 (1935); CURRENT LEGISLATION, *Judicial Notice of the Law of Foreign States*, 20 COLUM. L. REV. 476 (1920); COMMENT, *Judicial Notice and Deposition Practice in International Litigation*, 1966 DUKE L.J. 512, 513-14; COMMENT, *Conflict of Laws—Judicial Notice of Foreign Law*, 30 MICH. L. REV. 747, 755-61 (1932).

been achieved had the case been heard by a court in the appropriate foreign country. The actual utilization of the presumptions, however, seems to reflect a desire to apply the law of the forum absent a strong showing that another law controls.<sup>86</sup> If this is true, the use of presumptions rather than a direct application of domestic law probably represents a form of deference to the "vested rights" theory, from which, until recently, there has been little open deviation.

Perhaps the oldest and most convenient device for bypassing the need to prove foreign law in order to avoid the harsh consequences of a failure of proof, and a device that has been a progenitor of a number of other evasive procedures, is the postulate that when the principle of law at issue is "rudimentary," it can be presumed to subsist in all civilized jurisdictions. This view is supported by dictum in Mr. Justice Holmes' opinion in *Crosby* and is most frequently applied in cases involving intentional torts.<sup>87</sup> The absence of any extensive reliance on this presumption over the years reflects the obvious fact that no consensus exists as to which principles of law are "rudimentary."

The most frequently invoked presumption appears to be that foreign law is identical to the law of the forum.<sup>88</sup> An extreme example of this approach is *Louknitsky v. Louknitsky*,<sup>89</sup> in which Chinese marital-property law was presumed to be the same as California's community-property law. Although this particular decision

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86. In *Monroe v. Douglass*, 5 N.Y. 447, 452 (1851), the court observed: "[T]he laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie*, the rule of decision; and if either party wishes the benefit of a different rule or law . . . he must aver and prove it." See also *Hill v. Wilker*, 41 Ga. 449 (1871); *Leavenworth v. Brockway*, 2 Hill. 201 (N.Y. 1842).

87. See, e.g., *Compagnie Générale Transatlantique v. Rivers*, 211 Fed. 294 (2d Cir. 1914); *Parrot v. Mexican Cent. Ry.*, 207 Mass. 184, 93 N.E. 590 (1911). See also *Mackey v. Mexican Cent. Ry.*, 78 N.Y. Supp. 966 (N.Y. City Ct. 1902). An interesting corollary of the "rudimentary principles" doctrine is that the court need not apply the *lex loci* when a tort occurs in an "uncivilized" country but is free to apply the law of the country that has the closest nexus to the parties. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909); *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 129 (1904); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

88. See generally 3 BEALE, *CONFLICT OF LAWS* § 622A.2, at 1679-80 (1935); CHESHIRE, *PRIVATE INTERNATIONAL LAW* 129 (5th ed. 1957); Note, *Evidence: Presumptions as to the Law of Foreign Countries*, 42 CALIF. L. REV. 701 (1954). Some states have codified the presumption. See, e.g., N.J. STAT. ANN. § 2A:82-87 (Supp. 1965).

89. 123 Cal. App. 2d 406, 266 P.2d 910 (Dist. Ct. App. 1954). See also *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); *Gallard v. Winans*, 111 Md. 434, 74 Atl. 626 (1909); Annot., *Presumptions as to Law of Foreign Countries*, 75 A.L.R.2d 529 (1961). Section 311(a) of California's Evidence Code expressly authorizes the application of California law when the law of a foreign country "cannot be determined," if the court can do so consistently with the United States and California Constitutions.



may be preferable to a dismissal for failure of proof or even to a Herculean, but time consuming and expensive, effort by court and litigants to devine and decipher foreign law, it hardly represents an aesthetic or rational application of the identity presumption. Given its use in *Louknitsky*, qualms about the presumption assuming Frankenstein qualities are understandable, especially when it is realized that the task of overcoming it usually will fall on a party who, absent the presumption, would not have the burden of establishing the existence of a cause of action or defense under foreign law. Thus, a plaintiff with a valid cause of action under forum law but none under the governing foreign law may reap the benefits of the presumption at the expense of a somnolent defendant or one who lacks the resources to investigate foreign law. Moreover, the party who normally has the burden of showing that domestic and alien law diverge often will remain silent because domestic law is favorable to him, although in many instances he may be the party in the best position to prove the foreign law.

Most states have accorded more limited dimensions to the identity presumption than California did in *Louknitsky*. For example, the presumption usually has not been applied when the foreign cause is based upon a statute or when damages include a penal element;<sup>90</sup> in some cases it has been limited to the law of a sister state or of those foreign countries that still adhere to the common law.<sup>91</sup> Some jurisdictions have been even stricter and held that the presumed identity applies only to that part of a foreign country's jurisprudence that is analogous to "common law" or have extended the presumption only to those countries whose law is "fundamentally" the same as forum law.<sup>92</sup> Another variation of the identity presumption calls for the application of forum law when no other law has been brought to the court's attention.<sup>93</sup> This use of local law usually

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90. See generally *Grow v. Oregon S.L. Ry.*, 44 Utah 160, 138 Pac. 398 (1913).

91. See *Banco de Sonora v. Bankers' Mut. Cas. Co.*, 124 Iowa 576, 100 N.W. 532 (1904); *Savage v. O'Neil*, 44 N.Y. 298 (1871); *Stokes v. Macken*, 62 Barb. 145 (N.Y. Sup. Ct. 1861). When the roots of a state's jurisprudence are traceable to a foreign country, the general presumption of identity usually will override this common-law limitation. *E.g.*, *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222 (N.D. Tex. 1963), modified on other grounds, 347 F.2d 168 (5th Cir. 1965) (Texas and Mexico); *cf. Record Truck Line, Inc. v. Harrison*, 109 Ga. App. 653, 137 S.E.2d 65 (1964).

92. See generally *Kales, Presumption of the Foreign Law*, 19 HARV. L. REV. 401, 410-13 (1906); *Annot., Presumption as to Law of Foreign Countries*, 75 A.L.R.2d 529, 538-39 (1961). One curious presumption identifies the foreign law only with the forum's common law, even when the forum's common law has been changed by statute. See *Reidman v. Macht*, 98 Ind. App. 124, 183 N.E. 807 (1932). The net effect may be the application of a set of legal principles that is not in force either in the foreign country whose law is to be applied or in the forum.

93. See *Van Wyck v. Hills*, 4 Rob. 140 (La. 1843); *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 46 S.W. 794 (1893).

is predicated upon the hypothesis that the conduct of the parties—their failure to assert foreign law—represents acquiescence in the court's application of forum law.<sup>94</sup>

Although many commentators have referred to the use of these presumptions as "naïve" or "unrealistic," they generally have applauded the application of forum law out of sympathy for the results achieved or because of their antipathy toward the vested rights theory of conflict of laws. Several scholars have offered conceptual frameworks to rationalize the application of the forum's law. One effort of this type is Professor Arthur Nussbaum's "Substantial Justice Theory," which permits a court to apply domestic law whenever the parties appear content with local law or whenever the application of forum law would be "just," as measured by the difficulties and costliness of proving foreign law under the common-law methods and by whether forum law provides "a perfectly reasonable disposition of the litigation."<sup>95</sup> Professor Nussbaum, however, would apply foreign law, under something akin to the public-policy concept, in matrimonial disputes and whenever a substantial disparity exists between the philosophy underlying the relevant portions of local and foreign substantive law.

Perhaps the most penetrating analytical rejection of the treatment accorded a failure to prove foreign law under *Crosby* and *Walton* has been advanced by Professor Brainerd Currie, who advocates the use of forum law absent a request by one of the parties that another law be applied.<sup>96</sup> According to the Currie thesis, if a party does request the application of foreign law, he has the burden of establishing the relevant rules of decision under that law.<sup>97</sup> Unlike

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94. See, e.g., *Watford v. Alabama-Florida Lumber Co.*, 152 Ala. 178, 44 So. 567 (1907); *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951). See also SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 78-80 (1959). The parties' tacit agreement that the court apply forum law in this context should be distinguished from a stipulation by the parties that their contract be governed by the law of a particular country. See Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1039-40 (1941).

95. See Nussbaum, *supra* note 94, at 1039-44. Note that if the recent statutory modifications of the common-law proof methods effectively reduce the cost and difficulty of proving foreign law, one of the legs of Professor Nussbaum's theory will be weakened.

96. Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1001 (1958). English practice after the seventeenth century seems to have been of like tenor. See *id.* at 967-70.

97. A result not too different from that suggested by Professor Currie was reached in *Leary v. Gledhill*, 8 N.J. 260, 267, 84 A.2d 725, 728 (1951), 37 CORNELL L.Q. 748 (1952). Both Professor Currie and the *Leary* court argue that the deficiencies of the "territorial" or "vested rights" approach to determining and applying foreign tort cases is best exemplified by *Walton*. See also 5 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶¶ 4511.02, .06 (1966). One of the important objections pointed out by Professor Currie to the *Crosby-Walton* approach is that it calls for a

the use of presumptions, this approach is not based on the fiction that foreign law is being applied by proxy; it is an unabashed utilization of forum law. Direct application of forum law absent a request to apply foreign law is advantageous in terms of administrative simplicity, certainty, and, because it avoids a forfeiture of rights for a failure of proof, fairness. A traditionalist might object to Professor Currie's thesis on the ground that it may result in a reversal of the burden of going forward and perhaps even the ultimate burden of persuasion when a request to apply foreign law is made. Yet this already has occurred in jurisdictions employing one of the identity presumptions. An even more fundamental retort to this objection to the Currie approach is that traditional notions about burdens of proof on issues of fact are relevant to the proof of foreign law only if the fact characterization of foreign law is accepted. If it is rejected, as it should be, a number of pathways to follow on the quest for a governing law become manifest. But more of this later.<sup>98</sup>

### III. PRACTICE IN THE FEDERAL COURTS

#### A. *Raising an Issue of Foreign Law*

##### 1. *The Traditional Pleading Requirement*

Prior to the Federal Rules of Civil Procedure, the federal courts embraced the fact theory of alien law and insisted that a party intending to rely on foreign law give formal notice in his pleadings.<sup>99</sup> As did the state courts,<sup>100</sup> the federal courts required the substance and effect of foreign law to be pleaded; it was not necessary

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dismissal for a failure of foreign-law proof without it being certain that there is any foreign law on the point or, even if there is, that the foreign law expresses an important public policy. Currie, *supra* note 96, at 1003. Therefore, the vested-rights approach may result in the dismissal of a cause when foreign law is so uncivilized that the forum would not have applied it even if it had been established. See note 87 *supra*.

98. See text accompanying notes 306-31 *infra*.

99. See, e.g., *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912); *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889); *Rowan v. Commissioner*, 120 F.2d 515 (5th Cir. 1941); *cf. Great Am. Ins. Co. v. Glenwood Irrigation Co.*, 265 Fed. 594 (8th Cir. 1920). The generally accepted notion that a federal court judicially notices the laws of all the states, see text accompanying notes 146, 149-50 *infra*, eliminates the need to plead the law of the state in which the court is sitting or the law of any other state. See, e.g., *Lamar v. Micou*, 114 U.S. 218 (1885); *United States Rubber Co. v. Poage*, 297 F.2d 670 (5th Cir. 1962); *Wade v. Lynn*, 181 F. Supp. 361 (N.D. Ohio 1960); *Speed v. Transamerica Corp.*, 103 F. Supp. 47 (D. Del. 1952); *Straub v. Jaeger*, 9 F.R.D. 672 (E.D. Pa. 1950). *But cf. Anderson v. National Producing Co.*, 253 F.2d 834 (2d Cir.), *cert. denied*, 357 U.S. 906 (1958). The party relying on the law of another state does have the obligation to call its applicability to the court's attention, however. See *Prudential Ins. Co. v. Carlson*, 126 F.2d 607 (10th Cir. 1942). See also *Jan-nenga v. Nationwide Life Ins. Co.*, 288 F.2d 169 (D.C. Cir. 1961).

100. See text accompanying notes 19-22, 55-58 *supra*.

to include a verbatim transcript of the foreign law or the materials supporting the pleader's interpretation of it.<sup>101</sup> In several cases, however, the pleader was required to set forth a reasonably specific abstract of the controlling provisions of foreign law.<sup>102</sup> A failure to plead foreign law in the requisite detail generally resulted in a dismissal with leave to replead.<sup>103</sup>

This pattern persevered virtually unchallenged for many years after the Federal Rules were adopted.<sup>104</sup> Finally, in 1955, the Second Circuit, in *Siegelman v. Cunard White Star Ltd.*,<sup>105</sup> sanctioned the taking of judicial notice of the English law of estoppel under section 344-a of the New York Civil Practice Act, which the court applied pursuant to Federal Rule 43(a), even though the parties neither pleaded nor attempted to prove the content of English law. The court concluded that inasmuch as Federal Rule 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," it is unnecessary to plead the legal theory on which the claim is based.<sup>106</sup> *Siegelman* was characterized as "a bombshell" and disapproved of by some commentators<sup>107</sup> but received the

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101. See, e.g., *United States v. National City Bank*, 7 F.R.D. 241 (S.D.N.Y. 1946); cf. *Coronet Phosphate Co. v. United States Shipping Co.*, 260 Fed. 846 (S.D.N.Y. 1917) (admiralty). Under the Conformity Act, 17 Stat. 196 (1872), the pleading rules of the forum state guided the federal courts in determining the sufficiency of a foreign-law statement. See, e.g., *Panama Elec. Ry. v. Moyers*, 249 Fed. 19 (5th Cir. 1918).

102. See *Poras v. Gabor Bano*, 24 F.R. Serv. 8a.474 (S.D.N.Y. 1957); *Lehnertz v. Société Anonyme Belge d'Exploitation de la Navigation Aérienne*, 8 F.R.D. 319 (S.D.N.Y. 1948); *Keasbey & Mattison Co. v. Rothensies*, 1 F.R.D. 626 (E.D. Pa. 1941). In *McKenzie & Sarabia, The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353 (1956), the authors suggest that the preferable practice is to include detailed allegations concerning the applicable foreign law in the pleadings.

103. See, e.g., *Harrison v. United Fruit Co.*, 143 F. Supp. 598 (S.D.N.Y. 1956); *Keasbey & Mattison Co. v. Rothensies*, *supra* note 102. See also *Supine v. Compagnie Nationale Air France*, 100 F. Supp. 214 (E.D.N.Y. 1951).

104. See, e.g., *Liechti v. Roche*, 198 F.2d 174 (5th Cir. 1952); *Harris v. American Int'l Fuel & Petroleum Co.*, 124 F. Supp. 878 (W.D. Pa. 1954); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944); *Chemacid, S.A. v. Ferrotar Corp.*, 3 F.R.D. 45 (S.D.N.Y. 1942). *But see* Keefe, Landis & Shaad, *Sense and Nonsense about Judicial Notice*, 2 STAN. L. REV. 664, 685 (1950). The pleading requirement also survived in admiralty. See *Prol v. Holland-America Line*, 234 F. Supp. 530 (S.D.N.Y. 1964); text accompanying notes 113-14 *infra*.

105. 221 F.2d 189 (2d Cir. 1955).

106. *Id.* at 196.

107. SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 26 (1959); Busch, *When Law Is Fact*, 24 FORDHAM L. REV. 646 (1956). One commentator opined that *Siegelman* did not eliminate pleading and proof of foreign law. Drachsler, *Judicial Initiative in the Proof of Foreign Law*, A.B.A. SEC. INT'L & COMP. L., PROCEEDINGS 126, 128 (1956). In view of the plain language of the opinion concerning pleading, the statement seems difficult to support as an absolute proposition.

The cries of surprise seem inappropriate since a similar conclusion was reached in *Jansson v. Swedish Am. Line*, 185 F.2d 212 (1st Cir. 1950), although the opinion in that case did not contain an extended analysis of the question and was rendered without reference to Rule 8(a). See also *Rosenthal v. Compagnie Générale Trans-*

approbation of others.<sup>108</sup> Moreover, the text of the court's opinion created considerable uncertainty as to the proper scope to be given the case.

Approximately a year after *Siegelman*, the Second Circuit was confronted by *Walton v. Arabian American Oil Co.*, which has previously been briefly described.<sup>109</sup> In *Walton* the court refused to take judicial notice of the law of Saudi Arabia under the same state statute that was applied in *Siegelman*. After noting the criticism that had been levelled at the earlier case, *Siegelman* was distinguished because it involved English law—a body of law “an American court can easily comprehend”; *Walton* was said to require the application of a jurisprudence “not easy” to ascertain.<sup>110</sup> As to its failure to invoke section 344-a of the New York Civil Practice Act, the Second Circuit stated:

a court “abuses” its discretion under that statute perhaps if it takes judicial notice of foreign “law” when it is not pleaded, and surely does so unless the party, who would otherwise have had the burden of proving that “law,” has in some way adequately assisted the court in judicially learning it.<sup>111</sup>

This passage is the court's only direct reference to the pleading question.

The impact of *Walton* on the pleading of foreign law in the federal courts prior to 1966 is unclear. Perhaps its significance was that it demonstrated the limitations on the discretion a federal district court might exercise in employing judicial notice in the absence of pleading, a point left very much in doubt by *Siegelman*. The case also may be viewed as a ukase to the federal courts not to invoke a state judicial-notice statute under circumstances in which it would be in-

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atlantique, 14 F.R.D. 33 (S.D.N.Y. 1953). The decision in *Rosenthal* seems to be based upon the rudimentary-principles concept, which was used to excuse not only a failure to plead French law but a failure to prove it as well. The court stated:

The rule seems to be that a plaintiff asserting a rudimentary right generally recognized in civilized countries may assume like recognition in the applicable jurisdiction and need not affirmatively allege the existence of the right and the imposition of liability for its violation.

*Id.* at 35. The court relied on *Cuba R.R., Jansson, and Compagnie Générale Transatlantique v. Rivers*, 211 Fed. 294 (2d Cir.), cert. denied, 232 U.S. 727 (1914). In *Harris v. American Int'l Fuel & Petroleum Co.*, 124 F. Supp. 878 (W.D. Pa. 1954), the court mistakenly referred to *Jansson* in concluding that foreign law must be pleaded.

108. Note, 69 HARV. L. REV. 563, 564-65 (1956).

109. 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956); see text accompanying notes 83-84 *supra*.

110. 233 F.2d at 544. Only one of the three judges on the *Walton* panel, Judge Frank, the author of the opinion, also was a member of the *Siegelman* panel.

111. *Id.* at 544. N.Y. CIV. PRAC. ACT § 344-a has been replaced by N.Y. CIV. PRAC. L. & R. 4511. The numerous implications of *Walton* are analyzed in Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

appropriate for a state court to do so. Finally, *Walton* may have had no bearing on the pleading of foreign law in the federal courts because it turned on the plaintiff's refusal to prove Saudi Arabian law rather than his failure to plead it. A dismissal for lack of proof as to the existence of a cause of action under foreign law is not necessarily inconsistent with the *Siegelman* notion that Federal Rule 8(a) does not require foreign law to be pleaded. In view of the plethora of theses that can be conjured up, it is not surprising that the post-*Siegelman* and *Walton* foreign-law pleading decisions were somewhat inconsistent and reflected the uncertainty generated by the two cases.<sup>112</sup>

The admiralty pleading practice before the promulgation of

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112. This was particularly true in the district courts in the Second Circuit. In *Telesphore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958), the court ignored *Siegelman* and stated, in dictum, that the pleader must set out the substance of foreign law and "appropriate citations of the applicable statutes and one or more citations of decisional law, if there be any." *Id.* at 730. See also *Poras v. Gabor Bano*, 24 F.R. Serv. 8a.474 (S.D.N.Y. 1957) (pleading requirement said not changed by Federal Rules; *Siegelman* not cited). The *Walton* court also noted that section 344-a of New York's Civil Practice Act did not affect the Federal Rules. *Cf. Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957). In *Luckett v. Cohen*, 145 F. Supp. 155 (S.D.N.Y. 1956), Judge Murphy, again in dictum, stated that pleading foreign law was not required in view of *Siegelman*, but went on to say:

However, assuming Mexican law is the law to be applied, why should not plaintiff plead the law he thinks applicable. His answer is that the Court of Appeals for the Second Circuit in so many words has said it was not necessary. Although he might not have to plead it under *Siegelman* he would be better advised to do so since he will eventually have to prove it, if in fact Mexican is the applicable law.

*Id.* at 157. See also *Bakhshandeh v. American Cyanamid Co.*, 211 F. Supp. 803 (S.D.N.Y. 1962) (Iranian law not pleaded). A square holding dismissing the complaint with leave to amend for failure to plead the foreign law upon which the claim was based is found in *Harrison v. United Fruit Co.*, 143 F. Supp. 598 (S.D.N.Y. 1956). The decision is consistent with *Siegelman* and *Walton* only if those cases are read as requiring pleading whenever it would be improper for foreign law to be judicially noticed by a federal court pursuant to state law—a strained interpretation because of the weak, if not nonexistent, interrelationship between what should be pleaded under Rule 8(a) and the propriety of using Rule 43(a) to take judicial notice under state law.

Outside the Second Circuit, the post-*Siegelman* and -*Walton* and pre-1966 status of pleading foreign law also was unclear. In *Philp v. Macri*, 261 F.2d 945 (9th Cir. 1958), the Ninth Circuit rejected a request to take judicial notice of Peruvian law, concluding that in light of *Crosby* "appellant's complaint, having failed to allege his right to recover," had to be dismissed. *Id.* at 948. The court cited *Walton* but did not refer to *Siegelman*. The same year the Second Circuit wrestled with *Siegelman*, the District Court of Delaware decided *F.A.R. Liquidating Corp. v. Brownell*, 130 F. Supp. 691 (D. Del. 1955), a case involving the Trading With The Enemy Act. At a pretrial conference following the Third Circuit's reversal of an earlier grant of summary judgment by the trial court, a foreign-law issue was interposed by the defendant for the first time. The court held that because it had not been pleaded, foreign law could not be interjected at that point and would not be listed as a triable issue in the pretrial order—a result somewhat inconsistent with *Siegelman*. The decision actually may turn on the district court's belief that its freedom to define the issues for trial was circumscribed by the prior decision of the court of appeals. In *Pederson v. United States*, 191 F. Supp. 95 (D. Guam 1961), the court expressly applied *Siegelman* and held the pleading of foreign law unnecessary.

Federal Rule 44.1, which applies to both civil and admiralty litigation, appears to have been less confused but slightly more burdensome than the practice on the civil side of the court. Whereas Civil Rule 8(a) required only a short and plain statement of the claim, former Admiralty Rule 22 required the pleader to set forth "the various allegations of fact upon which the libellant relies." This standard was interpreted as requiring more than conclusory statements as to the substance and effect of foreign law;<sup>113</sup> an unadorned statement that a right of action existed under the laws of a foreign country was insufficient.<sup>114</sup>

An evaluation of the conflicting judicial views on pleading foreign law will provide a useful transition to a discussion of Federal Rule 44.1. A pleading requirement is supported by the metaphysics of the fact theory of foreign law<sup>115</sup> and numerous federal decisions rendered prior to *Siegelman*. The significance of the latter point is somewhat questionable, however, because *Siegelman* was the first decision rendered under the Federal Rules of Civil Procedure to analyze the impact of Rule 8(a) on the pleading requirement. Earlier post-1938 cases were content to intone the common-law rule and cite pre-1938 decisions or other post-1938 cases that had relied exclusively on cases decided before the Federal Rules were adopted.<sup>116</sup>

A pleading requirement also might be justified as a notice device. Simply put, it is unrealistic to expect a court to sense the presence

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113. See *Evangelinos v. Andreavapor Cia. Nav., S.A.*, 291 F.2d 624 (2d Cir. 1961); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957). See also *Wall Street Traders, Inc. v. Sociedad Española de Construcción Naval*, 236 F. Supp. 358 (S.D.N.Y. 1963). Prior to the advent of the Admiralty Rules, a federal admiralty court was not bound to follow state practice under the Conformity Act but could develop its own pleading practice. In *Coronet Phosphate Co. v. United States Shipping Co.*, 260 Fed. 846, 847 (S.D.N.Y. 1917), the court seems to have done precisely that with regard to foreign law by stating that the pleader "is bound to set out its substance so that the court may judge whether it has the effect which he ascribes." See also *The Jean Jadot*, 14 F. Supp. 161 (E.D.N.Y. 1935). *But cf.* *The Alps*, 19 Fed. 139 (S.D.N.Y. 1883) (pleading of English law not required because plaintiff's claim was small and defendant could not have been misled).

114. See *Evangelinos v. Andreavapor Cia. Nav., S.A.*, *supra* note 113; *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952).

115. The two most important federal-practice texts lend credence to the fact theory as a basis for a pleading requirement. See 1A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 253 (Wright ed. 1961); 2 MOORE, *FEDERAL PRACTICE* ¶ 8.17[9] (2d ed. 1966). Professor Moore suggests a *rapprochement* between the conflicting views whereby foreign statutes "if easily accessible" would be referred to in the pleadings but foreign decisions would not. This suggestion does not obviate any of the basic objections to a pleading requirement and interposes an unnecessary fount of contention.

116. See, e.g., *Rowan v. Commissioner*, 120 F.2d 515 (5th Cir. 1941); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944). Even the pre-*Siegelman* opinions in the *Jansson* litigation, see note 107 *supra*, focused on the fact that both parties knew foreign law controlled the case and did not mention the possibility that former practice had been changed by the Federal Rules.

of a foreign-law issue without any guidance from the litigants, and it is desirable to eliminate the possibility that parties will be surprised by a sudden invocation and application of foreign law. But whether the pleading stage is either the only or the most advantageous point on the litigation spectrum for requiring that notice be given of the relevance of foreign law is questionable. This doubt is reinforced by the fact that the Federal Rules represent a drastic departure from the practices current when the common-law rule relating to pleading foreign law was formulated,<sup>117</sup> and the perpetuation of the original rule can be justified only if it is harmonious with the norms and objectives of the existing pleading mandates.

Even if it be assumed, *arguendo*, that foreign law does raise an issue of fact, the Federal Rules do not call for the pleading of facts or recitals of the type required by the pleading systems in vogue during the gestation and maturation of the fact theory. Moreover, the pretrial center of gravity of present day federal litigation has moved from the pleadings toward the deposition and discovery phase. This shift in emphasis was designed to alleviate the pleadings of some of the manifold burdens they formerly carried and to eliminate much of the hypertechnicality and time consuming motion practice that was characteristic of code and common-law pleading; aspects of the former systems that rarely furthered the disposition of cases on their merits. Nothing in the Federal Rules indicates that these policy objectives are inapplicable when the pleader is trying to raise an issue of foreign law or that actions involving an issue of alien law are to be encumbered by a heavier pleading burden. Indeed, as the Second Circuit pointed out in *Siegelman*, the unqualified text of Rule 8(a) is evidence to the contrary.<sup>118</sup>

Perhaps even more fundamental is the questionable utility of a pleading requirement. It is futile to require a party to identify the governing foreign law and elaborate on its content at the pleading stage; an attorney cannot be expected to have a sufficient mastery of the operative facts at an embryonic stage of the litigation to enable him to discharge a pleading requirement meaningfully. A rule that requires counsel to engage in extensive and expensive forays into the complexities of the jurisprudence of one or more foreign countries before the viscera of the action have been exposed is of dubious

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117. See generally 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 251 (Wright ed. 1961); 2 MOORE, FEDERAL PRACTICE ¶ 8.05 (2d ed. 1966); cf. *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957).

118. The federal courts generally have rejected the argument that certain classes of litigation allegedly having peculiar characteristics should be governed by "special" pleading requirements. See, e.g., *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957).



value. Moreover, a mandatory pleading requirement often will have the effect of intimidating an uncertain pleader into alleging the relevance of foreign law in order to protect himself against the possibility of waiver, which in turn engenders reliance on the part of his adversary and causes him to devote energy to a foreign-law issue that is formally raised in the pleadings but may later prove to be vaporous. Another weakness of a pleading requirement is that it does not guarantee a definitive or binding statement concerning foreign law because the Federal Rules take a liberal stance regarding pleading amendments<sup>119</sup> and hypothetical and alternative statements,<sup>120</sup> moreover, a party is not compelled to elect among several potentially applicable laws at the pleading stage.<sup>121</sup> Given the pitfalls of pleading alien law, a federal court would be remiss if it did not take a liberal attitude toward requests to amend a pleading containing a statement of foreign law.

Inasmuch as the objective of providing notice of a party's intention to rely on foreign law can be secured at any reasonable point anterior to or during trial and the pleadings do not bind the parties to any particular theory or statement of foreign law, there is little justification for a mandatory pleading rule. A pleader is not required to cite local statutes or decisions or set forth their substance and effect in an action predicated upon domestic law. Why should he be required to do so in an action involving foreign law? No satisfactory answer is readily apparent. Indeed, it is difficult to identify any reason other than the historic tendency to characterize the law of a foreign country as a fact—a characterization whose genesis is obscure and whose significance lies outside the pleading orb.<sup>122</sup> Even conceding that foreign-law issues often present unique problems of identifying and procuring source materials or of divining the intent of legal materials written in a strange language and predicated on a jurisprudence and history variant from our own, these are insufficient bases for departing from the basic precepts of Federal Rule pleading. Long before the appearance of Rule 44.1, the federal courts should have distinguished the giving of notice of a foreign-law issue—a legitimate, but by no means exclusive, pleading goal—from the process of ascertaining and applying the content of foreign law; it is only in the latter context that the difficulties presented by alien law

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119. FED. R. CIV. P. 15.

120. FED. R. CIV. P. 8(e).

121. See *Finne v. Koninklijke Luchtvaart Maatschappij N.V.*, 11 F.R.D. 336 (S.D.N.Y. 1951). See also *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944).

122. See text accompanying notes 7-18 *supra*.

might justify some departure from the treatment accorded domestic law.

## 2. *The Reasonable Written Notice Requirement of Federal Rule 44.1*

In preparing its proposals regarding the determination of foreign law for submission to the Advisory Committee on the Federal Rules of Civil Procedure, the Commission and Advisory Committee on International Rules of Judicial Procedure and the drafting group of the Columbia Law School Project on International Procedure extensively debated and finally rejected a suggestion that a subparagraph requiring the pleading of foreign law be added to Federal Rule 9. Variations on the following formulation were considered:

When setting forth a claim or defense governed by the law of a foreign country or its political subdivision, the pleader shall identify the country or subdivision and state generally the substance of the foreign law.

It was decided that a provision of this type would be antithetical to the basic premises of Federal Rule pleading and that it might encourage unfruitful motion practice directed to the sufficiency of the foreign-law statement or require the court to determine foreign-law issues at too preliminary a point in the lawsuit. Once the notion of a special pleading rule was abandoned, it was agreed that a rule covering a range of foreign-law problems in a manner consistent with the treatment accorded analogous problems by the Federal Rules should be proposed to the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure.

The first sentence of Rule 44.1 reflects that philosophy. It requires a party who intends to raise an issue of foreign law to "give notice in his pleadings or other reasonable written notice."<sup>123</sup> This passage is designed to minimize the opportunity for unfair surprise and to eliminate the confusion that followed *Siegelman* and *Walton* by making it clear that pleading is not a prerequisite to raising an issue of foreign law. An attorney who intends to invoke foreign law now has sufficient temporal flexibility to investigate his client's case fully before raising the issue; the absence of any compulsion to plead foreign law should avoid premature conclusions and poorly-timed or wasteful research efforts.<sup>124</sup> When a pleader is uncertain whether

123. As a result of the unification of civil and admiralty procedure in 1966, Rule 44.1 applies also to admiralty cases. The notice requirement in criminal cases is discussed in note 5 *supra*.

124. The new Rule seems consistent with a number of state statutes, see, *e.g.*,

foreign law applies or is in doubt as to which country's law controls, he may refrain from asserting foreign law until it is convenient for him to do so. In many instances, of course, the relevance of foreign law is apparent from the outset and an attorney will find it relatively simple and desirable to satisfy the first sentence of Rule 44.1 by giving notice in his pleading of his intention to raise a foreign-law issue.

Rule 44.1 simply calls for "reasonable written notice"; neither the statutes nor the judicial decisions of a foreign country need be cited or set out *in haec verba*. Since the Rule does not require the "substance" or "effect" of foreign law to be pleaded, it is evident that the primary function of the notice is not to spell out the precise contents of foreign law but rather to apprise the court and the litigants of its relevance to the lawsuit—an objective that can be achieved with a minimum of formality and without a high degree of specificity.<sup>125</sup> The Rule does insist upon a certain quantum of information, however. A notice merely announcing that "counsel intends to raise an issue concerning the law of a foreign country" obviously would be insufficient. The spirit of the "reasonable written notice" standard requires the notice giver to specify the segment of the controversy he believes is governed by foreign law and to identify the country whose law is thought to control. When it is unclear whether foreign law is in issue or when the identity of the relevant law is uncertain at the time compliance with Rule 44.1 is attempted, the party giving notice may protect himself by stating his intentions alternatively or hypothetically.<sup>126</sup>

Should events following the service of the notice prove its contents to be inaccurate, the liberal amendment provisions in Federal Rule 15 provide a safety valve for modifying a notice given in the pleadings,<sup>127</sup> and these provisions can be used by analogy to establish

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CAL. EVID. CODE §§ 310-11, 450-60 (effective Jan. 1, 1967); MD. ANN. CODE art. 35, § 50 (1957); N.Y. CIV. PRAC. L. & R. 4511(b), and the tenor of judicial construction given the Uniform Judicial Notice of Foreign Law Act in some states, see, e.g., *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955); *Colozzi v. Bevko, Inc.*, 17 N.J. 194, 110 A.2d 545 (1955).

125. The conclusory words "substance" and "effect" have generated considerable confusion when used in some state foreign-law pleading provisions. See, e.g., 3 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3016.16 (1966).

126. See FED. R. CIV. P. 8(e)(2); cf. *Tsangarakis v. Panama S.S. Co.*, 197 F. Supp. 704 (E.D. Pa. 1961); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944).

127. Cf. *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465, 470 (5th Cir. 1954), cert. denied, 348 U.S. 927 (1955). See also 1A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 442 (Wright ed. 1961); 3 MOORE, *FEDERAL PRACTICE* ¶ 15.08(2) (2d ed. 1966).

standards for modifying a notice given outside the pleadings. A trial court's willingness to permit a party to deviate from his notice will depend upon a variety of factors, including (1) the length of time that has elapsed between the original notice and the attempt to amend, (2) the notice giver's good faith in submitting the first notice and seeking its correction, (3) the complexity of the foreign-law issues, (4) the extent to which other parties have relied on the original notice or may be prejudiced by the change, and (5) the court's attitude toward the mandates in Rule 15 directing that amendments be allowed whenever the interests of justice would be served.

The specific content of the notice should not be viewed as immutable or used to restrict a party's proof at trial unreasonably. Once an issue as to a certain country's law has been raised, the notice giver's proof should not be limited to the particular statutes or decisions that may have been identified in the notice. An adverse party cannot complain if the court looks beyond those references to other portions of the applicable foreign law or if the party who gave notice seeks to support his position with additional materials.<sup>128</sup> The variance problem becomes more complex when a party seeks to depart from his notice by interjecting the law of a nation other than one mentioned in the original notice. In this situation, the court must consider the same factors that are pertinent to a pleading amendment or a variance between pleading and proof and, when the shift is sought after trial has commenced, an attempt must be made to evaluate the amendment in light of the impact it may have on the parties and their trial preparation.

The new Rule is properly silent as to when the notice should be served inasmuch as that is a function of the circumstances in each case. Obviously, the timing of the notice is one aspect to be considered in determining whether a notice is "reasonable." According to the Advisory Committee's Note to the Rule:

The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice.<sup>129</sup>

The court thus has broad discretion to accept or reject a notice tendered at any point in the proceedings and, as is true of an attempt

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128. Cf. *Continental Assur. Co. v. Henson*, 297 Ky. 764, 181 S.W.2d 431 (1944).

129. Advisory Committee Note to Federal Rule 44.1, H.R. Doc. No. 391, 89th Cong., 2d Sess. 51 (1966), reprinted in 39 F.R.D. 117, 118 (1966), 1966 U.S. CODE CONG. & AD. NEWS 807, 808.

to modify a notice, can draw upon its experience in analogous contexts, such as pleading amendments and variances.<sup>130</sup> Generally, however, a party should not be permitted to raise a foreign-law issue after the pretrial conference is held, absent extenuating circumstances.<sup>131</sup>

Notice may be given by any party who "intends to raise" an issue of foreign law. Normally, this means that the party whose cause of action or defense is based on foreign law is responsible for calling the relevance of foreign law to the attention of the court and the other litigants. When the foreign-law issue is of a collateral nature in an otherwise entirely domestic action—for example, a question in an American naturalization controversy of the validity of a marriage or the legitimacy of a child under the law of another country—the notice-giving burden will fall on the party who plans to rely on foreign law when the particular issue ultimately is litigated.

The problem becomes more complex when the action appears to depend upon foreign law but the plaintiff chooses to proceed as if it were governed by forum law and does not give notice under Rule 44.1. If the defendant believes that the applicable foreign law provides no redress for the plaintiff's grievance, he will probably challenge the latter's right to recover on that basis. Does this mean that the obligation to give notice has shifted to the defendant, or is he free at any point in the litigation to spring his defense that the plaintiff's action is governed by an alien law that affords no relief? Since the defendant is a party who "intends to raise" an issue of foreign law, the text of the new Rule seems to require his giving notice. The conclusion is the same from a policy perspective. The function of the first sentence of Rule 44.1 is to insure that the presence of a foreign-law issue is called to the attention of the court and the litigants as early as possible. It would be atavistic to permit the defendant, or any party, to secrete an issue of foreign law until his adversary has irretrievably relied on domestic law. The defendant must be obliged to assert his belief that the plaintiff's right to recover depends on foreign law. There do not appear to be any considerations warranting an antipodal conclusion. The burden of

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130. Cf. *Tsakonites v. Transpacific Carriers Corp.*, 246 F. Supp. 634, 636 (S.D.N.Y. 1965). In *Northwest Orient Airlines, Inc. v. Gorter*, 254 F.2d 652 (9th Cir. 1958), the defendant mistakenly relied on the law of British Columbia. Just as the case was being submitted for decision, the defendant moved to amend its answer to show that the law of the Dominion of Canada was applicable. The Ninth Circuit reversed the trial court's denial of the motion because the defendant's reliance on the law of British Columbia was excusable error and permitting the amendment would not prejudice the plaintiff.

131. See *Valdesa Compania Naviera, S.A. v. Frota Nacional de Petroleiros*, 348 F.2d 33, 36-38 (3d Cir. 1965). The relationship between the pretrial conference and foreign law is discussed at text accompanying notes 226-30 *infra*.

giving notice is a light one and compliance does not affect the choice-of-law rules or bear on the consequences flowing from a failure to establish foreign law. Thus, if the defendant is obliged to give notice, he does not thereby assume the burden of persuading the court on that issue<sup>132</sup> or waive the effect of the plaintiff's failure to establish his rights should the court ultimately decide that the case is governed by foreign law.<sup>133</sup>

According to the Advisory Committee, once notice is given by one party, it "serves as a basis for presentation of material on the foreign law by all parties" without the issuance of subsequent notices.<sup>134</sup> However, if a party believes that a markedly different portion of the law referred to in the original notice is relevant or wishes to assert the law of a different country, the text of the Committee's Note does not seem apposite and it is advisable for him to serve his own notice. A second notice presumably is not necessary when a party merely intends to challenge the first notice giver's construction and suggested application of foreign law, as would be the case when the defendant wishes to base his defense on a portion of the code that the plaintiff claims furnishes him with a cause of action.<sup>135</sup>

## B. *Determining an Issue of Foreign Law*

### 1. *Proof of Foreign Law*

a. *The pattern prior to Federal Rule 44.1.* Shortly after the establishment of the federal judiciary, the United States Supreme Court put its imprimatur on the fact characterization of foreign law<sup>136</sup> and the federal courts predictably adopted the common-law pattern of proof. As a result, the party alleging the applicability of foreign law was assigned the burden of proving it by competent evidence and

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132. See *Preferred Acc. Ins. Co. v. Grasso*, 186 F.2d 987 (2d Cir. 1951). See also *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

133. The consequences of failing to establish foreign law in the federal courts are discussed at text accompanying notes 306-31 *infra*.

134. Advisory Committee Note to Federal Rule 44.1, H.R. Doc. No. 391, 89th Cong., 2d Sess. 51 (1966), reprinted in 39 F.R.D. 117, 118 (1966), 1966 U.S. CODE CONG. & AD. NEWS 807, 808; *cf. Wilson v. Dailey*, 191 Md. 472, 62 A.2d 284 (1948).

135. *Cf. Continental Assur. Co. v. Henson*, 297 Ky. 764, 181 S.W.2d 431 (1944); *H. & J. Gross, Inc. v. Fraser*, 140 Mont. 95, 368 P.2d 163 (1962). Although they occasionally may provide useful analytical pegs, the notions of "estoppel" and "waiver" should not be overworked in this context. See also Comment, *Judicial Notice of Foreign Law*, 38 WASH. L. REV. 802, 805, 815 (1963). In order to avoid the type of calcification that so often accompanies these verbal shorthands, the court always should return to the objectives of the first sentence of Rule 44.1 and to considerations of fairness.

136. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 38 (1801).

the federal courts rejected all supplications to the effect that they had inherent power to take judicial notice of foreign law.<sup>137</sup>

The federal courts have recognized four exceptions to the proof requirement. The first applies to so-called rudimentary principles of law. In *Compagnie Générale Transatlantique v. Rivers*<sup>138</sup> this notion was invoked in an action by a female passenger against a French steamship company for injuries incurred as a result of a vicious and wanton attack by one of the defendant's employees. The Second Circuit rejected the defendant's argument that the action failed because the plaintiff did not plead and prove French law, stating that it would be "almost an insult to any self-respecting, civilized country" to fail to assume that the employee's conduct was redressible under its law.<sup>139</sup> The court put the burden of proving the lack of a cause of action under French law on the steamship company. Further elaboration of the rudimentary principles doctrine is found in Judge Learned Hand's opinion in *E. Gerli & Co. v. Cunard S.S. Co.*:<sup>140</sup>

The extent of our right to make any assumptions about the law of another country depends upon the country and the question involved; in common-law countries we may go further than in civil law; in civilized, than in backward or barbarous. We can say more in the case of France or Italy, than of Abyssinia, or Afghanistan . . . , less, than in the case of England or Australia. No doubt, when there

137. See, e.g., *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889); *Ennis v. Smith*, 55 U.S. (14 How.) 400, 426 (1852); *Armstrong v. Lear*, 33 U.S. (8 Pet.) 52 (1834); *Strother v. Lucas*, 31 U.S. (6 Pet.) 763 (1832); *Commissioner v. Hyde*, 82 F.2d 174 (2d Cir. 1936); *In re Circle Trading Corp.*, 26 F.2d 193 (2d Cir. 1928); *Mexican Cent. Ry. v. Chantry*, 136 Fed. 316 (5th Cir. 1905); *Mexican Nat'l R.R. v. Slater*, 115 Fed. 593 (5th Cir. 1902), *aff'd*, 194 U.S. 120 (1904). See also *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858 (2d Cir. 1943) (habeas corpus petition); *Normann v. Schmidt*, 125 F.2d 162 (C.C.P.A. 1942); *Ex parte Hing*, 22 F.2d 554 (W.D. Wash. 1927); *Hockett v. Alston*, 3 Indian Terr. 432, 58 S.W. 675 (1900) (law of Cherokee Nation); *Yam Ka Lim v. Collector of Customs*, 30 Phil. Is. 46 (1915). The attitude of the federal courts toward foreign law and its proof is exemplified by the following passage from *Shapleigh v. Mier*, 83 F.2d 673 (5th Cir. 1936), *aff'd*, 299 U.S. 468 (1937):

It [Mexican Law] remains foreign law to be proven as a fact when written by production of copies of the Constitution and statutes, and in other respects by the testimony of experts. The writings are to be construed by the judge as other writings in evidence, but if uncertain in meaning or application evidence of experts is again admissible to aid the construction. . . . Any other rule would not work, for the judge could hardly be truly conversant with the law of Mexico and would have no access to the forum; and if he were free, as in case of taking judicial notice, to consult any book or person in his discretion, the parties litigant would have no means of knowing what he relied on and no sure means of putting the truth before him.

*Id.* at 676. See also *Guaranty Trust Co. v. Hannay*, 210 Fed. 810 (2d Cir. 1913); *Shelton v. Canadian No. Ry.*, 189 Fed. 153 (C.C.D. Minn. 1911); *Seton v. Delaware Ins. Co.*, 21 Fed. Cas. 1093 (No. 12675) (C.C.D. Pa. 1808); *Robinson v. Clifford*, 20 Fed. Cas. 1001 (No. 11948) (C.C.D. Pa. 1807).

138. 211 Fed. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914).

139. *Id.* at 298.

140. 48 F.2d 115 (2d Cir. 1931).

is no evidence, we are always much limited in cases where the common-law does not prevail; but we are not quite without power in commercial matters arising in one of the great commercial countries of Western Europe. . . . We can assume that in Italy an agreement of carriage creates obligations, generally measured by the language used. . . . We may not, however, assume anything as to how far a carrier by contract is allowed to set a value upon the goods he carries; as to that we know nothing. *Prima facie*, the agreement is a contract; he who maintains that in a given situation it is not, must prove the law of Italy.<sup>141</sup>

At first glance, the rudimentary principles theory appears to be an attractive mechanism for eliminating the need to prove foreign law, especially if it is applied with the reasoned flexibility suggested by Judge Hand. It is curious, therefore, that despite the recognition of the doctrine for the better part of a century—certainly an adequate time for it to mature and expand—it has been used, except in a handful of cases, only in actions involving grossly antisocial conduct on the part of the defendant. Relatively few judges have invoked it and the federal courts have yet to agree on the propriety of applying it in such basic contexts as negligence<sup>142</sup> and the master-servant relationship.<sup>143</sup>

The second exception to the proof requirement permits the federal courts to take judicial notice of the principles of international law and the maritime law of western nations.<sup>144</sup> According to a number of decisions, only the well established and widely recognized rules of international and maritime law are within the aegis of this exception.<sup>145</sup> For example, the federal courts have refrained from taking judicial notice of deviations from general maritime law adopted by individual nations.

The two remaining special rules are isomorphic and can be considered together. Under the third exception, a federal court is obligated to apply the judicial decisions and statutes of the several states, not merely the law of the state in which it happens to be

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141. *Id.* at 117.

142. Compare *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956), with *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962), and *Jansson v. Swedish Am. Line*, 185 F.2d 212 (1st Cir. 1950), and *Rosenthal v. Compagnie Generale Transatlantique*, 14 F.R.D. 33 (S.D.N.Y. 1953).

143. See *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912).

144. See *The Paquete Habana*, 175 U.S. 677 (1900); *The New York*, 175 U.S. 187 (1899); *The Belgenland*, 114 U.S. 355, 370 (1885); *The Scotia*, 81 U.S. (14 Wall.) 170 (1871); *Lawlor v. Ingres Nassau S.S. Line, Inc.*, 161 F. Supp. 764 (D. Mass. 1958). See also McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 310 (1952).

145. See, e.g., *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 396 (1949). See also *Yang-Tsze Ins. Ass'n v. Furness, Withy & Co.*, 215 Fed. 859 (2d Cir. 1914), *appeal dismissed*, 242 U.S. 430 (1917).



sitting.<sup>146</sup> The fourth exception actually is a group of closely related incursions on the proof requirement. Collectively they permit the federal courts to notice the foreign law in force in an area prior to its accession by the United States, the law in force in a territory before it became a state, the law common to a foreign country and a territory that has become a state,<sup>147</sup> and the law in the colonies and in England prior to the American Revolution.<sup>148</sup>

A reasonably persuasive rationale for each of the four exceptions is easy to articulate. Considerations of administrative convenience and fairness presumably underlie the rudimentary principles doctrine. The notion that a party asserting a "fundamental" or "rudimentary" right should not be forced to prove that foreign law recognizes the obvious has a certain appeal. The international-and-maritime-law exception apparently assumes that these principles are widely recognized, have the approbation of the courts in most nations, are easily ascertainable, and, for all practical purposes, have been assimilated into domestic law. Accordingly, it is deemed appropriate to ask the federal courts to apply this body of rules without formal proof. The relatively few cases applying these two exceptions may well be a testament to their limited value. In most instances it probably is easier to prove foreign law than to establish that it is "rudimentary" in character or, in the case of international or maritime law, "well-established."

Exceptions three and four are based on very different considerations and are really by-products of our federal polity and the role of the federal judiciary under the Constitution rather than aspects of any policy relating to the proof of foreign law. Because the Supreme Court's power to review state court decisions brings it into daily contact with the law of one or more states, it is inconceivable that

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146. See, e.g., *Lamar v. Micou*, 114 U.S. 218 (1885); *Pennington v. Gibson*, 57 U.S. (16 How.) 65, 81 (1853); *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 625 (1835) (Louisiana law applied). See also *Martin's Adm'r v. Baltimore & O.R.R.*, 151 U.S. 673, 678 (1894); *Salsberg v. Modern Transfer Co.*, 324 F.2d 737 (2d Cir. 1963); *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958); *McDermott v. John Hancock Mut. Life Ins. Co.*, 255 F.2d 562 (3d Cir. 1958), *cert. denied*, 358 U.S. 935 (1959); *Colello v. Sundquist*, 137 F. Supp. 649 (S.D.N.Y. 1955), *aff'd*, 229 F.2d 737 (2d Cir. 1956); 1A MOORE, FEDERAL PRACTICE ¶ 0.316[2] (2d ed. 1961). *But see* *Anderson v. National Producing Co.*, 253 F.2d 834 (2d Cir.), *cert. denied*, 357 U.S. 906 (1958).

147. See, e.g., *United States v. Chaves*, 159 U.S. 452 (1895); *United States v. Perot*, 98 U.S. 428 (1878); *Fremont v. United States*, 58 U.S. (17 How.) 542, 557 (1854); *United States v. Turner*, 52 U.S. (11 How.) 663 (1850); *Mexican Cent. Ry. v. Marshall*, 91 Fed. 933 (5th Cir.), *cert. denied*, 173 U.S. 705 (1899) (dictum); *cf. Lopez v. Sotelo*, 70 P.R.R. 475 (1949). See also *Panama Elec. Ry. v. Moyers*, 249 Fed. 19 (5th Cir. 1918); *Mexican Cent. Ry. v. Glover*, 107 Fed. 356 (5th Cir. 1901).

148. See, e.g., *Loree v. Abner*, 57 Fed. 159 (6th Cir. 1893).

the Court would treat issues of state law differently than other questions of law. In addition, all levels of the federal judiciary are required to determine issues of state law when sitting in diversity jurisdiction and, by virtue of the Rules of Decision Act,<sup>149</sup> must do the same in a variety of contexts when adjudicating federal-question cases. Moreover, from the inception of the national judicial system, the federal courts, without any concern for the technicalities of proof, have referred to the laws of the several states—and to English law—for guidance in determining what state and federal law is or should be in a variety of contexts.<sup>150</sup> Courts that have grown accustomed to this process cannot be expected to pay serious attention to an argument that they are incapable of performing a comparable function when they are asked to apply state law.

It obviously is eminently sensible to permit the federal courts to take notice of the law of each of the nation's constituent units, whether it be their current law or their ancient law. But does it make sense to denominate the Spanish or French law formerly in force in parts of the South and Southwest, or the law of Louisiana, as "law" when it must be applied by a federal court in New York, and then to characterize the present law of Spain or France as "fact," when the consequence of this nomenclature is to superimpose on the latter the same rules of proof as are used to determine an automobile's speed or a traffic light's color?<sup>151</sup> The two situations certainly cannot be distinguished on the basis of the burden they will impose on the court. Of course, it is plausible to argue that absent the type of policy justifications that are at the root of the third and fourth exceptions to the proof requirement, the federal courts should not be burdened with the task of delving into foreign law and should be permitted to rely on adversarial presentations. Beyond this hypothesis, for which there is little existing empirical evidence or judicially articulated support, there is little to commend the existing distinction.

The Federal Rules of Civil Procedure did not deal directly with the proof of foreign law prior to 1966. Between 1938 and 1966 most

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149. Judiciary Act of 1789, § 34, 1 Stat. 73, 92, as amended, 28 U.S.C. § 1652 (1964). The relationship among the Rules of Decision Act, a number of related statutes, the proof of foreign law in the federal courts, and Rule 44.1, is discussed at text accompanying notes 431-519 *infra*.

150. Between the decisions in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the federal courts frequently engaged in this type of an investigation to ascertain general federal common law. *E.g.*, *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368 (1893).

151. See *United States v. Turner*, 52 U.S. (11 How.) 663, 668 (1850).

federal courts adhered to prior practice by refusing to take judicial notice of foreign law and insisting that it be proved as a fact.<sup>152</sup> The four exceptions to the proof requirement retained their limited virility but the courts manifested no proclivity to expand them.<sup>153</sup> A few courts departed from the common-law rule and took judicial notice of foreign law, but usually only of extremely primordial legal principles and without any enlightening discussion.<sup>154</sup>

Several federal courts deviated from common-law techniques by relying on the passage in Federal Rule 43(a) providing that all evidence

shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held.<sup>155</sup>

The first two grounds for admissibility are of little relevance to this discussion since there are no general federal statutes dealing with proof of foreign law<sup>156</sup> and the pre-1938 practice of proving alien law in equity seems to have been the same as it was on the law side of the federal courts. The third basis for admission—the “rules of

152. See, e.g., *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956); *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955); *Esso Standard Oil, S.A. v. The Gasbras Sul*, 239 F. Supp. 212 (S.D.N.Y. 1964); *Prol v. Holland-America Line*, 234 F. Supp. 530 (S.D.N.Y. 1964); *Tsangarakis v. Panama S.S. Co.*, 197 F. Supp. 704 (E.D. Pa. 1961); *Nicolas Eustathiou & Co. v. United States*, 154 F. Supp. 515 (E.D. Va. 1957); *The Vulcania*, 32 F. Supp. 815 (S.D.N.Y. 1940). See also *Emmerich v. May*, 130 F. Supp. 426 (S.D.N.Y. 1955).

153. See, e.g., *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962); *Lawlor v. Incres Nassau S.S. Line, Inc.*, 161 F. Supp. 764 (D. Mass. 1958); *Rosenthal v. Compagnie Generale Transatlantique*, 14 F.R.D. 33 (S.D.N.Y. 1953).

154. See *Dulles v. Katamoto*, 256 F.2d 545 (9th Cir. 1958) (judicial notice that person born in Japan is a Japanese citizen); *Guzman v. Gleason*, 234 F. Supp. 145 (D.D.C. 1964) (common-law marriages not recognized in the Philippines); *Fianza CIA Nav. S.A. v. Benz*, 178 F. Supp. 243 (D. Ore. 1958), *rev'd on other grounds*, 279 F.2d 490 (9th Cir. 1960) (judicial notice that certain commercial transactions were bona fide and in due course under Panamanian law).

155. FED. R. CIV. P. 43(a) is intended to favor the admissibility of evidence. Professor Moore has stated that it “revolutionizes federal evidence, and in general places admissibility upon the sole basis of relevancy and materiality.” 5 MOORE, FEDERAL PRACTICE ¶ 43.02[3] (2d ed. 1966).

156. Two federal statutes of somewhat limited application are worthy of mention. According to the Federal Register Act, 49 Stat. 502 (1935), 44 U.S.C. § 307 (1964), any material concerning foreign law that appears in the Federal Register can be judicially noticed. Similarly, § 1741 of the Judicial Code, 28 U.S.C. § 1741 (1964), which incorporates the practice under FED. R. CIV. P. 44, facilitates the introduction in evidence of foreign official documents and records, including various documents relating to the law of a foreign country such as statutes, administrative regulations, and judicial decisions. See Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1042-46 (1965). Because of the great freedom Rule 44.1 gives the trial judge, § 1741 and Rule 44 will be of limited utility in the proof of foreign law.

evidence" applied in the courts of the state in which the district court is sitting—proved to be more fruitful. It enabled a federal court sitting in a state with a liberal attitude toward the introduction of foreign-law materials to exercise the same freedom as a state court in that jurisdiction even if the material was technically inadmissible under some widely accepted principle of evidence. For example, a federal court in a state that had enacted the Uniform Proof of Statutes Act could accept an official publication of a foreign statute without further proof.<sup>157</sup> In those states that had enacted a permissive or mandatory judicial-notice statute, a federal court theoretically could apply it to foreign law under Rule 43(a). Indeed, a number of cases assumed that Rule 43(a) permitted a federal court to take judicial notice of facts whenever a state court would,<sup>158</sup> and this construction was extended to judicial notice of foreign law without hesitation;<sup>159</sup> this was done even though Rule 43(a) is only a rule of admissibility and it is not self-evident that the judicial-notice doctrine falls within its ambit. Doubts about this use of Rule 43(a) were alluded to in *Siegelman* but the court endorsed Professor Moore's view that the Rule applies to judicial notice because "the statute or rule which favors the reception of the evidence governs";<sup>160</sup> the Second Circuit concluded that "the most convenient method of presenting the foreign law is obviously not to have to introduce evidence on it at all, but simply to treat it in the same fashion as domestic law."<sup>161</sup>

But the willingness to employ state judicial-notice statutes under Rule 43(a) did not radically alter the established pattern. The federal courts tended to be conservative in their use of the forum state's judicial-notice statute and generally refrained from resorting to it unless a state court would have taken judicial notice in a comparable

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157. Conceivably, a copy of a foreign statute could satisfy the Uniform Proof of Statutes Act but not qualify under the pre-1966 text of Federal Rule 44.

158. *E.g.*, *Golaris v. Jewel Tea Co.*, 22 F.R.D. 16 (N.D. Ill. 1958). See also *Insurance Research Serv., Inc. v. Associates Fin. Corp.*, 134 F. Supp. 54 (M.D. Tenn. 1955).

159. See *Lady Nelson, Ltd. v. Creole Petroleum Co.*, 286 F.2d 684, 686 (2d Cir. 1961) (dictum); *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Petition of Petrol Shipping Corp.*, 37 F.R.D. 437 (S.D.N.Y. 1965); *Telesphore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944). See also *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 544 n.6 (2d Cir. 1962); *Krasnow v. National Airlines, Inc.*, 228 F.2d 326 (2d Cir. 1955).

160. See 5 MOORE, *FEDERAL PRACTICE* ¶ 43.09 (2d ed. 1966).

161. 221 F.2d at 196. One writer has complained that the *Siegelman* decision goes beyond the limits placed on N.Y. Civ. Prac. Act § 344-a by the New York courts, particularly *Sonnesen v. Panama Transp. Co.*, 298 N.Y. 262, 82 N.E.2d 569 (1948), *cert. denied*, 337 U.S. 919 (1949). See *Busch, Reply to Report on "Judicial Initiative in the Proof of Foreign Law,"* A.B.A. SEC. INT'L & COMP. L., PROCEEDINGS 136 (1956).

case.<sup>162</sup> Moreover, even today, only about one-fourth of the states permit or require judicial notice to be taken of foreign law and in many of these states the courts have been parsimonious in their utilization of the statutes.<sup>163</sup> Thus, in most federal courts proof of the law of foreign countries continued to follow the same inefficient and needlessly prodigal pattern employed prior to 1938—the introduction of some combination of official publications, duly authenticated copies of documents concerning foreign law, oral expert testimony, formal depositions of experts who were unavailable to testify, and a variety of other miscellany.<sup>164</sup>

*b. The effect of Federal Rule 44.1.* The procedure for proving foreign law has been substantially changed by the second sentence of Federal Rule 44.1, which provides a uniform procedure for all the district courts—thereby eliminating the need to rely on state practice in those states in which it has been advantageous to do so in the

162. This restraint is best exemplified by several decisions in the New York federal courts. In *Hausman v. Bailey*, 22 F.R.D. 304 (S.D.N.Y. 1958), a stockholder's derivative suit, the court declined to take judicial notice of Venezuelan law on a motion to dismiss, preferring to treat it as a fact to be proved at trial. See also *Bakhshandeh v. American Cyanamid Co.*, 211 F. Supp. 803 (S.D.N.Y. 1962); *Harrison v. United Fruit Co.*, 143 F. Supp. 598 (S.D.N.Y. 1956); *Murphy v. Bankers Commercial Corp.*, 111 F. Supp. 608 (S.D.N.Y.), *aff'd*, 203 F.2d 645 (2d Cir. 1953). Again, in *Telesphore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958), a request to take judicial notice of certain Quebec statutes was rejected; the court felt it lacked the "facilities" to do so and believed that counsel had the duty to research Quebec law and present the fruits of their efforts to the court. Much the same reasoning led the court to refrain from noticing Greek law in *Petition of Petrol Shipping Corp.*, 37 F.R.D. 437 (S.D.N.Y. 1965). See also *Wall Street Traders, Inc. v. Sociedad Española de Construcción Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964) (admiralty case involving law of Spain). Only in *Royal Exch. Assur. v. Brownell*, 146 F. Supp. 563 (S.D.N.Y. 1956), *aff'd*, 257 F.2d 582 (2d Cir. 1958), did the Southern District of New York reject conflicting expert testimony and assert its power to take judicial notice; as in *Siegelman*, however, English law was involved. Cf. *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965).

During the period embraced by these federal cases, New York state courts took judicial notice of the laws of Quebec, *Estate of McDougald*, 272 App. Div. 176, 70 N.Y.S.2d 200 (1947), *Holland*, *In re Baruch's Estate*, 131 N.Y.S.2d 84 (Surr. Ct. 1954), *Ontario*, *Olson v. Kilian*, 203 Misc. 847, 119 N.Y.S.2d 94 (Sup. Ct. 1953), and *Italy*, *Southwestern Shipping Corp. v. National City Bank*, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958), *rev'd on other grounds*, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352 (1959), *cert. denied*, 361 U.S. 895 (1959). See also *Mangrelli v. Italian Line*, 208 Misc. 685, 144 N.Y.S.2d 570 (Sup. Ct. 1955) (dictum); *Matter of Grant-Suttie*, 205 Misc. 640, 129 N.Y.S.2d 572 (Surr. Ct. 1954); *Nussbaum, Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957). In *Southwestern Shipping*, the court received considerable aid from counsel.

163. See text accompanying notes 49, 55-58 *supra*.

164. See, e.g., *Chemical Bank N.Y. Trust Co. v. Kennedy*, 199 F. Supp. 256 (D.D.C. 1961), *rev'd on other grounds*, 319 F.2d 720 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 965 (1964). The court always has been the ultimate arbiter of the admissibility of foreign-law material. In *Federal Ins. Co. v. American Export Lines, Inc.*, 113 F. Supp. 540 (S.D.N.Y. 1953), the court rejected as insufficient an attempt to establish the law of Italy by introducing the digest of Italian law appearing in *Martindale-Hubbell Law Directory*.

past and liberating the federal courts in the remaining states from the common-law practice.<sup>165</sup> The new Rule permits the court to consider any material that is relevant to a foreign-law issue, whether submitted by counsel or unearthed by the court's own research, and without regard to its admissibility under the rules of evidence.<sup>166</sup> The purpose of this provision is obvious. One of the objectives of Rule 44.1 is to abandon the fact characterization of foreign law and to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that is possible. Thus the trial judge's freedom of inquiry no longer is encumbered by restraints on his research or by the rules of admissibility, which may be useful in the context of fact issues tried to a jury but are of no utility in establishing the content of foreign law.

Since the new Rule dissipates former inhibitions, the court may consider any material the parties wish to present. Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning.<sup>167</sup> The task of procuring an acceptable copy of a foreign official record has been facilitated substantially by the extensive revision of Federal Rule 44, which was adopted with Rule 44.1 in 1966.<sup>168</sup> In addition to primary materials and expert testimony, a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals,<sup>169</sup> and a wide variety of unauthenticated documents relating to foreign law. The trial judge is free to accept these items and ascribe whatever probative value he

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165. The second sentence of Rule 44.1 states: "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." The full text of the Rule is set out in note 5 *supra*.

166. Cf. UNIFORM RULES OF EVIDENCE 10(2).

167. See *Ennis v. Smith*, 55 U.S. (14 How.) 400, 426 (1852); *Chemical Bank N.Y. Trust Co. v. Kennedy*, 199 F. Supp. 256 (D.D.C. 1961), *rev'd on other grounds*, 319 F.2d 720 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 965 (1964); *The Atlanta*, 82 F. Supp. 218 (S.D. Ga. 1948). See also *Esso Standard Oil, S.A. v. The Gasbras Sul*, 239 F. Supp. 212 (S.D.N.Y. 1964). It obviously is inadvisable to rely on an unelaborated text of a foreign statute or decision. Counsel should offer the court enough background information to permit it to comprehend the relevance of the proffered material to the litigation. See, e.g., *Application of Chase Manhattan Bank*, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

168. Fed. R. Civ. P. 44.1 is virtually identical to Article V of the Uniform Interstate and International Procedure Act, which is outlined in note 71, *supra*.

169. Although some of the early cases contain debate on the point, the federal courts have relied on foreign-law treatises for some time. E.g., *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 452 (1869); *The Pawashick*, 19 Fed. Cas. 5 (No. 10851) (D. Mass. 1872).

thinks they deserve; early decisions limiting the court's power to consider legal materials that were not properly attested or were inadmissible under the rules of evidence have no precedential value under Rule 44.1.<sup>170</sup>

Written or oral expert testimony accompanied by extracts from foreign legal materials probably will continue to be the basic mode of proving foreign law.<sup>171</sup> A foreign-law expert is not required to meet any special qualifications; indeed, he need not even be admitted to practice in the country whose law is in issue.<sup>172</sup> It is not surprising, therefore, that federal courts have not felt bound by the testimony of experts and upon occasion have placed little or no credence in their opinions.<sup>173</sup> In *Bostrom v. Seguros Tepeyac, S.A.*,<sup>174</sup> for example, the court commented on the plaintiff's Mexican law expert as follows:

The witness was a native of Germany and studied law there. He left Germany during the period of the exodus in the middle thirties. . . . He has never obtained a license to practice law anywhere. . . . The only official recognition of his law study was the action in 1960 of his native state of Bavaria in conferring on him the honorary title of "Landgerichtsrat," which means Judge of the Superior Court. The honorary appointment was given, to use his

170. See *Ennis v. Smith*, 55 U.S. (14 How.) 400, 426-30 (1852); *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804). See generally *The Pawashick*, *supra* note 169.

171. See *José Taya's Sons v. Compania Arrendataria de Tabacos de Espana*, 280 Fed. 825 (2d Cir. 1922); *Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448 (D. Mass. 1966); *Esso Standard Oil, S.A. v. The Gasbras Sul*, 239 F. Supp. 212 (S.D.N.Y. 1964); *Maiorino v. United States*, 111 F. Supp. 817 (S.D.N.Y. 1952). A number of the deficiencies of expert testimony are outlined in GUTTERIDGE, *COMPARATIVE LAW* 48-50 (2d ed. 1949). See also SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 41-48 (1959); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1243-44 (1966); Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 38 (1957).

172. See *Nicolas Eustathiou & Co. v. United States*, 154 F. Supp. 515 (E.D. Va. 1957); *Murphy v. Bankers Commercial Corp.*, 111 F. Supp. 608 (S.D.N.Y. 1953), *aff'd*, 203 F.2d 645 (2d Cir. 1953). There is an intimation in *Panama Elec. Ry. v. Moyers*, 249 Fed. 19 (5th Cir. 1918) that the trial judge could have qualified as an expert in Panamanian law if he had been called to testify.

173. *E.g.*, *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965); *Usatorre v. The Victoria*, 172 F.2d 434 (2d Cir. 1949); *Merinos Viesca y Compania, Inc. v. Pan Am. Petroleum & Transp. Co.*, 83 F.2d 240 (2d Cir.), *cert. denied*, 299 U.S. 547 (1936); *Application of Chase Manhattan Bank*, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962). See also *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955); *Wood & Selick, Inc. v. Compagnie Générale Transatlantique*, 43 F.2d 941 (2d Cir. 1930). In *Panama Elec. Ry. v. Moyers*, 249 Fed. 19 (5th Cir. 1918), the trial court's refusal to admit evidence on the law of Panama offered by a judge of that country was held to be reversible error. The lower court had rejected the testimony on the ground that it did not want "to delegate . . . the right to pass upon the issues involved in this case." *Id.* at 22.

174. 225 F. Supp. 222 (N.D. Tex. 1963), *modified on other grounds*, 347 F.2d 168 (5th Cir. 1965).

words, in "the course of what is called 'restitution' ". He is foreign law librarian for one of the large county law libraries in California, which has a collection of books on the laws of some foreign countries, including Mexico. He has had no formal education in the Spanish language; but he has studied it on his own to the extent that he considers he can read and translate it, though he cannot speak it well. He has written "articles on the law of the Republic of Mexico," and has testified in two cases on the laws of that country as well as in one case on those of Norway. There was no indication of the nature of such writings and testimony or that they had any relation to the questions involved in this case. As far as the evidence goes, the articles might have been of such general nature that a government professor could have written them. A good lawyer or law professor from Mexico could have been produced at practically the same expense; and a deposition of one of them would have cost considerably less. In a case involving questions of foreign law, a party owes the court the duty of producing an expert witness whose learning and experience equal or surpass custody of law books, a general interest in the subject, and a willingness to testify on any phase of the laws of any foreign country. . . .<sup>175</sup>

As intimated in *Bostrom*, the federal courts expect adequate expert testimony on foreign law and the failure to produce it may damage a litigant's case. The latter point is illustrated by *Dulles v. Katamoto*,<sup>176</sup> in which the United States government attempted to prove Japanese law by producing a statement written by one Japanese official to another and two opinions from nonlawyers. The court concluded that the absence of "the testimony of an experienced Japanese practitioner" raised an inference that the law was contrary to the construction advanced by the government.<sup>177</sup>

The passage in Rule 44.1 expressly authorizing the court to engage in its own foreign-law research, a prerogative frequently exercised on issues of domestic law, is an improvement over prior practice for a number of reasons.<sup>178</sup> All too often counsel will do an

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175. *Id.* at 230-31. When the expert seems qualified, the court usually will honor his testimony. See *Guaranty Trust Co. v. Hannay*, 210 Fed. 810 (2d Cir. 1913).

176. 256 F.2d 545 (9th Cir. 1958).

177. *Id.* at 547. See also *Black Diamond S.S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 397 (1949) (court unimpressed by personal consultations with three Belgian maritime lawyers that were not on the record). Some courts have insisted that written expert testimony must be sworn. *E.g.*, *Application of Chase Manhattan Bank*, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

178. A number of federal courts exercised considerable independence in examining foreign law on their own before receiving express authorization to do so. *E.g.*, *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222 (N.D. Tex. 1963), *modified on other grounds*, 347 F.2d 168 (5th Cir. 1965); *cf.* *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933). See also *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955). In *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir.



inadequate job of researching and presenting foreign law or will attempt to prove alien law in such a partisan fashion that the court is obliged to go beyond their offerings. On occasion, the trial judge will have better foreign-law resources than counsel or, because of his personal background or prior exposure to a particular country's law, have greater expertise in researching and applying foreign law than the attorneys. In these circumstances it would be foolish to restrict the court's line of vision to the materials formally presented in evidence by the parties.

The trial judge's freedom to engage in his own research gives him maximum flexibility as to the material to be considered and the methodology to be employed in determining foreign law in a particular case. To exercise his discretion under the new Rule responsibly, the judge must take account of a variety of factors, including the importance of foreign law to the case, the complexity of the foreign-law issue, and how best to meet the needs of and be fair to both litigants. In many instances the judge will not utilize the prerogatives found in the second sentence of Rule 44.1. Nothing in the Rule requires him to engage in private research; his right to insist upon a complete presentation by counsel on the foreign-law issues has been preserved. The Rule recognizes that judges are reluctant to research and determine foreign law without some assistance from the attorneys<sup>179</sup> and does not obligate them to undertake that burden.<sup>180</sup> At a minimum, however, federal trial judges pre-

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1965), Judge Friendly undertook the task of investigating Greek law when the expert testimony proved unsatisfactory. He eventually relied on a discussion of the same issue in an earlier federal case. Doubt as to the propriety of this practice was expressed in *Di Sora v. Phillips*, 10 H.L. Cas. 624, 639-40, 11 Eng. Rep. 1168, 1175 (1863) and in SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 64-69 (1959). See also note 295 *infra*.

179. See, e.g., *Petition of Petrol Shipping Corp.*, 37 F.R.D. 437 (S.D.N.Y. 1965); *Wall Street Traders, Inc. v. Sociedad Española de Construcción Naval*, 236 F. Supp. 358, 359 n.6 (S.D.N.Y. 1963); *Telephore Couture v. Watkins*, 162 F. Supp. 727 (E.D.N.Y. 1958).

180. The Rule also refrains from using the term "judicial notice" because of the widespread confusion and controversy concerning the character of that doctrine. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 981-1001 (1958), for a brilliant "exposé" of the vagaries and deficiencies of the use of the judicial-notice doctrine in this context. If the court is so disposed, it may be able to secure aid in determining foreign law from the foreign ministry or department of justice of the foreign country, see, e.g., *United States v. Pink*, 315 U.S. 203, 218 (1942); SMIT, *ITALIAN AND AMERICAN PROCEDURES OF INTERNATIONAL COOPERATION IN LITIGATION: A COMPARATIVE ANALYSIS* 15-17 (1962); Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1107-08 (1965); cf. *Westfal-Larsen & Co. v. United States*, 41 F.2d 550 (N.D. Cal. 1930), or from a reliable private agency, such as the Max Planck Institute for Foreign and International Private Law in Germany, that is willing to prepare an opinion on the law of a particular country.

sumably should continue to take judicial notice under the four traditional exceptions to the proof requirement.<sup>181</sup> Moreover, it must be remembered that one of the policies inherent in Rule 44.1 is that, whenever possible, foreign-law issues should be resolved on their merits and on the basis of a full evaluation of the available materials. To effectuate this policy, the court is obliged to take an active role in the process of ascertaining foreign law. The notice requirement and the mode of proof were deliberately left flexible and informal to encourage court and counsel to regard the determination of foreign law as a co-operative venture requiring an open and unstructured dialogue among all concerned.<sup>182</sup> Thus, a judicial practice of automatically refusing to engage in research or to assist or direct counsel would be inconsistent with one of the Rule's basic premises.

In many respects, proof of foreign law under the new Rule is similar to the pattern employed in a number of foreign countries. Because the rules of evidence are less of an impediment in civil-law countries than in common-law jurisdictions, most European courts are extremely flexible in receiving information concerning foreign law<sup>183</sup> and a number of them permit their courts to engage in *ex parte* foreign-law investigations.<sup>184</sup> In Latin America, courts in na-

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See also GUTTERIDGE, *COMPARATIVE LAW* 51 (2d ed. 1949). Some of the deficiencies of relying on opinions furnished by foreign officials are outlined in Rafalko, *Pleading, Proving and Obtaining Information on Foreign Law*, 43 U. DET. L.J. 95, 97-98 (1965). See also SOMMERICH & BUSCH, *FOREIGN LAW—A GUIDE TO PLEADING AND PROOF* 55-57 (1959). To date nothing of consequence has materialized from a number of suggestions that the United States enter into arrangements with other countries for the exchange of legal materials and opinions. See, e.g., Part VII, Art. 12, Harvard Research in International Law, *Draft Convention on Judicial Assistance*, 33 AM. J. INT'L L. 112 (Supp. 1939). See also Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 546-47, 552-53, 556-62 (1953).

181. See text accompanying notes 138-51 *supra*.

182. Advisory Committee Note to Federal Rule 44.1, H.R. Doc. No. 391, 89th Cong., 2d Sess. 51-52 (1966), reprinted in 39 F.R.D. 117, 118-19 (1966), 1966 U.S. CODE CONG. & AD. NEWS 807, 808-09.

183. See generally KUHN, *PRIVATE INTERNATIONAL LAW* 100-03 (1937); Shaper & Smit, *The Netherlands*, in *INTERNATIONAL COOPERATION IN LITIGATION: EUROPE* 382, 394-95 (Smit ed. 1965); Sommerich & Busch, *op. cit. supra* note 180, at 105-16; Kuhn, *Judicial Notice of Foreign Law*, 39 AM. J. INT'L L. 86 (1945); Miller, *supra* note 180, at 1127-29; Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1027 (1941).

184. For example, § 293 of the German Code of Civil Procedure states:

The law prevailing in another country, the customary law and charters need to be proved only in so far as they are unknown to the Court. In ascertaining these legal norms the Court is not confined to the evidence adduced by the parties; it may use, also, other sources of information and may make any orders necessary for their utilization.

See I STEIN-JONAS-SCHÖNKE, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG* (18th ed. 1953). See also Kassationsgericht of the Canton of Zurich, Oct. 12, 1951, 11 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT (ANNUAIRE SUISSE DE DROIT INTERNATIONAL) 302-

tions that adhere to the Bustamente Code must judicially notice the law of any other country that has adopted the Code.<sup>185</sup> A more cautious attitude toward the proof of foreign law prevails in those nations with a Napoleonic Code tradition.<sup>186</sup>

A question that frequently generates debate is whether the trial court should be required to give notice to the parties whenever it examines foreign-law materials not submitted by counsel or whenever it espies a foreign-law issue not raised by the parties, researches the question, and then applies alien law. Although Rule 44.1 is silent on the point, the Advisory Committee's Note negates the existence of any such duty. This conclusion finds support in the analogous treatment now accorded to domestic-law issues in the federal courts. Since a court often applies the product of its private research into domestic law without prior notice to the litigants, it should not be required to give notice in the foreign-law situation as a matter of course.

Common sense and the same policy considerations underlying the notice requirement in the first sentence of Rule 44.1 necessitate some qualification of the proposition that the court need *never* give notice, however. If the court either unearths material that varies markedly from that offered by the parties or plans to utilize foreign law in a way not contemplated by the parties, notice and an opportunity to react to the court's research should be given.<sup>187</sup> A similar obligation exists when the trial court raises an issue of foreign law on its own or decides that the case is controlled by the law of a country other than the one whose law the parties believed to be applicable.<sup>188</sup> As a practical matter, the interaction between counsel

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03 (1954); GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN ¶ 12.06 (1965); Dölle, *De l'application du droit étranger par le juge interne*, 44 REVUE CRITIQUE DE DROIT INTERNATIONALE PRIVÉ 233 (1955).

185. Sixth International Conference of American States, Code of Private International Law, Jan. 16–Feb. 20, 1928, arts. 408-13, reprinted in Pan Am. Law and Treaty Ser. No. 34, at 38, 65-66.

186. See, e.g., Herzog & Smit, *France*, in INTERNATIONAL COOPERATION IN LITIGATION: EUROPE 119, 149-52 (Smit ed. 1965); Rigaux & Miller, *Belgium*, in *id.* at 30, 50-51. Although the fact theory is prevalent in Europe, a number of civilian scholars have rejected it. E.g., MEILI, DAS INTERNATIONALE CIVILPROZESSRECHT 134-40 (1904). See also Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1019-20 (1941).

187. See SCHLESINGER, COMPARATIVE LAW 142 (2d ed. 1959); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1296, (1952). See also GINSBURG & BRUZELIUS, CIVIL PROCEDURE IN SWEDEN ¶ 12.06(b) (1965); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 974-78 (1955).

188. In either of these situations, the court's obligation to apprise counsel of what it is doing may well be of due-process dimensions. Cf. *Saunders v. Shaw*, 244 U.S. 317 (1917). The failure to give notice in these situations also might violate the parties' right to stipulate as to the controlling law.

The second sentence of FED. R. CRIM. P. 26.1, which is identical to the second sen-

and trial judge throughout the lawsuit makes it likely that the parties will have knowledge of the judge's intentions and research activity.<sup>189</sup> Consequently, a blanket requirement that the trial court give formal notice whenever it goes beyond the presentation by the parties regardless of the triviality of the issue or the deviation from the record is unsound and was properly characterized by the Advisory Committee as "an element of undesirable rigidity . . . [in] the procedure for determining issues of foreign law."<sup>190</sup>

## 2. *Foreign Law Prior to Trial*

*a. Pretrial discovery.* Issues of foreign law can be framed, molded, and even resolved prior to trial in a number of ways. Many of the most important mechanisms for accomplishing this are found in the deposition and discovery practice set out in Federal Rules 26 through 37. Oral and written examinations, interrogatories to parties, and requests for admissions often are used to refine and sharpen disputed issues, record expert testimony on foreign law, and gather information and foreign legal materials.

Federal Rule 28(b) enumerates several methods for securing testimony or opinions from people in a foreign country for use on a summary-judgment motion or at trial.<sup>191</sup> The least expensive but probably the slowest and most cumbersome of these is the letter

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tence of Rule 44.1, does not violate the right of confrontation in the sixth amendment if foreign-law issues are viewed as matters of law rather than fact. See 4 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 2191 (Wright ed. 1961 Supp. 1966); Reznick, *The New Federal Rules of Criminal Procedure*, 54 *Geo. L.J.* 1276, 1307 (1966).

189. The problem of counsel not being aware of the court's independent activities may be more serious on the appellate level. See notes 301-05 *infra* and accompanying text.

190. Advisory Committee Note to Federal Rule 44.1, H.R. Doc. No. 391, 89th Cong., 2d Sess. 51, 52 (1966), reprinted in 39 *F.R.D.* 117, 119 (1966), 1966 *U.S. CODE CONG. & AD. NEWS* 807, 809. An unnecessary degree of concern over the Advisory Committee's position regarding notice is voiced in Cohn, *The New Federal Rules of Civil Procedure*, 54 *Geo. L.J.* 1204, 1245-46 (1966).

The new California Evidence Code takes a more cautious position than does Federal Rule 44.1. Section 454(b) of California's code provides that when a "court resorts to the advice of persons learned" in the law of a foreign country, "such advice, if not received in open court, shall be in writing." Section 455(a) goes on to state that before the jury is instructed or the case submitted, the parties must be given a reasonable opportunity to present "information relevant to . . . the tenor of the matter to be noticed." Subdivision (b) of the same section adds that "if the trial court resorts to any source of information not received in open court . . . such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken."

191. See, *e.g.*, *Danisch v. Guardian Life Ins. Co. of America*, 19 *F.R.D.* 235 (S.D.N.Y. 1956). See also *Harris v. American Int'l Fuel & Petroleum Co.*, 124 *F. Supp.* 878 (W.D. Pa. 1954).

rogatory. In the past, federal courts were reluctant to issue a letter rogatory to obtain expert testimony from abroad without a showing that comparable testimony was unavailable in this country.<sup>192</sup> Because Rule 44.1 permits the court to use any material relevant to a foreign-law issue, a more permissive attitude toward securing testimony by letter rogatory is likely in the future. Moreover, the precedential value of pre-1963 cases denying the use of a letter rogatory for procuring information concerning foreign law is questionable since these cases were decided when Federal Rule 28(b) stated that "letters rogatory shall be issued only when necessary or convenient," a passage that was construed to permit a letter rogatory only when testimony on notice or by commission was impossible or impracticable to obtain.<sup>193</sup> Since 1963, Rule 28(b) has provided that the absence of another means of securing testimony is not a prerequisite to the use of a letter rogatory; a trial judge may now issue a letter whenever it would be advantageous to do so.<sup>194</sup> If sounder, more impartial, or less expensive testimony can be procured by letter than is available in this country or than is obtainable pursuant to a notice or commission, a letter rogatory should be issued.

The scope of discovery on a foreign-law issue is not unlimited. For instance, a party may not be able to interrogate his adversary as to the details of the foreign law relied upon by the latter. In *Fisherman & Merchants Bank v. Burin*,<sup>195</sup> a request for citations to relevant portions of English law was denied. In an opinion somewhat at variance with the common-law fact theory of foreign law, the court rejected the argument that the defendant was entitled to the information because "foreign law must be pleaded and proven as any other evidentiary matter" and held that since the applicability of foreign law is a question for the court, the opinion of another party as to its content is an improper subject for interrogatories under Federal Rule 33. "Parties are not called upon to express opinions or conclusions."<sup>196</sup> A decision contrary to *Burin* is *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschap-*

192. See *American Infra-Red Radiant Co. v. Lambert Indus., Inc.*, 32 F.R.D. 372 (D. Minn. 1963); *United States v. Dunn*, 55 F. Supp. 535 (S.D.N.Y. 1944). See also *Holliday & Sons v. Schultzeberge*, 57 Fed. 660 (C.C.S.D.N.Y. 1893).

193. See, e.g., *United States v. Matles*, 154 F. Supp. 574 (E.D.N.Y. 1957); *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953).

194. See Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 812-13 (1964); Comment, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony*, 62 MICH. L. REV. 1375, 1391-92 (1964).

195. 11 F.R.D. 142 (S.D. Cal. 1951).

196. *Id.* at 145.

*pij*,<sup>197</sup> in which the plaintiff filed interrogatories asking the defendant to specify the foreign law upon which its defenses were based. The defendant refused to respond, claiming that the necessary information was wholly within the knowledge of his attorney. The court, emphasizing the fact characterization of foreign law and expressing the belief that interrogatories are designed to narrow the issues, ordered the defendant to state "the substance of the foreign law relied upon . . . with appropriate citation of applicable statutes and one or more citations of decisional law, if any."<sup>198</sup> It seems ironic that *Burin*, a case that rejected the fact theory, denied discovery whereas *Bernstein*, a straightforward application of the fact theory, resulted in a liberal utilization of discovery.

A request that a party divulge the passages of foreign law or the legal materials he intends to rely on technically falls within the scope-of-examination standard in Rule 26(b). Nonetheless, a number of federal decisions in contexts analogous to foreign law have agreed with *Burin* that legal opinions are not a proper discovery subject<sup>199</sup> and have refused to allow a party to depose his adversary's experts or to inspect reports prepared by them.<sup>200</sup> On the other hand, discovery has been permitted when essential to the moving party's case and when comparable testimony cannot be obtained elsewhere;<sup>201</sup> in the realm of foreign-law issues, this standard might be satisfied if one party's expert on a particular country's law is the only one readily available. Reluctance to permit discovery in this context stems from the belief that it is unfair to permit one litigant to obtain the fruits of his opponent's diligence without contributing his own effort. In addition, the lofty conception of the role of trial counsel and of the integrity of the adversary system that emerges from the work-product

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197. 11 F.R.D. 48 (S.D.N.Y. 1951).

198. *Id.* at 49; *cf.* *Kendall v. United Air Lines, Inc.*, 9 F.R.D. 702 (S.D.N.Y. 1949) (expert opinion compelled from engineer in defendant's employ).

199. See generally 2A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 768, at 321-26 (Wright ed. 1961); 4 MOORE, *FEDERAL PRACTICE* ¶¶ 26.16[4], 33.17 (2d ed. 1966).

200. See, *e.g.*, *Hoagland v. Tennessee Valley Authority*, 34 F.R.D. 458 (E.D. Tenn. 1963); *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D. Del. 1959); *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 8 F.R.D. 313 (W.D.N.Y. 1948). *But see* *Seven-Up Bottling Co. v. United States*, 39 F.R.D. 1 (D. Colo. 1966).

201. See, *e.g.*, *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947), *aff'd sub nom.* *Sacks v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947). See also 2A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 652.5 (Wright ed. 1961); 4 MOORE, *FEDERAL PRACTICE* ¶ 26.24 (2d ed. 1966); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *STAN. L. REV.* 455 (1962); *Developments in the Law—Discovery*, 74 *HARV. L. REV.* 940, 1031-32, 1038 (1961).

concept of *Hickman v. Taylor*<sup>202</sup> acts as a powerful restraint on examinations into an adversary's trial preparations.

An immutable rule that foreign law is not a fit subject for pre-trial examination probably is unwise. Although this article advocates the abandonment of the common-law approach to foreign law and the substitution of an equation between foreign and domestic law to the extent feasible, it would be disingenuous to ignore the burden often entailed in investigating and preparing foreign-law issues for trial. In light of the high cost of procuring foreign-law materials and experts, a party should be permitted to use discovery to mark off the periphery of the foreign law in issue, even if it results in a slightly wider scope of inquiry than is available on issues of domestic law.

It might be useful to distinguish between pretrial discovery inquiries that serve to define or narrow the scope of a foreign-law issue and those that attempt to commit a party to a particular construction of foreign law or require him to do research that could as easily be undertaken by the party seeking disclosure. Admittedly this dichotomy is vulnerable to the charge that it will prove to be highly evanescent in many contexts or that it represents little more than an abdication to the trial court's judgment of the balance to be struck between an interrogator's *bona fides* and the possible salubrious impact discovery may have on the litigation's progress. Yet, the latter is exactly the type of judgment federal district judges are thought competent to make. It also is true that the court may have to exercise more than the normal amount of control during discovery to avoid abuse but this will be a relatively transitory drain on judicial energies and should become inconsequential once guidelines for discovery have been established.

The same elastic approach is useful with regard to discovering the opinions of foreign-law experts. Whenever there is a significant discrepancy in the litigants' ability to gain access to experts or whenever a party can make a persuasive showing that examination of his adversary's expert or of the expert's opinion is necessary to prepare for trial, discovery should be allowed on appropriate terms and conditions. For example, it would be entirely appropriate for the court to direct the examining party to reimburse his opponent for part of the expert's fee.<sup>203</sup> Another possibility is a court-appointed

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202. 329 U.S. 495 (1947). An exhaustive analysis of the considerations relevant to the discovery of information obtained from an expert appears in Friedenthal, *supra* note 201, at 469-88.

203. See *Henopen Hotel Corp. v. Aetna Ins. Co.*, 33 F.R.D. 306 (D. Del. 1963); *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963).

expert who would be examined by both parties and whose fee could be assessed in any manner that seems equitable.<sup>204</sup>

In some instances the scope of pretrial examination has been limited by the contents of the pleadings. The oft-cited decision in *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*<sup>205</sup> held that absent a foreign-law issue in the pleadings, written interrogatories on foreign law are improper because they are not relevant to the subject matter of the action, as is required by Rule 26(b). The propriety of restricting discovery to matters that are raised by the pleadings was dubious even at the time *Empresa Agricola* was decided, inasmuch as Rule 26(b) defines "relevant" for purposes of pretrial examination in terms of the "subject matter" of the litigation, which clearly embraces more than what is found within the four corners of the pleadings.<sup>206</sup> Now that Rule 44.1 eliminates any need to plead foreign law, the limitation on discovery voiced in *Empresa Agricola* makes no sense and should be ignored. Moreover, satisfaction of the new Rule's notice requirement certainly is not a prerequisite to using discovery to gather information, documents relevant to foreign law, or facts.<sup>207</sup> If Rule 44.1 were thus interpreted, the flexibility of its notice-giving mechanism would be badly compromised, for in many instances discovery will be needed in advance of notice to enable a party to make a reasoned judgment as to the applicability of foreign law.

Federal Rule 36, which permits a party to ask another litigant to admit facts and concede the genuineness of documents, is another discovery device occasionally used to ascertain foreign law.<sup>208</sup> At a minimum, Rule 36 is an appropriate vehicle for eliminating controversy as to the authenticity of copies of foreign legislative, administrative, and judicial materials and for facilitating their use at trial.<sup>209</sup> Inasmuch as Rule 44.1 renders the rules of admissibility inapplicable to foreign-law materials, this use of Rule 36 usually will

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204. Cf. Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957).

205. 57 F. Supp. 649 (S.D.N.Y. 1944).

206. See 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647 (Wright ed. 1961); 4 MOORE, FEDERAL PRACTICE ¶ 26.16 (2d ed. 1966).

207. See text accompanying notes 128-31 *supra*.

208. Technically, Rule 36 is not a discovery device since it presupposes knowledge by both parties. See Conway, *Admissions of Fact Under the Federal Rules of Civil Procedure*, 26 J.B.A.D.C. 421, 422 (1959); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 968-70 (1961).

209. See McKenzie, *The Proof of Alien Law*, in A.B.A., SEC. INT'L & COMP. L., PROCEEDINGS 50, 52 (1959); McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353, 365-67 (1956).



be of little moment to the determination of foreign law.<sup>210</sup> A more rewarding utilization of Rule 36 would be to procure admissions as to the interpretation or relevance of specific portions of foreign law. But there is some question as to whether this is an appropriate application of the Rule. In *Fuhr v. Newfoundland-St. Lawrence Shipping Ltd.*,<sup>211</sup> a request was made for an admission that the word "code" in the Panamanian Labor Code is equivalent to "title." The request was vacated, the court holding that Rule 36 requires only that a party admit material within his knowledge or reasonably ascertainable by him. The defendant also was asked to admit that the plaintiff was covered by the Panamanian Labor Code, a seminal issue in the case. In rejecting this request the court stated that the "expression of opinions of the opposing attorney or party, or the interpretation or applicability of foreign law to the particular facts appear not to be within the purview of the Rule,"<sup>212</sup> an attitude consonant with the view, previously encountered in connection with the *Burin* and *Bernstein* decisions,<sup>213</sup> that legal opinions and conclusions are beyond the scope-of-examination standard of Rule 26(b).

Had the *Fuhr* court wanted to bring the request within the compass of Rule 36, it could have done so by feigning obeisance to the fact characterization of foreign law. It therefore seems slightly perverse that simply because Rule 36 refers to "matters of fact," strict application of the fact theory permits a request to admit an issue of foreign law whereas the domestic-foreign law analogy leads to a contrary conclusion. Although the text of Rule 36 makes it clear that the draftsmen of the Federal Rules did not wish pure questions of law to be the subject of a request to admit, it is unlikely that they intended Rule 36 to be governed by a strict application of the

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210. A request under Rule 36 could be of some tactical significance when a party wishes to use unauthenticated copies of foreign legal materials and fears that the court will give them less weight than they would receive if their accuracy and authenticity were acknowledged by all parties.

211. 24 F.R.D. 9 (S.D.N.Y. 1959).

212. *Id.* at 13. The court did permit requests for admissions as to the accuracy of translations. Curiously, it apparently did not occur to anyone that an admission as to the accuracy of a translation is itself premised on opinions and conclusions of law. See also *Moumdjis v. The Ionian Trader*, 157 F. Supp. 319 (E.D. Va. 1957) (requests for admission of opinion letters denied under the admiralty counterpart of Rule 36). In *Princess Pat, Ltd. v. National Carloading Corp.*, 223 F.2d 916 (7th Cir. 1955), the defendant refused to admit or deny certain requests concerning Brazilian customs regulations and attempted to justify this refusal with the assertion that the requests raised questions of law and not fact. The district court treated the unanswered requests as admitted and the Seventh Circuit affirmed.

213. See text accompanying notes 195-204 *supra*.

nebulous law-fact distinction or, for that matter, that they had the question of the Rule's relationship to foreign-law issues in mind when they formulated it.

It might be possible to rationalize the matter by differentiating between situations in which foreign law is relevant to a factual issue, which often occurs in litigation governed by domestic law, and instances in which foreign law provides the rules of decision for the entire lawsuit. A request under Rule 36 would be proper only in the former context. Unfortunately, this distinction has a highly arbitrary and artificial tone to it. A better approach might be to employ the type of flexibility suggested for defining the proper scope of discovery on an issue of foreign law;<sup>214</sup> that is, to permit a request to admit whenever it appears that it is made in good-faith, that it will serve to narrow the scope of the foreign-law issues, and that it is not a ruse to weld a party to a particular construction of foreign law.<sup>215</sup> For example, when a defendant is unable to prepare his case efficiently because of uncertainty as to the governing law, it might be appropriate to allow him to use Rule 36 to obtain a disclaimer from the plaintiff as to the applicability of a particular country's law. Since a party served with a request to admit is free to deny if he disagrees with his opponent or if he is legitimately uncertain as to the proper response, the plaintiff need not be burdened or disadvantaged by the request.<sup>216</sup>

*b. Summary judgment.* The summary-judgment motion has provided a forum for determining issues of foreign law prior to trial. In *Komlos v. Compagnie Nationale Air France*,<sup>217</sup> the question whether one of the plaintiffs had a right of action under Portuguese law was decided on the basis of the defendant's affidavits from experts in Portuguese law. The plaintiff had sought to fend off summary judgment by arguing that foreign law was a fact and could not be determined on affidavits, but failed to present anything persuasive contradicting the defendant's affidavits. Thus, the court, which had asked and had granted time for the submission of evidence on Portuguese law, felt it had no alternative but to conclude that there was no genuine issue concerning Portuguese law. The court opined that if such an issue existed, the plaintiff would have

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214. See text accompanying notes 202-04 *supra*.

215. See Finman, *The Request for Admissions in Federal Civil Procedure*, 71 *YALE L.J.* 371, 409-16 (1962).

216. See, e.g., *In re Pittsburgh Terminal Coal Corp.*, 14 *F.R.D.* 219 (W.D. Pa. 1953).

217. 111 *F. Supp.* 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 *F.2d* 436 (2d Cir. 1953), *cert. denied*, 348 *U.S.* 820 (1954).

offered something indicating that the defendant's experts were in error.<sup>218</sup>

Despite *Komlos*, successful summary-judgment motions directed toward issues of foreign law have been infrequent. Almost invariably, the motion has been denied when there is a conflict in the papers presented on the motion or among the foreign-law experts or when any doubt exists as to the tenor of the foreign law; the use of these standards derives from the theory that factual disputes are not to be resolved on a summary-judgment motion but must be reserved for trial.<sup>219</sup> In *Pisacane v. Italia Societa Per Azioni di Navigazione*,<sup>220</sup> for example, the question was whether the suit was time barred under Italian law. The answer depended on the validity under the Italian Civil Code of a provision in a steamship passage contract limiting the time for commencing suit against the carrier. The court denied the motion because the "question is one of fact," which the court felt could not be adjudicated on summary judgment. In fairness to the court, its resolution of the motion probably was influenced by the presence of only one affidavit on Italian law.

218. See also *Bachmann v. Blaw-Knox Co.*, 198 F. Supp. 617 (W.D. Pa. 1961); *Born v. Norwegian America Line, Inc.*, 173 F. Supp. 33 (S.D.N.Y. 1959); *Werkley v. Koninklijke Luchtvaart Maatschappij N.V.*, 110 F. Supp. 746 (S.D.N.Y.), *complaint dismissed*, 111 F. Supp. 299 (S.D.N.Y. 1952); *Egyes v. Magyar Nemzeti Bank*, 71 F. Supp. 560 (E.D.N.Y. 1947), *aff'd*, 165 F.2d 539 (2d Cir. 1948). Summary judgment can be granted against a defendant who fails to establish a defense under foreign law. See *Chemical Bank N.Y. Trust Co. v. Kennedy*, 199 F. Supp. 256 (D.D.C. 1961), *rev'd on other grounds*, 319 F.2d 720 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 965 (1964).

219. See *Albert v. Brownell*, 219 F.2d 602 (9th Cir. 1954) (*semble*); *Hausman v. Bailey*, 22 F.R.D. 304 (S.D.N.Y. 1958) (*motion to dismiss*); *N.V. Levensverzekering-Maatschappij van de Nederlanden v. United States*, 121 F. Supp. 116 (D. Conn. 1954) (*dictum*); *Mosbacher v. Basler Lebens Versicherungs Gesellschaft*, 111 F. Supp. 551 (S.D.N.Y. 1951); *Heiberg v. Hasler*, 1 F.R.D. 735 (E.D.N.Y. 1941). See also *Wall Street Traders, Inc. v. Sociedad Española de Construcción Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964); 6 MOORE, FEDERAL PRACTICE ¶ 56.17[25] (2d ed. 1966); SOMMERICH & BUSCH, FOREIGN LAW—A GUIDE TO PLEADING AND PROOF 81-89 (1959). *But see* *Caribbean S.S. Co. v. La Societe Navale Caennaise*, 140 F. Supp. 16 (E.D. Va.), *aff'd*, 239 F.2d 689 (4th Cir. 1956). Some federal courts have taken the position that foreign law "is a problem for factual determination" and that a summary-judgment motion is "inappropriate." *E.g.*, *Eastern Commercial Bank, S.A.L. v. General Mut., Inc.*, 34 F.R.D. 260 (E.D. Pa. 1963). These cases are little more than variations on the "fact" syndrome and may mask a judicial feeling of insecurity when confronted with foreign law. There also has been a judicial disinclination to determine an issue of foreign law in advance of trial on motions addressed to the court's discretion when the resolution of the issue would not terminate the litigation. See, *e.g.*, *Markovic v. National City Bank*, 12 F.R.D. 175 (S.D.N.Y. 1952) (*court refused to investigate Yugoslavian law on a motion for permissive intervention*). See also *Wendell v. Holland-America Line*, 30 F.R.D. 162 (S.D.N.Y. 1961). This attitude seems defensible on the ground that if the case is destined for trial, there is no point in determining a foreign-law issue that might become moot.

220. 219 F. Supp. 424 (S.D.N.Y. 1963). See also *Caruso v. Italian Line*, 184 F. Supp. 862 (S.D.N.Y. 1960); *Murphy v. Bankers Commercial Corp.*, 111 F. Supp. 608 (S.D.N.Y. 1953), *aff'd*, 203 F.2d 645 (2d Cir. 1953).

The propriety of deferring determination of a foreign-law issue from summary judgment to trial, as is true of the propriety of the treatment given alien law in other contexts, partially depends upon the validity of the common-law fact approach. If the fact characterization is replaced by an analogy between foreign and domestic law, as is being advocated in this article, then a conflict over foreign law is not a dispute over a material fact within the meaning of Federal Rule 56 and a court should feel free to resolve a foreign-law issue on a summary-judgment motion.

The argument in favor of the domestic-foreign law analogy in the summary-judgment context is reinforced by the statement in the last sentence of Rule 44.1 that the court's determination of foreign law is to be treated "as a ruling on a question of law."<sup>221</sup> This passage is intended to encourage the processing of foreign law in the trial court in a way that will insure proper appellate review<sup>222</sup>—an objective that obviously applies to the handling of summary-judgment motions. It would not be consonant with the Rule's philosophy to conclude that the determination of a foreign-law issue at trial is to be treated as a question of law but is to be treated as a question of fact when the resolution is sought on a summary-judgment motion. To carry out the mandate in Federal Rule 44.1, conflicts concerning the content of foreign law should not automatically be held to raise a "genuine issue as to any material fact" and prevent summary judgment under Rule 56.

In cases such as *Pisacane*, therefore, when the proof before the court on a summary-judgment motion is not harmonious or is unpersuasive or inconclusive, the court should request a further showing by counsel, engage in its own research, or direct that a hearing be held, with or without oral testimony, to resolve the issue.<sup>223</sup> A combination of these courses will insure as detailed a foreign-law presentation as might be anticipated at a full trial on the merits.<sup>224</sup>

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221. The full text of Federal Rule 44.1 is set out in note 5 *supra*.

222. See text accompanying notes 293-98 *infra*.

223. In *Heiberg v. Hasler*, 45 F. Supp. 638 (E.D.N.Y. 1942), a special master was appointed to ascertain French law in aid of a summary-judgment motion.

224. The approach suggested in the text seems to have been employed in *Caribbean S.S. Co. v. La Societe Navale Caennaise*, 140 F. Supp. 16 (E.D. Va.), *aff'd*, 239 F.2d 689 (4th Cir. 1956), in which the defendant moved for summary judgment against the plaintiff's claims based upon breach of contract, warranty, and fraud. The court rejected the plaintiff's contention that a dispute as to French law precluded summary judgment.

It is fundamental that, if there be a disputed issue of a material fact, the Court should not grant summary judgment. In this case there is no dispute as to the factual situation, although experts on French law have disagreed as to the interpretations to be placed thereon. Should the case be heard on its merits, these same "disputes" would exist and the Court would then be obliged to accept the

When the grant or denial of summary judgment turns on an issue of foreign law, there is no reason to permit the respondent to rest on his pleadings or to rely on the placebo that the issue cannot be resolved until trial, at which time oral testimony and cross-examination will be available. This suggestion is consistent with the 1963 amendment to Rule 56(e), which eliminates reliance on the pleadings and obliges a party to defend against the motion with whatever competent material is at his disposal. The 1963 change expresses the almost universal understanding that summary judgment is designed to probe a formal paper dispute to see if a litigable issue actually is present.<sup>225</sup>

The advantages of resolving a foreign-law issue at the summary-judgment stage are obvious. In *Pisacane*, a decision as to the validity of the contractual condition might well have terminated the litigation without trial and effectuated the primary purpose of the summary-judgment procedure—adjudication without trial of cases in which material facts are not in dispute and in which a full evidentiary display to a trier of fact is unnecessary. In addition to situations similar to *Pisacane*, a determination of foreign law on a summary-judgment motion would be desirable when the facts are stipulated and the issue is either whether a cause of action exists or whether an action is barred because of some affirmative defense.

*c. Pretrial conference.* A final device for dealing with foreign-law issues before trial is the pretrial conference.<sup>226</sup> Inasmuch as the conference usually takes place after both parties have prepared for trial and have had a chance to appraise their cases realistically, it often provides a good occasion for reaching agreement on alien law.<sup>227</sup> Even if the foreign-law questions cannot be determined at the

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interpretation of one or more of the experts or, in the alternative, arrive at its own conclusion upon a review of the French law and decided cases.

A disputed interpretation of a foreign law does not raise a material issue of fact sufficient to preclude action on a motion for summary judgment where, as in this case, counsel agree that all of the pertinent foreign law has been properly submitted as evidence.

*Id.* at 20-21. See also *Werkley v. Koninklijke Luchtvaart Maatschappij N.V.*, 100 F. Supp. 746 (S.D.N.Y.), *complaint dismissed*, 111 F. Supp. 299 (S.D.N.Y. 1952) (decision on motion reserved pending submission of affidavits of experts on Indian law).

225. See *Dressler v. MV Sandpiper*, 331 F.2d 130, 131-35 (2d Cir. 1964); 3 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* §§ 1235, 1235.1 (Wright ed. 1961); 6 MOORE, *FEDERAL PRACTICE* ¶¶ 56.22-23 (2d ed. 1966).

226. See *FED. R. CIV. P.* 16; *Harris v. American Int'l Fuel & Petroleum Co.*, 124 F. Supp. 878 (W.D. Pa. 1954). See also McCormick, *Judicial Notice*, 5 *VAND. L. REV.* 296, 308 (1952).

227. The parties are at liberty to stipulate as to the content of foreign law and frequently will be encouraged to do so by the court. See, *e.g.*, *Harris v. American Int'l Fuel & Petroleum Co.*, *supra* note 226.

conference, they can be identified, the scope of inquiry defined, the number of expert witnesses limited, and the modes of proof delineated. In some instances, the judge may appoint a special master to aid in ascertaining the content of foreign law.<sup>228</sup> As a practical matter, the pretrial conference may afford a party his last opportunity to raise a foreign-law issue and to satisfy the notice requirement in the first sentence of Rule 44.1.<sup>229</sup> Any request to depart from the pretrial order by raising a foreign-law issue or altering its contours will be carefully scrutinized by the court.<sup>230</sup>

### 3. *Determination of Foreign Law by Judge or Jury*

The drafts of the new Rule prepared by the Columbia Project and the Commission and Advisory Committee on International Rules of Judicial Procedure provided that the determination of foreign law "shall be made by the court and not by the jury." A similar passage was included in the Commission and Advisory Committee's drafts of the Uniform Interstate and International Procedure Act, and section 4.03 of that act as promulgated states: "The court, not [the] jury, shall determine the law of any governmental unit outside this state." In the course of redrafting the Federal Rule, the Advisory Committee on Civil Rules deleted the reference to court determination in the Commission's drafts. The Committee's Note accompanying Rule 44.1 explains the Rule's silence on the point with the assertion that "the rules refrain from allocating functions as between the court and the jury," but it goes on to indicate the advantages of judicial, rather than jury, determination of foreign law.<sup>231</sup> Another possible implication of the Advisory Committee's decision not to include in the Rule an express provision delegating foreign-law questions to the judge is that such a statement possibly might infringe the constitutional right to jury trial in federal civil actions.<sup>232</sup> Since the Rule's text leaves the question at large and the

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228. Cf. *Heiberg v. Hasler*, 45 F. Supp. 638 (E.D.N.Y. 1942).

229. See *Valdesa Compania Naviera, S.A. v. Frota Nacional de Petroleiros, S.A.*, 348 F.2d 33, 36-38 (3d Cir. 1965).

230. A court's willingness to permit a foreign-law issue to be raised after the pretrial conference will depend in part on the detail with which the pretrial order defines the legal issues and on whether the relevance of foreign law was discussed at the conference. In districts in which foreign-law issues appear with any frequency, it might be advisable for the judges at pretrial to inquire as a matter of course into the possible presence of such an issue.

231. Advisory Committee Note to Federal Rule 44.1, H.R. Doc. No. 391, 89th Cong., 2d Sess. 51, 52 (1966), reprinted in 39 F.R.D. 117, 119 (1966), 1966 U.S. CODE CONG. & AD. NEWS 807, 809. See also 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 998 (Wright ed. Supp. 1966).

232. The second paragraph of the Rules Enabling Act, 28 U.S.C. § 2072 (1964), expressly removes the jury-trial right from the domain of the rulemakers. The con-

courts presumably are free to develop the practice as they see fit, it is necessary to explore the topography of these constitutional considerations. The odyssey begins, as do almost all inquiries concerning the reach of the Constitution's jury-trial guarantee, with an examination of the treatment accorded issues of foreign law at the time the seventh amendment was adopted.

*a. The English and American experience.* The English authorities are sparse and shed little light on the jury-trial question. This dearth of precedent probably stems from the English courts' reluctance until comparatively recently to take jurisdiction over foreign causes and from their penchant for applying common law even after they finally began to adjudicate these controversies.<sup>233</sup> Despite the paucity of authority, many of the English secondary sources penned after the middle of the nineteenth century cavalierly assert that such issues are for the jury; others simply state that foreign law is to be proved as a fact and do not speak to the jury issue.<sup>234</sup> Nonetheless, the cases cited by the text writers for the jury-issue conclusion are not very persuasive.

However, several decisions do illustrate somewhat the English practice during the last half of the eighteenth century. In the important case of *Mostyn v. Fabrigas*,<sup>235</sup> decided in 1774, Lord Mansfield stated that knowledge of the laws of a foreign country is secured "by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is." The purport of this passage is obscure inasmuch as Lord Mansfield's opinion does not specify what facet of the foreign-law issue was to be submitted to the jury or in what way the court was expected to "assist the jury." It also must be appreciated that *Mostyn* was the first case in which Kings Bench seriously

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junctive quality of the Enabling Act's text—"such rules . . . shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution"—leaves open the argument that the jury-trial right immunized against the activities of the rulemakers is broader than the right preserved by the seventh amendment. The interrelationship between the rulemaking power and Rule 44.1 is discussed at text accompanying notes 515-19 *infra*.

233. See Sack, *Conflicts of Laws in the History of the English Law*, in 3 *LAW: A CENTURY OF PROGRESS* 342 (1937). The notion of the jury as a body of men chosen from the locale of the events in suit was not altered by statute until 1705. See 4 & 5 Ann, c. 16, § 6 (1705). In the seventeenth century and even well into the eighteenth century, English courts felt compelled to justify their assertion of jurisdiction over cases arising in a foreign country by requiring a fictitious allegation of venue in England. See, e.g., *Dutch West India Co. v. van Moses*, 1 Strange 612, 93 Eng. Rep. 733 (K.B. 1795); *Ward's Case*, Latch. 3, 82 Eng. Rep. 245 (K.B. 1662).

234. See BEST, *EVIDENCE* § 33 (5th ed. 1870); CHESHIRE, *PRIVATE INTERNATIONAL LAW* 130 (5th ed. 1957); DICEY, *CONFLICT OF LAWS* 1107-10 (Morris ed. 1958); 1 TAYLOR, *EVIDENCE* § 5, at 8 (3d ed. 1858).

235. 1 Cowp. 161, 174, 98 Eng. Rep. 1021, 1023 (K.B. 1774).

considered applying foreign law in a personal tort case. Much of the opinion is devoted to the propriety of taking jurisdiction in such actions and to the obstacles presented by the English tradition of laying venue in and choosing a jury from the place where the events in dispute occurred. In context, therefore, the references in *Mostyn* to "proved as facts" and "assist the jury" may not have been conscious statements that all issues of foreign law were to be ascertained by the jury. They may simply reflect the type of verbal imprecision that usually accompanies doctrinal parturition and represent a vestige from the period in which all issues other than the domestic law of England were characterized as issues of fact.<sup>236</sup> Lord Mansfield's remarks also may betray a degree of uncertainty as to the proper judge-jury relationship in this context—an uncertainty caused by the extensive revision of the jury institution during the centuries preceding *Mostyn* from a body of witnesses to a group of fact-finders.<sup>237</sup> Finally, the words "proved as facts" may refer to the mode of proof and not to the mechanics of adjudication. Some support for this hypothesis can be extrapolated from Lord Mansfield's fairly extensive discussion in *Mostyn* of the mode of proving foreign law in Privy Council and Chancery, neither of which employed a jury.

In *Male v. Roberts*,<sup>238</sup> an action for assumpsit at Common Pleas decided a quarter of a century after *Mostyn*, Lord Eldon observed that the law of Scotland "should be given in evidence to me as a fact."<sup>239</sup> In another part of the same opinion he stated that "I cannot take the fact of what that law is, without evidence."<sup>240</sup> This language from *Male* is inconsistent with *Mostyn* if the latter is read as

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236. See text accompanying notes 7-11 *supra*.

237. It was not until the beginning of the seventeenth century that English juries were permitted to determine foreign facts. See *Richardson v. Dowdele*, Cro. Jac. 55, 79 Eng. Rep. 47 (K.B. 1605). See also Sack, *supra* note 233, at 346-49.

238. 3 Esp. 163, 170 Eng. Rep. 574 (C.P. 1800).

239. *Id.* at 164, 170 Eng. Rep. at 574. A similar statement was made by Lord Kenyon in *Boehlinck v. Schneider*, 3 Esp. 59, 170 Eng. Rep. 537, 538 (C.P. 1799). In *Inglis v. Usherwood*, 1 East 515, 102 Eng. Rep. 198 (K.B. 1801), the plaintiff secured a verdict in an action in trover for certain goods delivered in Russia. When the case came before the full bench, the law of Russia, as reflected in a mercantile order, was quoted, construed, and applied by the court without any discussion of how it had been proven. *Blad v. Banfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674) was a suit by a Dane to enjoin an Englishman from suing at law to redress a seizure of the Englishman's property in Iceland by the Danish authorities. The Dane claimed that the seizure was justified by a patent from the King of Denmark. The chancellor issued the injunction saying that the Dane's rights were clear and that "to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in *Denmark* . . . or that a common jury should try whether the *English* have a right to trade in *Iceland*, is monstrous and absurd." *Id.* at 607, 36 Eng. Rep. at 993.

240. 3 Esp. at 165, 170 Eng. Rep. at 574.



requiring jury trial of issues of foreign law. To harmonize the remarks in *Male* and the suggested analysis of *Mostyn*, the following generalization is offered: at the close of the eighteenth century, English courts insisted that foreign law be proved in the same manner as facts but the evidence was addressed to the bench for determination and application. This thesis is consistent with the emergence of the fact theory of foreign law at approximately the time *Mostyn* and *Male* were decided.

A case that is difficult to align with either the suggested analysis or the jury-issue conclusion of the English text writers is *Trimbey v. Vignier*,<sup>241</sup> an action on two promissory notes at Common Pleas in 1834. At trial a witness testified as to the law of France and translated a portion of its *Code de Commerce*. In reply to a series of inquiries by the court, the jury concluded that an endorsement of the notes was invalid under French law. The court then directed judgment for the defendant "reserving all questions of law." Subsequently, the plaintiff obtained a rule ordering the defendant to show cause why a new trial should not be directed or why judgment should not be entered for the plaintiff. The rule also called for further opinions on French law. At *Nisi Prius*, Chief Justice Tindal directed judgment for the defendant after re-examining and applying French law *de novo*. The reported opinion is too delphic to permit a description of the respective roles of court and jury with any confidence, although the treatment given the foreign-law issue at *Nisi Prius* belies any strong commitment on the part of the English judiciary to jury trial on such issues.

In 1920, Parliament enacted the Administration of Justice Act,<sup>242</sup> section 15 of which provides that when foreign law must be ascertained, "any question as to the effect of evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone." Arguably, passage of this statute implies that prior practice was to the contrary, although one could as easily conclude that the statute codified the existing practice. Unfortunately, the parliamentary history does not inform us which is the correct legislative premise. Even if it did, query whether it would illuminate the nature of English practice in 1791.

The limited evidence that can be gleaned from the opaque pronouncements by the English courts between 1750 and 1850, the

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241. 1 Bing. (N.C.) 151, 131 Eng. Rep. 1075 (C.P. 1834).

242. 10 & 11 Geo. V., c. 81; see *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A. C. 289 (H.L.). The 1920 Act was replaced by § 102 of the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V., c. 49.

conclusory passages in the textbooks, and the current English statutory provision is simply too skeletal to justify the conclusion that there was a settled practice of allowing the jury to ascertain the content of foreign law at the time the seventh amendment was added to our Constitution. Only a monumental exercise in reconstructing history could yield a persuasive case as to the existence or nonexistence of such a practice. Inasmuch as the English judges did not even begin to cumulate any substantial experience with foreign law until the second half of the eighteenth century, the practice during the crucial period probably was highly fluid and differed from court to court. The inability to perceive a fixed English practice at the time the seventh amendment was adopted renders it difficult to conclude that the federal courts are constitutionally compelled by history to leave foreign-law issues to the jury.<sup>243</sup>

Turning to the practice in the United States, the jury-trial question was not treated uniformly by state courts during the period following the formation of the Union.<sup>244</sup> In a few states, the courts, either without relying on precedent or on the basis of extremely questionable authority, held that every issue of fact had to be determined by the jury, including an issue of foreign law; the trial judge in these states commented on the evidence of foreign-law but did not give a direction on it.<sup>245</sup> Courts in a more significant number of

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243. In *Galloway v. United States*, 319 U.S. 372 (1943), *petition for rehearing denied*, 320 U.S. 214 (1943), the Supreme Court rejected the argument that the directed-verdict mechanism violated the seventh amendment because it differed from the jury control devices available in 1791. The Court's opinion seems to be a counterpoint of a number of themes. First, "the amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791" but "was designed to preserve the basic institution of jury trial in only its most fundamental elements . . ." *Id.* at 390, 392. Second, the rules regulating "the jury's role on questions of fact" had not become "crystallized in a fixed and immutable system." *Id.* at 391. Third, "the passage of time has obscured much of the procedure which then may have had more or less definite form . . ." *Id.* at 392. Fourth, "apart from the uncertainty . . . which follows from an effort at purely historical accuracy, the consequences flowing from the view" may be "sufficient to refute it." *Id.* at 392. *But cf.* *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

244. See generally Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 27 (1957); Annot., *Determination of Question Relating to Foreign Law as One of Law or of Fact*, 34 A.L.R. 1447 (1925); Annot., *Construction and Effect of Foreign Statutes or Judicial Decisions as Question for Court or for Jury*, 68 A.L.R. 809 (1930).

245. See *Dyer v. Smith*, 12 Conn. 384 (1837); *Brackett v. Norton*, 4 Conn. 517 (1823); *Ingraham v. Hart*, 11 Ohio 255 (1842) (one justice dissenting). The cases relied upon by the Connecticut court in *Norton* and *Dyer* all are readily distinguishable and the two decisions apparently were overturned by the Connecticut legislature in 1840. See *Lockwood v. Crawford*, 18 Conn. 360 (1847). See also *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539 (1843). The Ohio court in *Ingraham* did not cite any authority to support its position. In THAYER, A PRELIMINARY TREATISE ON EVIDENCE 258 (1898), the author states that the practice of giving issues of foreign law to the jury "has a wide acceptance" but cites no cases in support of that proposition. The

jurisdictions limited their application of the fact theory to the mode of proof and construed and applied foreign law without the aid of a jury.<sup>246</sup> In *Pickard v. Bailey*,<sup>247</sup> for example, the New Hampshire Supreme Court stated that "foreign law, like foreign judgments, are to be proved as facts, and the better opinion is that the evidence should be addressed to the court, and not to the jury."<sup>248</sup> This appears to have become the predominant state practice by the middle of the nineteenth century. In Massachusetts and a few other jurisdictions, the courts traditionally have left all uncontroverted issues of foreign law and questions of statutory and decisional interpretation to the judge, but have permitted the jury to resolve conflicts in expert testimony or draw any necessary inferences or analogies therefrom.<sup>249</sup> Perhaps the best articulation of this view appears in the North Carolina Supreme Court's opinion in *Hooper v. Moore*.<sup>250</sup> The court analyzed the authorities and was not

able to find any case where the question of the law of another state, or foreign country, has been left to be decided by a jury, without instructions from the court, in regard to it, except the case of *Moore v. Gwyn*, 5 Ire. Rep. 187 [sic]. . . .<sup>251</sup>

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remark in de Sloovère, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086, 1104 n.71 (1933), that the number of cases holding that foreign law is for the jury is "legion," clearly is an overstatement.

The early state cases in which the jury played a dominant role in the ascertainment of foreign law may be explained in terms of the enthusiasm for the jury and the unpopularity of the royal judges during the colonial and revolutionary periods. See THAYER, PRELIMINARY TREATISE ON EVIDENCE 253-57 (1898); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 677-78 (1918); Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171-77 (1964). Some of this sentiment undoubtedly survived the formation of the Union and makes analysis of the judge-jury relationship and the fact-law dichotomy during the first half of the nineteenth century hazardous and relatively unrewarding.

246. See, e.g., *Inge v. Murphy*, 10 Ala. 885 (1846); *De Sobry v. de Laistre*, 2 Har. & John. 164, 188-89 (Md. 1807); *Charlotte v. Chouteau*, 25 Mo. 465 (1857); *Pickard v. Bailey*, 26 N.H. 152 (1852); *Sidwell v. Evans*, 1 Pen. & W. 383, 388 (Pa. 1830). See also *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N.E. 97 (1906); *Thomson-Houston Elec. Co. v. Palmer*, 52 Minn. 174, 53 N.W. 1137 (1893).

247. 26 N.H. 152 (1852).

248. *Id.* at 169. See also *Hall v. Costello*, 48 N.H. 176, 179 (1868); *Ferguson v. Clifford*, 37 N.H. 86, 98 (1858); *Fourth Nat'l Bank v. Bragg*, 127 Va. 47, 102 S.E. 649 (1920), 11 A.L.R. 1034 (1921); *Rood v. Horton*, 132 Wash. 82, 89, 231 Pac. 450, 452 (1924).

249. See *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N.E. 947 (1909); *Hancock Nat'l Bank v. Ellis*, 172 Mass. 39, 51 N.E. 207 (1898); *Ely v. James*, 123 Mass. 36 (1877); cf. *Wylie v. Cotter*, 170 Mass. 356, 49 N.E. 746 (1898). See also *Trasher v. Everhart*, 3 Gill & Johns. 234 (Md. 1831); *Harrison v. Atlantic C.L.R.R.*, 168 N.C. 382, 84 S.E. 519 (1915); *St. Louis & S.F. Ry. v. Conrad*, 99 S.W. 209 (Tex. Civ. App. 1906); *Hite v. Keene*, 149 Wis. 207, 134 N.W. 383 (1912).

250. 50 N.C. 136 (1857).

251. *Id.* at 139. In *Moore v. Gwynn*, 27 N.C. 138 (5 Ire. Law. 187) (1844) the North Carolina court dealt with conflicting testimony as to the common law of a sister state.

It went on to conclude that

if the existence of an unwritten law of another State, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the *credibility of the witnesses*, and it is the province of the court to inform the jury as to the construction, meaning, and legal effect of the law, supposing its existence to be proven; and to this end, the court shall avail itself of the judicial decisions of the State or Country.<sup>252</sup>

The New York rule has been inconstant since the beginning of this century. In *Bank of China, Japan & The Straits, Ltd. v. Morse*,<sup>253</sup> foreign statutes and decisions were construed by the court despite conflicting testimony; it was stated that although foreign law raises an issue of fact, once proof has been submitted the issue is subject to judicial determination. In subsequent decisions, however, the New York Court of Appeals appears to have moved toward the Massachusetts and North Carolina approach. In *Hanna v. Lichtenhein*,<sup>254</sup> the Court stated:

On a trial of an issue of fact when the evidence furnished is conflicting or inconclusive the law of a foreign state may be a question for the jury although ordinarily when the evidence is all furnished it is the function of the judge to decide as to the law of a foreign state.<sup>255</sup>

This approach was elaborated upon again in *Fitzpatrick v. International Ry.*,<sup>256</sup> this time with regard to foreign judicial decisions.

When these [court decisions] state the unwritten law of the foreign jurisdiction with reasonable certainty and clearness their application should not be left to the speculation of twelve men. If instances should arise, which will be rare, where the decisions are so perplexing or doubtful that the experts disagree on the law we shall have to determine whether the question of the foreign law must then be solved by the jury. How the jury can do this as well as the judge, experienced in the law, I cannot quite appreciate.<sup>257</sup>

At present, rule 4511(c) of New York's Civil Practice Law and Rules expressly provides that issues of foreign law are to be deter-

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252. 50 N.C. at 140. See also *Charlotte v. Chouteau*, 33 Mo. 194 (1862); *Knight v. Wall*, 19 N.C. 121 (1836); *State v. Jackson*, 13 N.C. 366 (1830) (criminal case); *Oregon v. Looke*, 7 Ore. 43 (1879).

253. 168 N.Y. 458, 61 N.E. 774 (1901).

254. 225 N.Y. 579, 122 N.E. 625 (1919).

255. *Id.* at 583, 122 N.E. at 627. The court cited two Massachusetts cases at the end of the quoted passage.

256. 252 N.Y. 127, 169 N.E. 112 (1929), 68 A.L.R. 801 (1930).

257. *Id.* at 140, 169 N.E. at 117.

mined by the court and included in its charge to the jury. The provision does not indicate what is embraced by the term "determine" but it presumably empowers the New York courts to ascertain the substance of foreign law and to resolve any conflict in the testimony.<sup>258</sup>

The early federal foreign-law cases are not particularly enlightening on the jury-trial question. In *Talbot v. Seeman*,<sup>259</sup> decided in 1803, the Supreme Court intoned the monotonous refrain that foreign law cannot be judicially noticed and has to be "proved as facts." Since the case was in admiralty, any attempt to divine its jury-trial implications would be profligate. A year later, the Court decided *Church v. Hubbard*,<sup>260</sup> an action on the case involving two policies of marine insurance. The question before the court was whether the insured's brig had been seized by the Portuguese for illicit trade, a risk excluded by the policies. Documents purporting to be copies of edicts issued by the authorities at the place of seizure were introduced. The Supreme Court concluded that it was improper to place these documents before the jury because they were defectively authenticated. Unfortunately for present purposes, the Court did not indicate why the documents had been offered to the jury. Inasmuch as the edicts pertained to the seizing of the plaintiff's ship, they probably were introduced to show that the ship had been seized by the Portuguese for involvement in illicit trade rather than to establish the Portuguese law of illicit trade. The former is a traditional fact question. If this hypothesis is correct, *Church* was not a foreign-law case in the sense that the jurisprudence of a foreign country provided the rules of decision, but was a domestic action in which the details of a foreign occurrence were properly ascertained by the jury; as such it may be of little probative value for the current inquiry. A case more in point is *United States v. Turner*,<sup>261</sup> a mid-nineteenth century decision in which the Court recognized and com-

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258. The question whether the predecessor of rule 4511(c), N.Y. Civ. Prac. Act § 344-a violated the jury-trial guarantee in the New York Constitution was raised but left open in *Graybar Elec. Co. v. New Amsterdam Cas. Co.*, 292 N.Y. 246, 250, 54 N.E.2d 811, 812 (1944), *cert. denied*, 323 U.S. 715 (1944). In *Jongebloed v. Erie R.R.*, 297 N.Y. 534, 74 N.E.2d 470 (1947), *cert. denied*, 333 U.S. 855 (1948), the same argument, which apparently had been rejected below, was not considered by the Court of Appeals. Although it cannot be stated categorically that the issue has been foreclosed, the nonchalant treatment accorded it by New York's highest court would certainly so indicate. See Note, 18 ST. JOHN'S L. REV. 73 (1943). Compare SOMMERICH & BUSCH, FOREIGN LAW—A GUIDE TO PLEADING AND PROOF 20-21 (1959), with SCHLESINGER, COMPARATIVE LAW 43-44, 131 n.(b) (2d ed. 1959).

259. 5 U.S. (1 Cranch) 1, 38 (1803).

260. 6 U.S. (2 Cranch) 187, 238 (1804).

261. 52 U.S. (11 How.) 663 (1850).

mented upon the absurdity of leaving issues of foreign law to the jury:

Witnesses, it appears, were examined in the District Court, to prove that this instrument was a perfect and complete grant by the laws of Spain then in force in the province of Louisiana in relation to grants of land; and the counsel for the appellees moved for an issue upon this point, to be tried by the jury. This motion was properly refused by the court, and the issues which the court directed were confined to questions of fact. The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that State depend, must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other State. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana. And it can never be maintained in the courts of the United States that the laws of any State of this Union are to be treated as the laws of a foreign nation, and ascertained and determined as a matter of fact, by a jury, upon the testimony of witnesses.<sup>262</sup>

The *Turner* Court did add the following dictum, however.

[I]f the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that State would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdicts of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend.<sup>263</sup>

Because *Turner* involved the Spanish law in force in Louisiana before that state entered the Union, which brings it under one of the four traditional exceptions to the proof requirement,<sup>264</sup> the Court's dictum cannot be regarded as a definitive statement on the jury-trial issue. Nonetheless, it is the most illuminating discussion of the relationship between jury trial and issues of foreign law that can be found in the Supreme Court decisions prior to the beginning of this century.

Two early cases decided by Mr. Justice Washington on circuit may indicate that the usual practice in the federal trial courts shortly after those tribunals were established was for the judge to decide issues of foreign law absent special factors. In the first case, *Seton v. Delaware Ins. Co.*,<sup>265</sup> the Justice set out the substance of

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262. *Id.* at 668.

263. *Ibid.*

264. See text accompanying notes 138-50 *supra*.

265. 21 Fed. Cas. 1093 (No. 12675) (C.C.D. Pa. 1808).

certain Cuban commercial regulations in his charge to the jury and apparently limited the jury's function to applying the facts to the Cuban law as charged. In *Consequa v. Willings*,<sup>266</sup> the question whether certain trade customs existed in Canton, China was left to the jury. In an extended discussion, Mr. Justice Washington concluded that normally foreign law, both written and unwritten, must be proved as a fact, but that after the submission of proof it was the court's task to ascertain the alien law and decide its effect. He added that when a custom or usage is sufficiently established to be treated as assimilated into the foreign country's law, it also is subject to judicial determination. However, when the existence of a custom or usage is not proved beyond reasonable doubt, the court may leave that limited question to the jury. Noting that the existence of the particular usage in issue had not been established beyond reasonable doubt, Mr. Justice Washington held that no error had been committed in submitting the question to the jury; neither its precise content nor its application to particular facts was before the jury.

Reconstructing the federal practice in the years preceding the Federal Rules of Civil Procedure, it seems reasonable to say that when an issue of foreign law involved the interpretation of statutes, textual material, or judicial decisions it was treated as one of law for the court, as historically has been the case with all written documents.<sup>267</sup> This approach seems best exemplified by a Supreme Court dictum from *Finney v. Guy*:<sup>268</sup>

Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is . . . is really a matter of opinion . . . and courts are not concluded thereby from themselves consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions.<sup>269</sup>

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266. 6 Fed. Cas. 336 (No. 3128) (C.C.D. Pa. 1816).

267. Cf. *Trasher v. Everhart*, 3 Gill & Johns. 234 (Md. 1831); *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S.E. 421 (1896); *Di Sora v. Phillipps*, 10 H.L. Cas. 624, 637-42, 11 Eng. Rep. 1168, 1174-75 (1863).

268. 189 U.S. 335 (1903).

269. *Id.* at 342. See also *Eastern Bldg. & Loan Ass'n v. Williamson*, 189 U.S. 122, 126 (1903); *Mexican Nat'l R.R. v. Slater*, 115 Fed. 593, 608 (5th Cir. 1902), *aff'd*, 194

The contours of federal practice were somewhat less certain when the expert testimony used to establish foreign law was in conflict. In *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil Co.*,<sup>270</sup> the Second Circuit stated that when the construction of a foreign statute is controverted, the court's conclusion is one of fact. Since a jury had been waived, the court expressly avoided the question under discussion. Nonetheless, in defining the scope of appellate review it did treat the lower court's resolution of the testimonial conflict as a fact determination. But in another pre-1938 case, *Merinos Viesca y Compania, Inc. v. Pan American Petroleum & Transport Co.*,<sup>271</sup> the same court stated: "The meaning of a foreign statute is for the court notwithstanding the conflict of testimony of experts."<sup>272</sup>

Since 1938, a number of federal judges have determined foreign-law issues without the aid of a jury and have justified their actions simply in terms of the jury not being a proper tribunal for such matters.<sup>273</sup> The Fifth Circuit gave extensive consideration to the issue in *Liechti v. Roche*,<sup>274</sup> which involved the availability of damages for pain and suffering under Panamanian law. The trial court had refused to submit the matter to the jury. After a review of many of the earlier federal cases, the appellate court simply concluded that "it was the judge's function to determine the state of the foreign law. . . ."<sup>275</sup> On the basis of *Liechti*, the District Court for the Western District of Texas, in *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*,<sup>276</sup> treated a portion of a special verdict dealing with Honduran law as advisory and made its own "findings of fact" as to

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U.S. 120 (1904); *Shelton v. Canadian No. Ry.*, 189 Fed. 153 (C.C.D. Minn. 1911). In *Barielle v. Bettman*, 199 Fed. 838 (S.D. Ohio 1912), the court commented that the "existence" of foreign law is a matter of fact triable by a jury. The only authorities cited for that proposition were two old Ohio state court decisions. One, *Evans v. Reynolds*, 32 Ohio St. 163 (1877), does not deal with jury trial at all and the other, *Ingraham v. Hart*, 11 Ohio 255 (1842), makes the unsupported statement that foreign law is for the jury.

270. 292 Fed. 846 (2d Cir. 1923).

271. 83 F.2d 240 (2d Cir. 1936).

272. *Id.* at 242. See also *Scheer v. Rockne Motors Corp.*, 68 F.2d 942 (2d Cir. 1934).

273. See *Liechti v. Roche*, 198 F.2d 174 (5th Cir. 1952); *Harris v. American Int'l Fuel & Petroleum Co.*, 124 F. Supp. 878 (W.D. Pa. 1954). *But cf.* *United States v. Baumgarten*, 300 F.2d 807 (2d Cir. 1962) (criminal case in which weight of expert's testimony left to jury). See also *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222 (N.D. Tex. 1963), *modified on other grounds*, 347 F.2d 168 (5th Cir. 1965). In one case in which local law was applied pursuant to the presumption that it was the same as the applicable foreign law, the court apparently formulated the law of the case for the jury. See *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 642 (10th Cir. 1962).

274. 198 F.2d 174 (5th Cir. 1952).

275. *Id.* at 177.

276. 215 F.2d 465 (5th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).



certain facets of that law. On appeal, the Fifth Circuit examined many of the authorities and concluded that the trial court had committed no error in deciding the foreign-law issues itself. Finally, in *Jansson v. Swedish American Line*,<sup>277</sup> Judge Magruder observed, in dictum, that "a question of foreign law, though commonly stated to be one of fact, is for the court, not the jury."<sup>278</sup>

b. *History and policy applied.* No federal case involving foreign law has been found in which the jury-trial question was considered to be of constitutional dimensions.<sup>279</sup> The federal courts apparently have neither felt themselves constrained by the English precedents nor considered it necessary to advance any historical or constitutional defense for the judicial determination of issues of foreign law; they have thought it sufficient merely to point out the deficiencies of leaving foreign law to the jury. Although federal courts have characterized issues of foreign law as "questions of fact" or "matters to be proved as facts" on innumerable occasions, these somniferous phrases apparently have encompassed only the manner in which evidence is presented to the court.<sup>280</sup> Rather than statements of actual practice, the few existing judicial intimations favoring jury trial appear to be loose dicta, undoubtedly the result of a failure to distinguish foreign law as a "fact" for purposes of proof from foreign law as "law" for purposes of either assigning it for determination or defining the appropriate scope of appellate review. When the federal experience is examined against the backdrop of the early English and state court decisions, the irresistible conclusion is that there is no historic tradition of submitting foreign-law issues to the jury that is of sufficient clarity to warrant a present-day federal judge to hold that he is bound to do so as a constitutional matter.

Even if venerable decisions did show that foreign law was triable by jury in 1791, there are at least two reasons why a shift in federal practice since then does not necessarily violate the integrity of the

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277. 185 F.2d 212 (1st Cir. 1950).

278. *Id.* at 216. The same statement appears in *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950, 957 n.6 (1st Cir. 1952).

279. It is interesting to note that only one writer has seriously suggested the possible existence of a constitutional problem if foreign-law issues are determined by the judge. See McKenzie, *The Proof of Alien Law*, A.B.A. SEC. INT'L & COMP. L., PROCEEDINGS 50, 51 (1959). See also McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353, 357-60 (1956). The point also is raised in a footnote in Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 322 n.38 (1958).

280. In *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222, 229 (N.D. Tex. 1963), modified on other grounds, 347 F.2d 168 (5th Cir. 1965), the court said: "Even in a jury case, the trial judge is the trier of fact as to the existence of foreign law and has the responsibility of construing it, if he finds it to exist."

seventh amendment. First, the rationale of any eighteenth century jury-trial practice would have been the fact characterization of foreign law, which means that the practice was an administrative, logical, by-product of the nomenclature of the day, rather than an attempt to effectuate any of the basic policies of the jury-trial guarantee. It would make little sense to preserve an eighteenth-century practice based on the fact theory—an approach that today has no significance, either procedurally or substantively, in light of our changed attitudes toward foreign law and the accessibility of information about legal systems operating beyond our borders. Furthermore, one result of the second sentence of Federal Rule 44.1 will be that foreign-law issues will not be presented in a form that fits the traditional pattern of proof to the trier of fact. Because of the inapplicability of the rules of evidence and the trial court's freedom to do its own research, foreign law will not be placed in evidence in the adversarial format upon which effective jury deliberation depends. It thus will be difficult, if not impossible, to integrate the jury mechanism into the current motif for establishing foreign law.

The second, perhaps obvious, point is that the seventh amendment's jury-trial guarantee is not immutable; over the years it has proven to be sufficiently flexible and malleable to survive the constant remolding necessitated by new problems and changed circumstances in many areas of the law.<sup>281</sup> Professor Austin Wakeman Scott has described the range within which jury-trial practice may be modified to meet changing conditions as follows:

Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of openmindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form.<sup>282</sup>

Several years after Professor Scott wrote these lines the Supreme Court, in *Gasoline Products Co. v. Champlin Refining Co.*,<sup>283</sup> up-

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281. The status and function of the jury also has been altered by political and social shifts in our society. See Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

282. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918).

283. 283 U.S. 494, 498 (1931). See also *Walker v. New Mexico & S.P.R.R.*, 165 U.S. 593, 596 (1897) (special interrogatory procedure not a violation of seventh amend-

held the partial new trial procedure against a seventh-amendment challenge. It said:

[T]he Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. . . . Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. It does not prohibit the introduction of new methods for ascertaining what facts are in issue. . . .<sup>284</sup>

In *Ex parte Peterson*<sup>285</sup> the Court was asked to pass upon the appointment of an auditor of a type unknown at common law to investigate and file a report simplifying, but not determining, the disputed issues. Mr. Justice Brandeis, writing for the Court, validated the procedure and commented that the seventh amendment "does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence."<sup>286</sup> Admittedly this case is not directly analogous to the problem under discussion because the auditor in *Peterson* was not given express power to "determine" the facts. Nonetheless, *Peterson* does exemplify the permissibility of delegating the tasks of issue simplification and definition, which by their nature entail some degree of qualitative fact analysis and ascertainment. Moreover, Mr. Justice Brandeis' opinion does emphasize the need to manipulate the jury institution to make it an efficient instrument for the administration of justice.

In addition, federal courts have taken judicial notice of a variety of factual matters under Rule 43(a) whenever state practice has provided the necessary authorization, without any suggestion that the seventh amendment has been violated. It is difficult to see how this practice differs from court determination of foreign law under Rule 44.1 in any way that is material to the jury-trial right. Moreover, the federal courts always have taken judicial notice of the law of all the states, international and maritime law, and the law, usages, and customs in force in a territory prior to its incorporation into the United States.<sup>287</sup> Is it reasonable to conclude that there is a constitu-

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ment); *Hosie v. Chicago & N.W.R.R.*, 282 F.2d 639, 643 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) (separation of liability and damage issues upheld).

284. 283 U.S. at 498.

285. 253 U.S. 300 (1920).

286. *Id.* at 309.

287. See, e.g., *Jenkins v. Collard*, 145 U.S. 546, 560-61 (1892); *Jones v. United States*, 137 U.S. 202, 214-16 (1890); *Lamar v. Micou*, 114 U.S. 218, 223 (1885); *Pennington v. Gibson*, 57 U.S. (16 How.) 65, 81 (1853); *United States v. Turner*, 52 U.S. (11 How.)

tional right to have a jury ascertain the law of Spain but not the Spanish law in force in the territory of Louisiana prior to its purchase by the United States? Of Italy but not of Indiana? How is the "vital significance" of the jury-trial right violated when a federal district judge in New York ascertains Italian law, instructs the jurors on its contents, and allows them to apply these instructions to the facts—the time-honored procedure employed by the New York federal courts in lawsuits governed by Indiana law?

Once constitutional qualms are laid to rest, the most obvious and germane consideration of all—one that has been alluded to throughout this discussion—is the simple, indisputable fact that the most appropriate organism in the judicial system for manipulating foreign legal materials is the judge, not the jury. The Supreme Court made it clear in *Galloway v. United States*<sup>288</sup> that when history does not compel the conclusion that a jury trial right is constitutionally based, it is appropriate for the court to weigh the merits and demerits of utilizing the special talents of the respective arbiters. In the context of foreign law, the position of the scales is clear. To permit jurors to wrestle with foreign statutes or judicial decisions hardly seems calculated to minimize fortuity or maximize rationality in the litigative process. To assume that jurors can digest and then apply foreign legal materials with any degree of accuracy or dexterity, no matter how carefully the court may indoctrinate them, is to engage in a fantasy. Jurors always have been viewed as less competent than judges to ascertain local law; why should we indulge in the hypocritical assumption that jurors are more qualified than judges to ascertain foreign law? The difficulties encountered and the expertise employed in determining foreign law are so similar to the problems and skills involved in a trial judge's daily manipulation of domestic law that a supervening justification, seemingly absent here, is necessary for extracting foreign law from his competence.<sup>289</sup>

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663, 668 (1850); *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 625 (1835); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 37-38 (1801).

288. 319 U.S. 372, 392-96, *petition for rehearing denied*, 320 U.S. 214 (1943). *Galloway* is discussed in note 243 *supra*.

289. Virtually all of the scholars who have voiced an opinion on this subject have expressed the view that foreign-law issues should be left to the court. See, e.g., 1 GREENLEAF, EVIDENCE § 486 (15th ed. 1892); STORY, CONFLICT OF LAWS § 638 (3d ed. 1846); 9 WIGMORE, EVIDENCE § 2558 (3d ed. 1940); Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147, 171-72 (1890). See also 3 BEALE, CONFLICT OF LAWS § 621.5 (1935); THAYER, A PRELIMINARY TREATISE ON EVIDENCE 257-58 (1898); 1 WHARTON, EVIDENCE § 303 (1877). *But see* WESTLAKE, PRIVATE INTERNATIONAL LAW § 413 (1859). On the question of relative competence, see also Weiner, *The Civil Jury Trial and the Law-fact Distinction*, 54 CALIF. L. REV. 1867, 1922-24 (1966).

The prospect of jury intrusion into the determination of foreign law is not made significantly more attractive by attenuating the jury's function. Even though the jury's historic role has been to weigh inferences and evaluate contradictory evidence regarding events and physical facts,<sup>290</sup> the court is more competent to resolve testimonial conflicts concerning the interpretation of foreign law. In many cases the divergence between the competing evidentiary displays will be more apparent than real and will stem from semantic debates engaged in by partisan experts rather than from fundamental jurisprudential disputes. Is there any doubt that a judge is in a better position than a jury to ferret out the real area of contention and analyze its dimensions? *A fortiori* when a basic disagreement does exist as to the content of foreign law, the training and talent of a judge should be brought to bear to resolve the issue. A mature system, like prudent people, should entrust the process of examination, diagnosis, and treatment of its problems to a clinician rather than to an *ad hoc* group of dragooned laymen.

It also is relevant that judicial determination of foreign law under Rule 44.1 clearly would be consistent with the tenor of present day Anglo-American practice. All of the federal judges who have dealt with the question in recent years have ascertained and applied foreign law without the aid of a jury, and almost all state judges do the same under section 5 of the Uniform Judicial Notice of Foreign Law Act, section 4.03 of the Uniform Interstate and International Procedure Act, or similar legislation.<sup>291</sup> Moreover, recent decisions in states that do not have any statutory directive on the subject have held that the only sensible approach is to leave issues of foreign law to the trial judge.<sup>292</sup>

#### 4. Appellate Review of Foreign Law Determinations

Prior to the promulgation of Federal Rule 44.1, the scope of review given a determination of foreign law varied among the cir-

290. A rough analogy can be drawn between construing and determining the effect of foreign legal materials and doing the same with written commercial instruments. In the latter context the function traditionally has been one for the court. See, e.g., *Bell v. Bruen*, 42 U.S. (1 How.) 169 (1843); *Levy v. Gadsby*, 7 U.S. (3 Cranch) 180 (1805); *Crowe v. Gary State Bank*, 123 F.2d 513 (7th Cir. 1941). See also THAYER, A PRELIMINARY TREATISE ON EVIDENCE 202-07 (1898).

291. See, e.g., Miss. CODE ANN. § 1761 (1956); N.Y. Civ. Prac. L. & R. 4511(c); N.C. GEN. STAT. § 8-4 (1953); cf. Vt. STAT. ANN. tit. 12, § 1699 (1958). See also UNIFORM RULE OF EVIDENCE 10(4).

292. E.g., *Prudential Ins. Co. of America v. O'Grady*, 97 Ariz. 9, 396 P.2d 246 (1964); *Choate v. Ransom*, 74 Nev. 100, 323 P.2d 700 (1958) (sister-state law). A state-federal divergence in assigning the function of determining foreign law might motivate forum shopping on the part of the plaintiff in diversity cases. See the discussion at text accompanying notes 395-405 *infra*.

cuits. Although several courts of appeals fully reviewed a district court's disposition of foreign-law issues,<sup>293</sup> a trial court's findings occasionally were characterized as determinations of fact and subjected only to limited re-examination.<sup>294</sup> The latter approach represents another manifestation of the fact theory and, before proceeding, it seems appropriate to invoke the reasons advanced throughout this article for equating issues of domestic and foreign law and to incorporate them as evidence of the desirability of giving the two types of issues identical treatment on appeal.

Presumably, appellate courts have been assigned the task of reviewing a trial court's legal conclusions because of their special expertise and competence in determining the existence, relevance, and application of rules of law. These particular qualities certainly are as valuable when the law of a foreign country is under examination as they are when the law of the forum is in issue. Indeed, the utilization of an appellate court's talents probably is of even greater importance in the case of foreign law than domestic law because of the special logistical difficulties encountered when dealing with the former. Inasmuch as reviewing courts usually have access to the legal materials offered and considered at trial, and in many instances have better foreign-law facilities at their disposal than do district courts, it is useful to permit appellate tribunals to re-examine foreign-law issues and apply their collegial powers exactly as is done on issues of domestic law. A more restrictive review of foreign-

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293. See, e.g., *Liechti v. Roche*, 198 F.2d 174, 177 (5th Cir. 1952) (dictum); *Mexican Nat'l R.R. v. Slater*, 115 Fed. 593, 608 (5th Cir. 1902), *aff'd*, 194 U.S. 120 (1904). See also *Wood & Selick, Inc. v. Compagnie Générale Transatlantique*, 43 F.2d 941 (2d Cir. 1930). In a number of cases, courts of appeals have re-examined the trial court's determination of foreign law without commenting on the question of the proper scope of review. See, e.g., *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965); *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950 (1st Cir. 1952). See also *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

294. See *Reissner v. Rogers*, 276 F.2d 506 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960); *Shapleigh v. Mier*, 83 F.2d 673, 676-77 (5th Cir.), *aff'd*, 299 U.S. 468 (1936); *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil Co.*, 292 Fed. 846 (2d Cir. 1923); *Hudson River Pulp & Paper Co. v. H. H. Warner & Co.*, 99 Fed. 187 (2d Cir. 1900). See also *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955) (foreign law "is as reviewable as any other fact issue"); Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 27-28 (1957); Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318 (1958). In *McKenzie & Sarabia, The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353, 355-56 (1956), the authors, after cloaking themselves in the mantle of the fact theory, proclaim that foreign-law material "is evidentiary in nature and hence *exclusively* for the lower court." (Emphasis in original.) Fortified by this "fact-evidence" schematic, they conclude that the test with respect to the correctness of the result reached in the trial court on an issue of foreign law should be whether there is "any evidence to sustain the trial court's finding."

law determinations than is usually accorded domestic law seems justifiable only when the oral testimony on alien law offered at trial is in conflict and the circumstances justify according special weight to the district judge's ability to evaluate credibility and demeanor.<sup>295</sup>

To further its objective of treating foreign and domestic law alike to the extent feasible, the final sentence of Rule 44.1 provides that the trial court's determination of foreign law is to be viewed "as a ruling on a question of law."<sup>296</sup> This statement should resolve the confusion that formerly existed among the courts of appeals concerning the scope of review of issues of foreign law and should give the appellate courts greater latitude than is permitted by the "clearly erroneous" test applied under Federal Rule 52(a) to findings of fact.<sup>297</sup> Similar provisions appear in section 3 of the Uniform Judicial Notice of Foreign Law Act and section 4.03 of the Uniform Interstate and International Procedure Act.

Effective plenary appellate review of foreign-law issues will be even more significant under Rule 44.1 than it was under former federal practice because of the district court's increased authorization to determine foreign law, engage in its own research, and examine materials not presented by the parties. Full appellate review of the trial court's utilization of these powers seems necessary both as a restraint against abuse and as a precaution against the possibility of trial-court error. An unintended side effect of increasing both the district court's involvement in the determination of foreign law and the number of cases in which foreign law actually is ascertained

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295. See *Remington Rand, Inc. v. Société Internationale Pour Participations Industrielles et Commerciales, S.A.*, 188 F.2d 1011 (D.C. Cir. 1951). The value of demeanor evaluation in the case of expert testimony on foreign law should not be overemphasized, however. It seems unlikely that the physical appearance and emotional state of a foreign-law expert will be sufficiently distinctive to provide insights into his competence that are not available from the record of his testimony.

The argument for full review of trial-court determinations of foreign law may be compromised by the fact that plenary appellate review of a construction of forum law is partially justified on the value of the resulting stare decisis effect, see *Brown, Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 905 (1943); decisions as to foreign law generally are not given such effect, see *Nussbaum, The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1034-35 (1941). However, in a number of contexts foreign-law determinations have been relied upon in subsequent litigation. See *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2d Cir. 1965); *Wood & Selick, Inc. v. Compagnie Générale Transatlantique*, 43 F.2d 941, 944 (2d Cir. 1930); cf. *Mary Duke Biddle*, 33 B.T.A. 127 (1935), *aff'd*, 86 F.2d 718 (2d Cir. 1936), *aff'd*, 302 U.S. 573 (1937). See also Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 324-28 (1958).

296. The full text of Rule 44.1 is set out in note 5 *supra*.

297. This test appears to have been applied to a foreign-law issue in *Reissner v. Rogers*, 276 F.2d 506 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960); *Remington Rand, Inc. v. Société Internationale Pour Participations Industrielles et Commerciales S.A.*, 188 F.2d 1011 (D.C. Cir. 1951).

by the court may prove to be an increase in the number of appeals and a higher incidence of trial-court error on such issues.<sup>298</sup>

A reasonable inference to be drawn from the new Rule's last sentence and the foreign-domestic law analogy is that appellate courts have the same freedom to examine foreign-law materials as is given to the trial courts under the second sentence of the new Rule.<sup>299</sup> Thus, a court of appeals is free to consider not only the fruits of the trial court's independent research and the materials introduced by the parties in the lower courts, but also any information that it has unearthed itself. By the same token, the attorneys should be permitted to present new foreign-law materials on appeal, subject, of course, to the usual caveats about overreaching and prejudice.<sup>300</sup>

A question that probably will occur more frequently under the new practice than it has in the past is the proper disposition of a case when the appellate court is convinced that the wrong foreign law was applied at trial, either because counsel failed to bring the correct law to the court's attention or because the choice-of-law rule was misapplied. The circuits appear to be divided as to whether this permits a direction for the entry of judgment or whether it constitutes reversible error or necessitates a remand.<sup>301</sup> In *Jannenga v. Nationwide Life Insurance Co.*,<sup>302</sup> the court took a mediate position

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298. With the possible exception of appeals from those districts whose judges are particularly conversant with the law of a certain foreign country, the courts of appeals should not afford the trial judge's foreign-law findings the same prima facie effect as often is given to his forum-law findings in diversity cases. See, e.g., *Rudd-Melikian, Inc. v. Merritt*, 282 F.2d 924 (6th Cir. 1960); *Massachusetts Bonding & Ins. Co. v. Julius Seidel Lumber Co.*, 279 F.2d 861 (8th Cir. 1960); *Cranford v. Farnsworth & Chambers Co.*, 261 F.2d 8 (10th Cir. 1958). See also *H. K. Porter Co. v. Wire Rope Corp.*, 367 F.2d 653, 662-63 (8th Cir. 1966).

299. Federal appellate courts have exercised this prerogative in the past. See, e.g., *Usatorre v. The Victoria*, 172 F.2d 434 (2d Cir. 1949).

300. See generally Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 319-22 (1958).

301. Compare *Prudential Ins. Co. v. Carlson*, 126 F.2d 607 (10th Cir. 1942), and *Great Am. Ins. Co. v. Glenwood Irrigation Co.*, 265 Fed. 594 (8th Cir. 1920), with *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958), and *United States v. Certain Parcels of Land*, 144 F.2d 626 (3d Cir. 1944). See also *Pecheur Lozenge Co. v. National Candy Co.*, 315 U.S. 666 (1942); *McClure v. United States Lines Co.*, 368 F.2d 197, 202 (4th Cir. 1966). In *Busch, When Law Is Fact*, 24 FORDHAM L. REV. 646, 657 (1956), the author suggests that when an appellate court discovers new material on foreign law it must "remand the proceedings to the trial court for further proof with respect to those . . . authorities, thus permitting the parties to be heard on the subject before a final decision is reached." No reason is given why the parties cannot be heard in the appellate court. Undoubtedly, the brooding omnipresence of the fact theory and the long standing practice of using common-law methods of proof lie at the root of the quoted passage. See also *Currie, On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 984-85 (1958).

302. 288 F.2d 169 (D.C. Cir. 1961).



and held that the judgment below need not be impeached unless the trial court's misapplication of foreign law resulted in perceptible injustice. This resolution of the question certainly is desirable from the perspective of giving the appellate courts sufficient freedom of action to avoid unnecessary reversals. The test is objectionable, however, because it seems to be little more than a paraphrase of the harmless-error rule and because it interjects a somewhat elusive standard into the process of appellate review—a process already choked by an excessive number of verbalisms—that may generate more uncertainty and controversy than the problem warrants.<sup>303</sup> Moreover, the *Jannenga* approach makes remand mandatory whenever “prejudice” is shown, without regard to whether the prejudice can be rectified on appeal. It seems more desirable to permit the appellate tribunal to apply the proper foreign law whenever it can do so on the basis of the record on appeal and a supplementary presentation by counsel; this is a common practice when domestic law has been misapplied by the trial court.<sup>304</sup> Remand then would be necessary only when an effective or fair application of foreign law is impossible without a new trial or when jury-trial considerations are paramount.<sup>305</sup> Abandonment of the fact theory of foreign law vitiates any justification for an absolute rule that alien law initially be determined by a trier of fact. Therefore, remand should be necessary only when the shift in the choice of foreign law is radical or when the magnitude of the presentations by the parties on the foreign law selected by the appellate tribunal would be too great an imposition on its energies.

### C. Consequences of Failing To Establish Foreign Law

The federal courts have displayed as much diversity of opinion with regard to the consequences of a failure to establish the content of foreign law as have the state courts.<sup>306</sup> This lack of judicial con-

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303. See 14 STAN. L. REV. 162 (1961).

304. *E.g.*, *Diemer v. Diemer*, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

305. Under some circumstances due process considerations may come into play if the appellate court concludes that the trial court's choice of law was erroneous, decides to apply the law of a different country, and fails to provide the party prejudiced by the shift with an opportunity to present evidence on the new law or to contest the court's application of it. *Cf. Saunders v. Shaw*, 244 U.S. 317 (1917).

306. See text accompanying notes 74-98 *supra* for a discussion of state practice.

The problem of a failure of proof can confront a defendant as well as a plaintiff. For example, in *Chemical Bank N.Y. Trust Co. v. Kennedy*, 199 F. Supp. 256 (D.D.C. 1961), *rev'd on other grounds*, 319 F.2d 720 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 965 (1964), a failure to establish a defense of impossibility under Hungarian law led to the granting of summary judgment against the defendant. The quantum of evidence needed to discharge the burden of proof on an issue of foreign law often depends on the character of the case. Thus, in *Dulles v. Katamoto*, 256 F.2d 545 (9th Cir. 1958), the court held that the government had not sustained what was characterized as a heavy burden of proof in a denaturalization proceeding.

sensus is exemplified by the different attitudes of the Second and Fourth Circuits in admiralty cases. In the Fourth Circuit, a failure to prove foreign law has led to the application of general American maritime law.<sup>307</sup> In the Second Circuit the impact of *Cuba R.R. v. Crosby*<sup>308</sup> is more evident; a failure to establish the existence of a cause of action under the applicable foreign law has resulted in a dismissal of the action.<sup>309</sup>

Despite the elevated status of the *Crosby* case and the prevalence of the vested-rights philosophy during the nineteenth century and the first half of the twentieth century, most federal cases involving a failure to prove foreign law have not resulted in the direction of a judgment on the merits against the party who has the burden of establishing alien law. The harshness of *Crosby* has been avoided by employing the previously discussed exceptions to the proof requirement.<sup>310</sup> Thus, federal courts have resorted to the rudimentary or fundamental principles concept in a number of cases to cure a failure of proof<sup>311</sup> and in other cases forum law has been applied on the

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307. See, e.g., *Heredia v. Davies*, 12 F.2d 500, 501 (4th Cir. 1926); *Todd Shipyards Corp. v. The City of Athens*, 83 F. Supp. 67 (D. Md. 1949).

308. 222 U.S. 473 (1912). The case is discussed at text accompanying notes 79-82 *supra*.

309. See *Ozanic v. United States*, 165 F.2d 738 (2d Cir. 1948); *Banque de France v. Chase Nat'l Bank*, 60 F.2d 703 (2d Cir. 1932); *The Hanna Nielsen*, 273 Fed. 171 (2d Cir.), *cert. denied*, 257 U.S. 653 (1921); *Bakhshandeh v. American Cyanamid Co.*, 211 F. Supp. 803 (S.D.N.Y. 1962); *McQuade v. Compania de Vapores San Antonio, S.A.*, 131 F. Supp. 365 (S.D.N.Y. 1955). See also *Rosden v. Leuthold*, 274 F.2d 747, 748 n.1 (D.C. Cir. 1960) (dictum); *Lauro v. United States*, 162 F.2d 32 (2d Cir. 1947); *Panama Elec. Co. v. Moyers*, 259 Fed. 219 (5th Cir. 1919) (refusal to direct verdict against plaintiff for failing to prove Panama law held erroneous); *Tsakonites v. Transpacific Carriers Corp.*, 246 F. Supp. 634 (S.D.N.Y. 1965); *Gonzalez v. Hearst Consol. Publications, Inc.*, 115 F. Supp. 721 (S.D.N.Y. 1953). At one point, the Ninth Circuit appeared to have cast its lot with the Second Circuit. In *Philp v. Macri*, 261 F.2d 945 (9th Cir. 1958), 75 A.L.R.2d 523 (1961), an action for defamation governed by Peruvian law, no proof of foreign law was presented. Relying on *Crosby*, the Ninth Circuit affirmed the Washington District Court's dismissal. "Where one country's judicial system is based on the Common Law and the other's on the Civil Law, both systems having been modified by statutory changes, there is little to recommend the employment of a presumption that the law of one is the same as the law of the other." *Id.* at 948. But an imposing string of other Ninth Circuit cases, some of which, like *Philp*, originated in Washington, have applied the presumption of identity between forum and foreign law. See *1700 Ocean Ave. Corp. v. GBR Associates*, 354 F.2d 993 (9th Cir. 1965); *San Rafael Compania Naviera, S.A. v. American Smelting & Ref. Co.*, 327 F.2d 581, 587 (9th Cir. 1964) (dictum); *Medina v. Hartman*, 260 F.2d 569 (9th Cir. 1958) (habeas corpus proceeding); *Gerking v. Furness, Withy & Co.*, 251 F. Supp. 781 (W.D. Wash. 1961). See also *Northwest Orient Airlines, Inc. v. Gorter*, 254 F.2d 652 (9th Cir. 1958).

310. See text accompanying notes 138-50 *supra*. See generally *Commissioner v. Hyde*, 82 F.2d 174 (2d Cir. 1936); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1035 (1941).

311. See *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962); *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931); *Compagnie Générale Transatlantique v. Rivers*, 211 Fed. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914); *Rosenthal v. Compagnie Générale Transatlantique*, 14 F.R.D. 33 (S.D.N.Y. 1953).

theory that it was the only law before the court<sup>312</sup> or in the belief that the parties agreed that forum law governed.<sup>313</sup> In an apparent plurality, or perhaps even a majority, of cases involving a failure to prove alien law, federal courts have presumed that foreign law is identical with forum law and have required the party claiming a divergence between them to prove it.<sup>314</sup>

Unfortunately, most of the federal opinions involving a failure of proof of foreign law lack any extensive or enlightening analysis of the factors leading to the particular disposition. The courts usually have not indicated whether they based their decisions on general federal principles or applied the law of the state in which the federal court was sitting. In several cases in which the latter course was clearly adopted, the court either expressed a belief that the doctrine of *Erie R.R. v. Tomkins*<sup>315</sup> compelled the application of the forum state's law<sup>316</sup> or failed to delineate the considerations that motivated its decision.<sup>317</sup>

312. *Barrielle v. Bettman*, 199 Fed. 838 (S.D. Ohio 1912).

313. *El Hoss Eng'r & Transp. Co. v. American Independent Oil Co.*, 183 F. Supp. 394 (S.D.N.Y. 1960), *rev'd on other grounds*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961). There may be some due-process limitation on the direct application of forum law when there is an insufficient connection between the litigants and the forum. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See also Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944); CALIF. LAW REV. COMM'N, REPORTS RECOMMENDATIONS AND STUDIES I-20 (1957).

314. See, e.g., *1700 Ocean Ave. Corp. v. GBR Associates*, 354 F.2d 993 (9th Cir. 1965); *San Rafael Compania Naviera, S.A. v. American Smelting & Ref. Co.*, 327 F.2d 581, 587 (9th Cir. 1964) (dictum); *Pedersen v. United States*, 191 F. Supp. 95 (D. Guam 1961); *Molina v. Sovereign Camp, W.O.W.*, 6 F.R.D. 385 (D. Neb. 1947); *The Hanna Nielson*, 25 F.2d 984 (W.D. Wash. 1928); *The Fort Gaines*, 18 F.2d 413 (D. Md. 1927). See also *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966); *Fowler v. Pennsylvania Tire Co.*, 326 F.2d 526 (5th Cir. 1964); *Compania de Aquaceros, S.A. v. First Nat'l City Bank*, 256 F. Supp. 658 (D.C.Z. 1966); *Messina v. Mutual Benefit Health & Acc. Ass'n*, 228 F. Supp. 865 (D.D.C. 1964), *aff'd*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); *Gerking v. Furness, Withy & Co.*, 251 F. Supp. 781 (W.D. Wash. 1961). In *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952), the court presumed that since Japanese law had been in force in Okinawa prior to World War II and no change in jurisprudence had been shown, Japanese law was still in effect.

315. 304 U.S. 64 (1933).

316. E.g., *Waggaman v. General Fin. Co.*, 116 F.2d 254 (3d Cir. 1940); *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222 (N.D. Tex. 1963), *modified on other grounds*, 347 F.2d 168 (5th Cir. 1965). Federal courts in several diversity of citizenship cases have assumed that the *Erie* decision has modified the traditional federal-court practice of taking judicial notice of the law of all the states and have applied the presumptions employed by the forum-state's courts. See, e.g., *Budget Rent-A-Car Corp. v. Fein*, 342 F.2d 509 (5th Cir. 1965). See also *Petersen v. Chicago, G.W. Ry.*, 138 F.2d 304 (8th Cir. 1943). In a more significant number of cases, however, the federal courts continue to take judicial notice of the law—at least the Constitution and statutes—of the several states. E.g., *Schultz v. Tecumseh Prods.*, 310 F.2d 426 (6th Cir. 1962) (application of *Erie* expressly rejected); *J. M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77 (5th Cir. 1962); *Trust Co. v. Pennsylvania R.R.*, 183 F.2d 640 (7th Cir. 1950); *Gallup v. Caldwell*, 120 F.2d 90 (3d Cir. 1941). See also note 425 *infra*.

317. E.g., *San Rafael Compania Naviera, S.A. v. American Smelting & Ref. Co.*,

Neither Federal Rule 44.1 nor the accompanying Advisory Committee Note attempts to describe the effect of a failure to prove foreign law. Two considerations may have contributed to this silence. The first, a concern on the part of the draftsmen that an attempt to regulate this subject, which is a complex admixture of conflict of laws and burden of proof doctrines, would transgress the limits of the Supreme Court's rule-making power or would run afoul of the *Erie* doctrine.<sup>318</sup> The second, a belief that a failure to prove foreign law under Rule 44.1 will be a *rara avis* because the Rule greatly increases a party's ability to establish foreign law and reinforces this capacity by giving the trial judge both extensive discretion to consider foreign-law materials and power to engage in his own research. Inasmuch as the failure-of-proof problem will have new dimensions under Rule 44.1, which could not be discerned at the time the Rule was drafted, it probably was thought appropriate to leave the matter to judicial development.

The consequences of a failure to prove foreign law should be viewed from two perspectives: as an exercise in conflict of laws, and as a problem of burden of proof. Separation of the two is useful solely for analytical purposes, because any attempt to divorce them is arbitrary. The conflicts approach necessitates an inquiry as to when a federal court is obliged to turn to the law of a foreign country as a source of decisional rules. Not all issues of foreign law raise conflicts problems. In many lawsuits foreign law is relevant only to a particular factual element or to the determination of a single issue<sup>319</sup> and the rules governing the rights and liabilities of the parties are found in domestic law. In these situations the application of foreign law to a particular facet of the case does not involve a choice of law, and conflicts theory does not offer any guidelines for dealing with a failure of foreign-law proof.

Of course, it is the forum's conflicts principles that determine when foreign law is to be the source of decisional rules in particular cases. This article is not the place to recapitulate or assay the debate between the advocates of the vested-rights theory of conflict of laws and the proponents of the various new methodologies that seek out

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327 F.2d 581 (9th Cir. 1964) (dictum); *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962); *Northwest Orient Airlines, Inc. v. Gorter*, 254 F.2d 652 (9th Cir. 1958); *Molina v. Sovereign Camp, W.O.W.*, 6 F.R.D. 385 (D. Neb. 1947).

318. The rule-making power is discussed at text accompanying notes 429-519 *infra*; the effect of *Erie* on Rule 44.1 is dealt with at text accompanying notes 376-428 *infra*.

319. See, e.g., *Crashley v. Press Publishing Co.*, 179 N.Y. 27, 71 N.E. 258 (1904) (whether alleged libelous statement printed by the defendant was an imputation of a crime under Brazilian law).

a controversy's "center of gravity," weigh governmental interests, or use forum law absent a strong policy motivation to look elsewhere.<sup>320</sup> It is sufficient for the present discussion to point out that the pre-Rule 44.1 practice regarding a failure to prove foreign law, which through *Crosby*, was appended to the vested-rights philosophy, left much to be desired. A pattern that permits a federal court to take judicial notice of the law of England, Mexico, or Spain as of a certain date because it happened to have been in force in a territory that has since become part of the United States, but requires a dismissal on the merits for a failure to establish the present-day equivalent of the same law, has a touch of factitiousness to it.<sup>321</sup> A scheme of this type makes even less sense under Rule 44.1 because its primary application would be in cases in which foreign law could not be ascertained despite the diligent efforts of both counsel and the trial judge. It simply is not fair to bar a party from recovering when neither his attorney nor the court is able to conjure up the content of the governing law. To speak of a failure of proof or to assume that the party has no rights under the controlling law in these circumstances is inappropriate.

Turning to the burden of proof tangent, it is easy to state the traditional allocations. One of the by-products of the *Crosby* case and the vested-rights tradition is that the burden of proving foreign law generally has fallen on the party whose cause of action or defense

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320. The "new" conflicts methodologies are exemplified in cases such as *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 261 (1961); *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), 95 A.L.R.2d 1 (1964); *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). In admiralty cases, the federal courts have used the "center of gravity" approach to determine the applicable law for some time. *E.g.*, *Jansson v. Swedish Am. Line*, 185 F.2d 212 (1st Cir. 1950); *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957). See also *McClure v. United States Lines Co.*, 368 F.2d 197 (4th Cir. 1966). Some of the recent scholarly writing on the new approaches to conflict of laws include: CAVERS, *THE CHOICE-OF-LAW PROCESS passim* (1965); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, reprinted in CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177 (1963); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966); *Symposium on New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673 (1963) (especially the articles by Professors Cavers, Currie, Ehrenzweig, and Reese). Although the analyses and semantic formulations offered by the scholars differ widely, they seem to lead to substantially the same results in application. See Kay, *Book Review*, 18 J. LEGAL ED. 341 (1966).

321. The contrast is not entirely academic. In *Loree v. Abner*, 57 Fed. 159 (6th Cir. 1893), the Court of Appeals for the Sixth Circuit and the Circuit Court in the District of Kentucky were called upon to apply the colonial law in force in Pennsylvania 170 years earlier. Moreover, the logic of the rule would require the pre-1867 law of Tsarist Russia to be judicially noticed by a federal court in Alaska, whereas a federal court in the Second Circuit would dismiss an action based on current or Tsarist Russian law in the absence of sufficient proof.

is based on it. In those jurisdictions employing the presumption of identity between local and foreign law, this burden has been shifted to the party asserting a lack of identity between the two.<sup>322</sup> One unsettled point is whether the presumption has the effect of shifting only the burden of production or affects the burden of persuasion as well. Although it probably is too early in the development of the new conflicts theories to predict with any certainty, it seems likely that if existing notions of burden of proof are retained in the context of foreign law, both burdens will remain on the party whose case depends upon the contents of foreign law.

When an irremedial failure of proof does occur under Rule 44.1, at the least the federal courts have the freedom to continue applying the variety of exceptions to the proof requirement that they have utilized in the past, assuming that the *Erie* considerations discussed below are not an impediment.<sup>323</sup> Hopefully, the courts will be able to exercise substantially greater flexibility. If the trend away from the *Crosby* case and the strict territorial notion of conflict of laws continues, the crazy-quilt of exceptions and presumptions developed over the years can be replaced by a more cohesive and rational scheme. Even though these judicial doctrines have been extremely useful as safety valves for the pressures created by *Crosby* and have achieved desirable results in particular cases, they are interstitial in character and have acted as palliatives for a judicial unwillingness to accept the consequences of the vested-rights doctrine. If the courts have nurtured the existing inroads on the integrity of the vested-rights system, they should be willing to exercise greater flexibility in dealing with failures in foreign-law proof than is currently practiced.<sup>324</sup>

In an attempt to formulate a better approach to the problem, it might be helpful to examine a situation in which the conflicts rule, whether it be of the new or old *genre*, clearly points to the law of a particular foreign country. To provide a tangible background for the inquiry, posit a lawsuit similar to *Walton*:<sup>325</sup> an action involving

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322. Indeed, the word "presumption" in this context appears to be a euphemism for declaring a shift in the burden of producing evidence or in the burden of persuasion. See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 199-203, 205-08 (1953).

323. See text accompanying notes 407-28 *infra*. The traditional exceptions to the proof requirement are discussed at text accompanying notes 138-50 *supra*.

324. In *Seguros Tepeyac, S.A. v. Bostrom*, 347 F.2d 168, 174 n.3 (5th Cir. 1965), the court commented:

In the interest of arriving at a just adjudication, the trial judge should have discretion in determining whether the law of the forum, with or without the disguise of a presumption, should prevail. This discretion should be especially broad in a state with a civil law background.

325. See text accompanying notes 83-84 *supra*.

a foreign tort in which the plaintiff is content to have his claim measured by forum law and demonstrates no desire to invoke foreign law, whereas the defendant perceives some advantage in applying the law of the place where the tort occurred and has given notice under Rule 44.1 that he intends to challenge the existence of a cause of action under the governing law.

Despite the siren call of countless cases applying burden-of-proof notions to a failure of foreign-law proof, the rejection of the fact characterization of alien law by Federal Rule 44.1 makes it clear that under the new federal practice the failure-of-proof problem does not involve burdens of production and persuasion in any classical sense. Many of the considerations involved in assigning responsibility for proving the facts demonstrating the defendant's negligence or the plaintiff's contributory negligence are inapposite to the question who should establish the content of the foreign law. In the latter context, the text of Rule 44.1 requires the court and counsel for the parties to share the responsibility for ascertaining the relevant rules of law, as they do in cases governed by domestic law, thereby rendering the traditional objectives of burdens of proof irrelevant. This is emphasized by the passages in the new Rule giving the trial court authority to do its own research and directing that foreign-law determinations be treated as rulings on questions of law.<sup>326</sup> The most effective way of insuring that the joint obligation of court and counsel is properly discharged is by giving the trial court discretion to allocate the workload entailed in establishing foreign law in light of such factors as convenience and economy; to insist upon the application of traditional burdens of proof is as ill-advised as it is illogical.

Even if one is hesitant about completely severing the umbilical cord to the past, a modicum of rationality can be provided within the confines of the existing burden-of-proof structure. Admittedly, there is something superficially attractive about the following set of alternative propositions: (1) a plaintiff who seeks relief on a cause of action that can be maintained in a federal court only if it can be asserted in the country in which the operative events occurred (either because the forum does not recognize the plaintiff's cause of action or because the forum does recognize it, but the applicable conflicts principle requires the application of foreign law) should bear the burden of establishing the content of that law; or (2) forum law should be applied unless a party who seeks to gain some advantage by displacing it with foreign law assumes the burden of establishing

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326. The text of Rule 44.1 is set out in note 5 *supra*.

the latter. Allocation of the task of establishing foreign law in terms of an alleged symbiotic relationship between conflict of laws rules and burdens of proof hardly seems inevitable, however. The burden of establishing a cause of action or defense under the controlling foreign law normally should rest on the party who would bear that burden if the litigation were governed by forum law. Thus, if the identity presumption is followed and the defendant wishes to overcome it, he should not be required to do more than produce enough evidence to show that the presumption is unrealistic in the particular case; the plaintiff ought to have the ultimate task of persuading the court that a cause of action exists under foreign law. Phrased somewhat differently, the party who raises a foreign-law issue should bear the initial burden of production but not necessarily the ultimate burden of persuasion.<sup>327</sup> This allocation is a rough equivalent of the view that a party who pleads the existence of a fact has the burden of presenting the first evidence with regard to it.<sup>328</sup> The suggested approach is somewhat more difficult to employ if the court adopts the "new" conflict of laws approach and uses an interest analysis in selecting the governing law. Sound application of that technique requires the court to analyze the content of the various potentially controlling laws before one is chosen. Thus, neither party has a burden with regard to ascertaining the applicable law in any meaningful sense. Nonetheless, it still might be advantageous to divorce the process of showing the character of foreign law for purposes of determining whether it should govern the lawsuit from the question of who has the burden of establishing a right to relief under the law ultimately chosen.

In the context of the hypothetical, the approach suggested in the

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327. There is a conflict among the commentators as to the effect of a presumption on these two burdens. Compare THAYER, A PRELIMINARY TREATISE ON EVIDENCE 339 (1898), and 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940), with Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1938), and Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 819 (1942). See also Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401 (1906).

The suggestion in text finds support in *Northwest Orient Airlines, Inc. v. Gorter*, 254 F.2d 652 (9th Cir. 1958), in which the appellee, an administratrix, sought damages for wrongful death stemming from the grounding of one of the appellant's airplanes in the tidal waters of the Pacific off the Dominion of Canada. The trial court presumed that the law of the place of injury was the same as Washington law and ignored the airline's motion after trial but prior to the entry of judgment to amend its answer to show that the Dominion of Canada had jurisdiction over the place of injury and that the applicable wrongful death act barred recovery. The Ninth Circuit, applying Washington law, stated that "the presumption of identity to Washington law of the law of another country disappears when evidence to the contrary is introduced." *Id.* at 653 n.3.

328. See McCORMICK, EVIDENCE §§ 306-07 (1954). See also 9 WIGMORE, EVIDENCE § 2489 (3d ed. 1940).



preceding paragraphs simply means that if the federal court concluded that the dispute is governed by the law of the country in which the tort occurred, the burden of proving that country's law of negligence, contributory negligence, and any other significant legal principles would be assigned in accordance with the allocation normally made of those issues in domestic actions or, when the forum's conflicts principles require, in accordance with the burdens prescribed by the applicable foreign law. The same treatment would be appropriate when the issues of foreign law are collateral to the main dispute and there is no choice-of-law problem.

Whatever treatment is accorded the burden problem, it must contain a degree of flexibility. In certain situations it may be proper to permit the trial court to exercise considerable discretion in assigning the burden. For example, if the parties have unequal access to foreign-law materials, fairness and litigation economics may warrant a departure from the traditional approaches. Thus, if the hypothetical is embellished by adding such facts as an accident in Afghanistan between an American plaintiff who has had no contact with Afghanistan other than his presence there at the time of the accident and an American corporate defendant with continuous and extensive commercial dealings in that country, it may be appropriate to ask the defendant to establish the content of Afghanistan law or at least to present whatever relevant legal materials are available to him, even though the burden normally would be on the plaintiff.<sup>329</sup> A full or partial reassignment of the burden also would be justifiable if one of the litigants is an Afghan or if the party with superior access to information concerning Afghan law has assiduously avoided mentioning its relevance.<sup>330</sup> A substantial number of additional variables, including the importance and character of the action, the level of the forum's interest in the dispute, the complexity of foreign law, and the difficulties of determining it, bear on the court's willingness to manipulate the burden. Although trial court discretion to reallocate the burden in order to minimize the number of cases in

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329. See Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 62, 66 (1954); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1042-43 (1941).

330. Although some of the commentators have expressed a lack of enthusiasm for assigning burdens of persuasion in terms of relative access to information, they do recognize that the burden-allocation process lacks a "key-principle" and generally retreat either to prior practice or to notions of "convenience, fairness and policy" to support their positions. See, e.g., McCORMICK, EVIDENCE § 318 (1954); 9 WIGMORE, EVIDENCE §§ 2486, 2488 (3d ed. 1940). The importance of the relative access to information is supported by the use of presumptions for procedural convenience. See McCORMICK, EVIDENCE § 309 (1954). See also Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937).

which foreign law cannot be ascertained may be viewed as a degree of flexibility approximating anarchy, it is not completely heretical as far as burden-of-proof doctrine is concerned and it is in accord with the new Rule's objective of maximizing the ability to establish foreign law.

The ultimate question, of course, is what is the appropriate *denouement* when the court has decided that foreign law controls and has allocated the burdens of production and persuasion, but the party with the latter burden has failed to discharge it? One obvious answer is that the normal consequences of a failure to discharge a burden should accrue. When the foreign-law issue merely is incidental or collateral to the controversy, this probably is sound. When foreign law is the source of the rules of decision, however, the justification for this approach is less apparent, especially if the forum's conflicts principles have any degree of elasticity. In any sensitive system for selecting the applicable law, an initial choice in favor of foreign rather than domestic law is tentative and to some degree presumes a capacity and willingness to ascertain the chosen law. Indeed, the court may have gravitated toward alien law because its content was thought fairer to the parties than domestic law or because the court believed that the nexus between the foreign country and the controversy was stronger than the tie between the forum and the dispute. If the party with the burden cannot (or occasionally even when he will not) establish foreign law, at least one of the premises upon which the court based its original decision to apply foreign law has proven to be inaccurate. Inasmuch as continued insistence on foreign law may result in the plaintiff's dismissal despite the possibility that a valid cause of action actually exists under foreign law, the court may wish to reappraise its initial reference to foreign law and consider the application of forum law. For example, when one or both of the litigants is a citizen of the forum and the failure to establish foreign law is not deliberate but stems from its esoteric or underdeveloped character,<sup>331</sup> there is little reason not to apply

331. See VON MEHREN & TRAUTMANN, *THE LAW OF MULTISTATE PROBLEMS* 99 (1965). Conversely, if neither party is a citizen of the forum state or if the federal court does not have any strong interest in the outcome of the litigation and does not find any rational basis for reallocating the burden or applying local law, it may choose to dismiss the action on the basis of *forum non conveniens*. The advantage of this escape valve is that it avoids an adjudication on the merits based on a failure to prove foreign law that will bar the losing party from seeking relief in another forum under more advantageous circumstances. Normally, however, the mere fact that proof of foreign law may be difficult is not a sufficient basis for granting a *forum-non-conveniens* motion. See *Horowitz v. Renault, Inc.*, 162 F. Supp. 344 (S.D.N.Y. 1958); cf. *La Electronica, Inc. v. Electric Storage Battery Co.*, 260 F. Supp. 915 (D.P.R. 1966). See also *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611 (3d Cir. 1966).

domestic law. The reasons for reassessing the decision to apply alien law become even more persuasive if, as suggested, the concept of burden of proof is considered inapposite to a failure to ascertain foreign law under Rule 44.1.

#### D. *The Implications of Erie R.R. v. Tompkins*

##### 1. *Setting the Stage*

Probably no Supreme Court decision rendered during this century has had as significant an impact on the distribution of judicial power between the federal government and the states as has *Erie R.R. v. Tompkins*.<sup>332</sup> Viewed narrowly, the case merely rejected the prevalent pre-1938 notion that section 34 of the Judiciary Act of 1789, the so-called Rules of Decision Act,<sup>333</sup> requires a federal court in diversity litigation to apply the statutes and certain limited categories of local rules and customs, but not the common law, of the states.<sup>334</sup> In doing so the Court upheld the constitutionality of the

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332. 304 U.S. 64 (1938). In view of the massive amount of literature on the *Erie* doctrine and the emphasis given it in current law-school curricula, it would be profligate to state the case's facts. Throughout this discussion case recitation will be minimized.

333. 1 Stat. 92 (1789), as amended, 28 U.S.C. § 1652 (1964).

334. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). See also WRIGHT, *FEDERAL COURTS* § 54 (1963). The *Erie* doctrine is neither applicable to all diversity cases nor limited to diversity cases. Occasionally, its relevance will depend on the source or nature of the right being asserted and the litigation's impact on national policies rather than on the technical character of the federal court's subject-matter jurisdiction. See, e.g., HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 697-99 (1953); Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953); Mishkin, *The Variosness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248 (1963). Since this facet of *Erie* jurisprudence is beyond the scope of this article, the textual discussion proceeds with the relatively uncluttered diversity case as its model.

Viewing *Erie* solely as an interpretation of the Rules of Decision Act, 28 U.S.C. § 1652 (1964), Federal Rule 44.1 would not present an *Erie* problem if it could be brought under the aegis of the specific exemption in that act for matters that are the subject of federal statute. Arguably, a Federal Rule promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1964), either has the status of a United States statute or is a matter with a sufficient nexus to a federal statute to fall within the intended coverage of the Rules of Decision Act. See Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 480 (1957). The Enabling Act is discussed in detail at text accompanying notes 475-519 *infra*.

The precise status of the Federal Rules of Civil Procedure has been a subject of considerable debate. The dissent of Mr. Justice Frankfurter in *Sibbach v. Wilson*, 312 U.S. 1 (1941), *rehearing denied*, 312 U.S. 655 (1941), concurred in by three other Justices, contains a statement that the Rules cannot be equated with federal statutes. A majority of the Court appears to have taken a contrary view. See Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030, 1031 (1949); Note, *State Jurisdictional Limitations Applied to Diversity Cases*, 1957 WIS. L. REV. 339. See also Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in*

Rules of Decision Act and simply invalidated the judicial construction given it during the reign of *Swift v. Tyson*.<sup>335</sup> However, Mr. Justice Brandeis' opinion for the Court purports to rest the case partially on constitutional considerations. In the third part of his opinion, the Justice argued:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>336</sup>

The possibility that Mr. Justice Brandeis intended this passage as a flourish or make-weight to add force to his rationalization of the drastic changes worked by *Erie* caused the lower federal courts to take little notice of the case's constitutional basis for almost twenty years and led several writers to question the significance of that aspect of the *Erie* opinion.<sup>337</sup>

Then in *Bernhardt v. Polygraphic Co.*,<sup>338</sup> decided in 1956, the constitutional foundation of Mr. Justice Brandeis' opinion in *Erie* was resurrected by the Supreme Court. The issue in *Bernhardt* was whether the federal Arbitration Act should be applied in a diversity case to a New York employment contract when the law of the forum state permits the revocation of an agreement to arbitrate at any time before an award is made. The Court interpreted the Arbitration Act narrowly to avoid a constitutional problem it described as follows: "*Erie* . . . indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."<sup>339</sup> According to the Court, the issue being

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*Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Note, 29 CALIF. L. REV. 543, 545-46 (1941). The quasi-statutory nature of the Rules seems to have been reinforced by *Hanna v. Plumer*, 380 U.S. 460 (1965). See text accompanying notes 364-74 *infra*.

335. 41 U.S. (16 Pet.) 1 (1842).

336. 304 U.S. at 78.

337. See, e.g., COOK, THE LOGICAL LEGAL BASIS OF THE CONFLICT OF LAWS 138-43 (1942); Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case*, 31 KY. L.J. 99 (1943); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278-79 (1946); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1024-35 (1953); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 186, 188-204 (1957). See also *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

338. 350 U.S. 198 (1956).

339. *Id.* at 202.

avoided was "whether arbitration touched on substantive rights, which *Erie* . . . held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe."<sup>340</sup>

Although the *Bernhardt* opinion does not deal directly with the status of matters of procedure under *Erie*, the last portion of the second passage quoted above seems to leave federal procedure within Congress' competence.<sup>341</sup> Given the language in *Bernhardt*, one might expect that the federal courts would have reached the conclusion that the Rules Enabling Act,<sup>342</sup> which is limited by its terms to practice and procedure, is a valid exercise of congressional power and is immune to an *Erie* challenge, and that any Federal Rule of Civil Procedure falling within the legitimate scope of the act also is invulnerable to an attack under *Erie*.<sup>343</sup> This conception of the interrelationship between *Erie* and the Federal Rules apparently had support immediately following the *Erie* decision<sup>344</sup> but the support atrophied when the Supreme Court transmuted the *Erie* philosophy in order to effectuate policies that had been expressed *sotto voce* in the original decision; as shall be seen below, however, this attitude may now be enjoying a renaissance in a slightly modified form.

340. *Ibid.* Although dictum, this language carries the implication that *Erie* disabled Congress from enacting any legislation applicable in diversity litigation that "touched on substantive rights." See generally WRIGHT, FEDERAL COURTS § 56, at 196-98 (1963); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 441 (1958); Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEXAS L. REV. 549, 550-54 (1959).

341. Mr. Justice Reed remarked in his concurring opinion in *Erie*: "The line between procedural and substantive law is hazy but no one doubts federal power over procedure." 304 U.S. at 92.

342. 28 U.S.C. § 2072 (1964).

343. See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1046-49 (1961). An unstated premise in this analysis is that "substance" and "procedure" have similar meanings in both the Enabling Act and *Erie* contexts. For some time the propriety of this premise was considered extremely doubtful. See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 715 (1950). *Hanna v. Plumer*, 380 U.S. 460 (1965), may well have had the effect of bringing the two standards together, at least with regard to testing the validity of the Federal Rules of Civil Procedure. See text accompanying notes 364-74 *infra*. Nonetheless, the argument that the *Erie* concept of "substantive"—that which the Constitution declares untouchable by Congress—is narrower than the Rules Enabling Act concept of "substantive"—that which Congress has declared untouchable by the Supreme Court and their rulemakers—cannot be consigned to oblivion.

344. In *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940), Judge Magruder commented:

[I]t is not doubted that Congress has the power to prescribe the "procedure" for the federal courts, and this would certainly include a power to include within the domain of "procedure" subject-matter falling within the borderland between substance and procedure, and rationally capable of classification within either category.

*Id.* at 756 n.4. See also Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins*, 24 J. AM. JUD. SOC'Y 57 (1940).

Between 1938 and *Bernhardt*, the Supreme Court gave the *Erie* doctrine an everwidening scope. In *Klaxon Co. v. Stentor Electric Mfg. Co.*,<sup>345</sup> the Court held that in diversity cases the federal judiciary was obliged to apply the conflict-of-laws principles of the forum state because "otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side."<sup>346</sup> Thus, the elimination of shopping as between state and federal fora, a pernicious characteristic of the *Swift v. Tyson* era but hardly the leitmotiv of Mr. Justice Brandeis' opinion in *Erie*, became a rationale for tying the federal judiciary to state conflicts rules.<sup>347</sup> The *Klaxon* case also made clear what was implicit in *Erie*: the words "substance" and "procedure" take on new meanings in the *Erie* environment, and categorizations evolved in other contexts are not necessarily apposite.

In *Guaranty Trust Co. v. York*,<sup>348</sup> the Supreme Court considered the propriety of a federal court granting equitable relief when a state court would have been foreclosed from awarding similar relief by the relevant state statute of limitations. The Court, speaking through Mr. Justice Frankfurter, refused to apply the so-called equitable remedial rights doctrine and stated, in a passage that is indelibly inscribed on the minds of a generation of law students and Erieticians:

Here we are dealing with a right to recover derived not from the United States but from one of the States. . . . [T]he forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is

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345. 313 U.S. 487 (1941).

346. *Id.* at 496.

347. See also *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358 (9th Cir. 1966). For a criticism of the *Klaxon* result in terms of constitutional power, see Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 541, 543-68 (1958). Variant appraisals of *Klaxon* are found in CAVERS, *THE CHOICE OF LAW PROCESS* 216-24 (1965); WRIGHT, *FEDERAL COURTS* § 57 (1963); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732 (1963); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954).

348. 326 U.S. 99 (1945), 44 MICH. L. REV. 477 (1945), 21 N.Y.U.L.Q. REV. 145 (1946), 31 VA. L. REV. 948 (1945).

whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R.R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.<sup>349</sup>

Thus emerged the outcome-determinative test—an attempt to prevent a federal court in diversity litigation from reaching a decision at variance with the result that would obtain in a state court in a comparable case.<sup>350</sup>

The Supreme Court decided two cases in 1949 involving "clashes" between the outcome-determinative test and the Federal Rules of Civil Procedure. In *Ragan v. Merchants Transfer & Warehouse Co.*,<sup>351</sup> the plaintiff commenced a tort action pursuant to Federal Rule 3 by *filing* a complaint within the Kansas two-year limitations

349. *Id.* at 108-09. Mr. Justice Rutledge, with whom Mr. Justice Murphy joined, dissented and warned of the "danger . . . of nullifying the power of Congress to control not only how the federal courts may act, but what they may do by way of affording remedies . . ." *Id.* at 116. See also *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

350. See *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), 35 CORNELL L.Q. 420 (1950), 44 ILL. L. REV. 533 (1949), 24 IND. L.J. 418 (1949), 28 TEXAS L. REV. 444 (1950); *Angel v. Bullington*, 330 U.S. 183 (1947). Note that the outcome-determinative test is not necessarily constitutionally based but may be an attempt to determine Congress' intent in the Rules of Decision Act or, with regard to the test's application to the Federal Rules, in the Rules Enabling Act. Premonitions of the *York* result were sounded in *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940); *Morgan, Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 158, 195 (1944); *Tunks, Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271, 278 (1939).

351. 337 U.S. 530 (1949), 35 CORNELL L.Q. 420 (1950), 38 GEO. L.J. 115 (1949), 48 MICH. L. REV. 531 (1950).

period but *service* on the defendant was not made until after that period had expired. Under Kansas law a statute of limitations was not tolled until the defendant was served. The Court concluded that the tolling provision was an integral part of the limitations statute and held the action barred in the federal courts because it was barred in the state courts. "Since that cause of action is created by local law, the measure of it is to be found only in local law. . . . Where local law qualifies or abridges it, the federal court must follow suit."<sup>352</sup> In the second case, *Cohen v. Beneficial Industrial Loan Corp.*,<sup>353</sup> the Court applied a New Jersey statute obliging a plaintiff in a stockholder derivative action to post security for litigation expenses even though former Federal Rule 23(b), now Rule 23.1, did not contain a similar requirement. The Court reasoned that the New Jersey statute created an independent right of action for costs and expenses in favor of the defendant that was protected by the security provision, and that this substantive policy had to be effectuated by the New Jersey federal court.

Although *Ragan* and *Cohen* do impinge upon the integrity of the Federal Rules of Civil Procedure, their impact probably is less drastic than some writers have indicated.<sup>354</sup> The cases did superimpose state substantive law on the application of the Federal Rules but they did not invalidate Rule 3 or former Rule 23(b). In *Ragan* the action clearly was "commenced" within the meaning of Rule 3 for purposes of filing the action and measuring various time periods under the Federal Rules; the substantive rights created by Kansas law were rendered unenforceable in a federal court because they were not asserted within the time limits established by that state's law. In *Cohen*, New Jersey's policy of securing the defendant's ability to enforce the plaintiff's liability for the expenses of an unsuccessful derivative action was believed sufficiently strong to warrant its application by the federal court in addition to the safeguards already provided for the defendant in Rule 23(b). When viewed as instances of the cumulation of state and federal law, rather than as a displacement of the latter, *Ragan* simply means that Rule 3 does not determine the point at which certain state-created rights are extinguished and *Cohen* merely holds that compliance with Rule 23 does not

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<sup>352</sup> *Id.* at 533.

<sup>353</sup> 337 U.S. 541 (1949), 35 CORNELL L.Q. 420 (1950), 48 MICH. L. REV. 706 (1950), 35 VA. L. REV. 789 (1949).

<sup>354</sup> See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 674-78 (1953); Clark, Book Review, 36 CORNELL L.Q. 181 (1950). Other writers have been less pessimistic. E.g., Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 RECORD OF N.Y.C.B.A. 64, 78-79 (1964).



automatically guarantee a federal forum when the state imposes additional impediments to access to its own courts in shareholder derivative suits.<sup>355</sup>

However, neither *Ragan* nor *Cohen* considered the possibility that the Federal Rules and the inferences emanating from them embody significant federal policies that should not have been subordinated to the policies reflected in the state statutes applied in those cases. Thus, for example, even if the statute involved in *Cohen* expressed New Jersey's desire to restrict shareholder derivative suits, might not former Federal Rule 23(b) represent a policy permitting comparatively easy access to the federal courts in such actions—a policy based upon a panoply of judicial administration factors different from the considerations that led the New Jersey legislature to constrict access to its own courts? Even if the New Jersey statute reflected that state's appraisal of the balance to be struck between corporations and their shareholders, should not the policy underlying Federal Rule 23(b) at least have been revealed and evaluated? In short, the holdings in *Ragan* and *Cohen* appear to be based on either (1) the unstated premise that the Supreme Court, despite the Rules Enabling Act, is impotent to promulgate a rule touching on matters of "substantive" law that will be operative in diversity litigation if it conflicts with state policy or (2) the unexpressed assumption that Federal Rules 3 and 23(b) do not reflect significant federal policies but merely articulate relatively banal procedural objectives.

Untrammelled application of the outcome-determinative formulation of *York* and its extension in *Cohen* and *Ragan* would require abandoning any hope of obtaining procedural uniformity among the national trial courts in diversity cases; almost any procedural rule may assume outcome-determinative dimensions in particular contexts.<sup>356</sup> Similarly, nothing short of obsequious conformity to state practice could eliminate forum shopping; even the relative condition of court calendars and the different qualities of state and federal judges might influence a litigant's forum choice. Moreover, the fact that the Constitution does not bestow power on the Congress or the federal courts to enact substantive law for diversity cases does not mean that the Constitution requires unerring identity of outcome between state and federal courts. That view ignores the exis-

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355. Cf. *Iovino v. Waterson*, 274 F.2d 41, 47-48 (2d Cir. 1959), *cert. denied sub nom. Carlin v. Iovino*, 362 U.S. 949 (1960).

356. See Clark, *supra* note 354, at 183; Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 450-51 (1958). For a catalog of the Federal Rules that might be affected by an unremitting quest for identity of outcome, see Hill, *supra* at 432-35.

tence of the Constitution's grant of diversity jurisdiction. By casting a federal court sitting in diversity jurisdiction in the role of a servile state tribunal, much of the desired protection theoretically afforded out-of-state litigants may be compromised. A strict outcome-determinative approach also ignores the value of preserving the equity powers traditionally exercised by federal courts and misses the importance of insuring an impartial adjudication of federal rights, which often are involved in diversity cases. This failure to give weight to the independence of the federal judiciary and to the frequent presence of important federal policies in diversity cases represents the weakest aspect of the *York* doctrine.<sup>357</sup>

The most recent chapter in the *Erie* saga indicates that the trend established by *York*, *Ragan*, and *Cohen* has been reversed. It starts with *Byrd v. Blue Ridge Rural Electric Co-operative, Inc.*,<sup>358</sup> decided two years after *Bernhardt*, in which the crucial question was whether the dispute was subject to the South Carolina Workmen's Compensation Act, and therefore resolvable only through the state administrative procedures, or could be heard in the federal courts. A jury verdict in the plaintiff's favor was reversed by the Fourth Circuit. The Supreme Court remanded the case to the trial court to permit the plaintiff to present evidence as to whether he was an employee of the defendant, which would determine whether the plaintiff fell within the Workmen's Compensation Act; the plaintiff had been denied that opportunity in the lower court. The Court, holding that South Carolina's practice of having the court determine an issue of the act's coverage was not an integral or substantive part of the state's Workmen's Compensation Act but was "merely a form and mode of enforcing the immunity . . . and not . . . intended to be bound up with the definition of the rights and obligations of the parties,"<sup>359</sup> directed the District Court to leave the question to the jury. Apropos of the *York* rule, the Court observed that if "outcome" were the only factor, the federal court might well be required to follow state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering

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357. It has been suggested that the test should be predictability prior to the time the forum is chosen. See Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 953, 956 (1951). See also Horowitz, *Erie R.R. v. Tompkins—A Test To Determine Those Rules of State Law to Which Its Doctrine Applies*, 23 SO. CAL. L. REV. 204, 214-15 (1950). Although this approach might cure the forum-shopping aspect of *Erie*, it may not always meet the problem of avoiding results in the federal courts that differ from those reached in the state courts.

358. 356 U.S. 525 (1958), 72 HARV. L. REV. 147 (1958), 43 MINN. L. REV. 580 (1959).

359. *Id.* at 536.

justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which . . . it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. . . . Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.<sup>360</sup>

The Court's decision seems to have been influenced by its belief that it was unlikely that the outcome of the case would be different if heard by a federal jury rather than by a state judge.<sup>361</sup>

At first glance, *Byrd* seems limited by its peculiar facts. Even though the Court did not base its decision on the seventh amendment, the "brooding omnipresence" of the constitutional status of the jury-trial right offers a basis for containing the application of the case's expansive language.<sup>362</sup> Moreover, no "likelihood of a different result" was shown in *Byrd*, which may mean that substituting a jury for a court determination does not raise a *York* problem. Despite these reasons for a conservative reading of *Byrd*, several courts of appeals have used the case to bypass *Erie* and preserve the integrity of the Federal Rules.<sup>363</sup> These courts have taken the position that

360. *Id.* at 537-38. See also *Simler v. Conner*, 372 U.S. 221 (1963); *Shenandoah Life Ins. Co. v. Hawes*, 256 F. Supp. 366 (E.D.N.C. 1966). A pre-*Byrd* decision of like tenor is *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575, 582 (5th Cir. 1957).

361. "We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." 356 U.S. at 540. In *Bernhardt* the Court had said that "the change from a court of law to an arbitration panel may make a radical difference in ultimate results." 350 U.S. at 203. Note, however, that the difference in "ultimate result" in *Byrd* is not predictable as it was in the *York* case.

362. 356 U.S. at 537 n.10. The commentators have expressed widely divergent views on the importance of *Byrd*. See Degan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 292-301 (1962); Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1098-99 (1963); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962); Weintraub, *The Erie Doctrine and State Conflict of Law Rules*, 39 IND. L.J. 228, 235-37 (1964); Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEXAS L. REV. 549, 554-63 (1959).

363. In *Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959), *cert. denied sub nom. Carlin v. Iovino*, 362 U.S. 949 (1960), the Second Circuit permitted substitution of an out-of-state administrator as plaintiff under Federal Rule 25(a)(1), although New York law would not have permitted substitution and the action could not have been maintained in a state court. Judge Friendly rejected the application of *York* on two grounds: first, whereas *York* involved a defined state policy embodied in a statute, he could find no such policy prohibiting revivor against a foreign administrator;

*Byrd* requires any relevant federal policies that will be encroached upon by the application of state law to be balanced against the desiderata of achieving identity of result and respecting state substantive policies. In addition, a number of decisions in which particular Federal Rules of Civil Procedure have been upheld support the proposition that the Rules express federal attitudes on the

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second, in *York* there was no federal legislation or clear federal policy covering the point in issue. *Byrd* was cited for the proposition that considerations other than mere "outcome" were relevant. Said the court:

Our holding is only that in this limited area Congress may use its power to "provide for service of process anywhere in the United States" in such a manner that in all suits properly in the Federal courts by or against United States citizens, including diversity suits, substitution of their personal representatives may be had on their decease. This is an area which the positive inference from Article III and the "necessary and proper" clause outweighs the negative inference from the limited grant of legislative power in Article I, § 8, and the Tenth Amendment that must have afforded the basis for the constitutional precept of *Erie*.

*Id.* at 48.

*Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960), held that a prior inconsistent statement of an officer of the defendant corporation was admissible in the federal courts under Rule 43(a), although a Florida statute seemed to exclude it. Again, *Byrd* was construed to indicate that:

[A]ll does not necessarily fall in the path of uniformity of result. So to determination of whether the application of the state rule would likely affect the outcome in a significant way must now be added the further one. Are there countervailing considerations reflecting substantial federal policies which outweigh in final balance the aim of like result? . . .

Not the least of these countervailing considerations is the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause. . . . A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state's judicial machinery. In entertaining diversity cases it is responding to a constitutional demand made effective by congressional action and . . . has a constitutional duty to hear and adjudicate. . . .

. . . An important countervailing policy consideration in the *Blue Ridge* sense therefore is the historic purpose of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act.

*Id.* at 406-08. As in *Iovino*, the Fifth Circuit in *Monarch* engaged in an analysis of the underlying premises of the Florida rule of exclusion. Finding no policy that would justify exclusion of the evidence in a federal court, it was held admissible.

The *Monarch* decision was referred to by the Fifth Circuit in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961), as standing for the proposition that the admissibility of evidence "is procedural, not substantive." The *Dallas County* case reaffirmed the proposition and held that the admissibility of a fifty-eight year old newspaper clipping was within the discretion of the federal court. The same result is implicit in *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961), *cert. denied*, 368 U.S. 956 (1962), although the *Erie* issue is discussed only in the dissenting opinion by Judge Moore. The majority opinion in *Hope* approvingly cites the *Monarch* discussion of Rule 43(a) and the problems posed by *Erie*. See also *McDonald v. United Airlines, Inc.*, 365 F.2d 593 (10th Cir. 1966). For a further discussion of various circuit court decisions, see WRIGHT, FEDERAL COURTS § 59 (1963).

Several post-*Byrd* circuit court cases applied the outcome-determination test of *York*, however. *E.g.*, *Hardwick v. Smith*, 286 F.2d 81 (10th Cir. 1961); *Summers v. Wallace Hosp.*, 276 F.2d 831 (9th Cir. 1960); *Aponte v. American Sur. Co.*, 276 F.2d 678 (1st Cir. 1960). An excellent Chautauqua on *Byrd* was conducted by Judges Clark and Friendly in *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963), and *Jافتex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

administration of justice in the district courts and that they reflect a congressional desire for a uniform, national procedural system applicable in all civil actions regardless of the basis of subject-matter jurisdiction. Thus, *Byrd* has produced a series of *ad hoc* analyses of the policies underlying various Federal Rules and a series of evaluations of whether those policies are sufficiently important to outweigh contrary state practices. This process imposes a difficult burden upon the courts, often results in abstract distinctions, and requires decisions that on many occasions are made without knowing whether the ruling will have any practical impact on the case. Nonetheless, the *Byrd* approach seems preferable to the complete absence of concern for federal interests that pervaded the *York*, *Ragan*, and *Cohen* regime.

In 1965, the Supreme Court again had occasion to consider the impact of the *Erie-York-Byrd* complex on the Federal Rules of Civil Procedure. This time the vehicle was *Hanna v. Plumer*.<sup>364</sup> At issue was whether a plaintiff in a Massachusetts diversity action, brought against an executor for personal injuries inflicted upon the plaintiff in South Carolina by the defendant's testatrix, could commence the lawsuit by substituted service under Federal Rule 4(d)(1) or was obliged to comply with a Massachusetts statute<sup>365</sup> requiring service "by delivery in hand" within one year after an executor posts bond for the performance of his duties. Both the district court and the First Circuit, concluding that the propriety of service of process should be tested with reference to the Massachusetts statute, granted the defendant's motion for summary judgment because timely in-hand service had not been made on the executor. The Supreme Court, in an opinion written by Mr. Chief Justice Warren, concluded that Rule 4(d)(1) "neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service."<sup>366</sup>

The Court disposed of the argument that the "outcome-deter-

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364. 380 U.S. 460 (1965), 54 CALIF. L. REV. 1382, 51 CORNELL L.Q. 551, 1966 DUKE L.J. 142, 27 OHIO ST. L.J. 345, 13 U.C.L.A.L. REV. 413 (1966).

365. MASS. GEN. LAWS ANN. ch. 197, § 9 (1955).

366. 380 U.S. at 464. In retrospect, *Hanna* appears to have been foreshadowed by *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), which also involved the validity of serving on an agent under Rule 4(d)(1). In upholding service, the Court impliedly rejected Mr. Justice Black's argument in dissent that the agency was invalid under the forum state's law and that the foreign defendants had been deprived of their right to be sued in their home state, a right the Justice felt was guaranteed them by *Erie*.

minative" test required application of the Massachusetts statute as follows:

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal time-table will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. . . . Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of inhand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.<sup>367</sup>

In a later portion of his opinion, the Chief Justice concluded that *Erie* considerations do not determine the validity or applicability of a Federal Rule. He argued that "the *Erie* rule has never been invoked to void a Federal Rule";<sup>368</sup> *Cohen, Ragan*, and similar cases were distinguished as instances in which the Federal Rule did not cover the point in dispute. According to the Chief Justice, a clash between a Federal Rule and local law—clearly present in *Hanna*—is resolved by applying the Federal Rule unless it can be demonstrated that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."<sup>369</sup> Although *Byrd* was not cited in the Court's discussion of the Federal Rules, its philosophy seems implicit in the notion that the Federal Rules are to be given effect despite contrary state law

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<sup>367</sup> 380 U.S. at 468-69. In redefining the *Erie* and "outcome-determination" policies, the Court emphasized the elimination of forum shopping and the "inequitable administration of the laws." The Chief Justice's opinion clearly manifests a lessened preoccupation with uniformity of outcome. See McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 888-901 (1965).

<sup>368</sup> 380 U.S. at 470.

<sup>369</sup> *Id.* at 471.

because of the federal policy inherent in "the constitutional provision for a federal court system" and the exercise of "congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."<sup>370</sup>

But has the pendulum swung too far? In a concurring opinion—there were no dissents—Mr. Justice Harlan suggested that it has and chastised the Court for straying too far from the basic precepts of *Erie*. He believed that the Chief Justice's opinion unduly sanctified the Federal Rules because if "a reasonable man [and those charged with the responsibility for formulating the rules "are presumably reasonable men"] could characterize any duly adopted federal rule as 'procedural,' the Court . . . would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens."<sup>371</sup>

*Hanna* seems to require that a federal court confronted with a challenge to a Federal Rule decide initially whether the Rule actually conflicts with state law or whether it is narrower in scope and permits the superimposition of state law, as in *Ragan* and *Cohen*.<sup>372</sup> If a conflict does exist,<sup>373</sup> the court must then determine whether the Federal Rule falls within the ambit of articles I and III of the Constitution and the delegation in the Rules Enabling Act.<sup>374</sup> Apparently abandoned (especially if Mr. Justice Harlan's appraisal of the majority opinion is accurate) is the notion derived from *Byrd* by several courts and commentators that competing state and federal practices must be balanced and that state practice can be permitted

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370. *Id.* at 472. The Court also remarked that "neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is co-extensive with the limitations on Congress to which *Erie* has adverted." *Ibid.*

371. *Id.* at 476. Mr. Justice Harlan believed the question to be whether "choice of a rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Id.* at 475.

372. See *Kuchenig v. California Co.*, 350 F.2d 551 (5th Cir. 1965), *cert. denied*, 382 U.S. 985 (1966).

373. See *Sylvestri v. Warner & Swasey Co.*, 244 F. Supp. 524 (S.D.N.Y. 1965), in which Judge Wyatt expresses the view that *Ragan* would not be followed after *Hanna*. That conclusion is not inevitable. Indeed, two circuits have concluded that FED. R. CIV. P. 3 does not purport to deal with the question of when an action is commenced for purposes of measuring the relevant limitations period. *Groninger v. Davison*, 364 F.2d 638 (8th Cir. 1966); *Sylvester v. Messler*, 351 F.2d 472 (6th Cir. 1965). The same approach can be taken toward *Cohen*. See also *Pinewood Gin Co. v. Carolina Power & Light Co.*, 41 F.R.D. 221 (D.S.C. 1966) (Rule 17(a) applied under *Hanna* despite contrary South Carolina practice).

374. See text accompanying notes 429-519 *infra* for a discussion of the Rules Enabling Act.

to prevail only when it is "bound up with the definition of the rights and obligations of the parties."<sup>375</sup>

## 2. *Rule 44.1 and the Erie Doctrine*

Given the tortuous evolution of the *Erie* doctrine and the new analytic framework provided by *Hanna*, what is the status of Federal Rule 44.1 in diversity cases? Approaching the Rule anatomically,<sup>376</sup> the provision in the first sentence requiring that the court and adverse parties be given "reasonable written notice" of an intent to rely on foreign law appears immune from challenge. Procedures for giving notice and pleading are among the most traditional "practice" subjects. If they are held outcome determinative, the goal of uniform application of the Federal Rules in diversity litigation is unobtainable. Even during the heyday of *Erie* and *York* the courts preserved the integrity of the pleading provisions in the Federal Rules,<sup>377</sup> and a contrary conclusion with regard to Rule 44.1 hardly seems conceivable. The notice-giving or quasi-pleading character of the first sentence of the new Rule falls under the aegis of the *Erie-York* era pleading cases and unquestionably is the beneficiary of the expanded protection accorded the Federal Rules by *Hanna*.<sup>378</sup>

To the extent that the second sentence of Rule 44.1 merely serves to render the exclusionary evidence rules inapplicable and to expand the court's permitted scope of examination on a question of foreign law, it is a rule of admissibility in the style of Rule 43(a).

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375. 356 U.S. at 536. See text accompanying notes 358-63 *supra*; Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 97 (1955). In its concluding paragraph, the Court does not completely shut the door on either the balancing approach or outcome determination by stating:

[A] court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts . . . .

380 U.S. at 473. Moreover, one aspect of determining whether a Federal Rule applies in a particular situation is an inquiry into the policies underlying the Rule, which may necessitate a weighing of the relevant federal, and any competing state, interests.

Neither the interest-balancing technique nor the many other emanations from the *Byrd* decision seem to have been atrophied by *Hanna* outside the realm of matters directly covered by the Federal Rules. See, e.g., *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858 (5th Cir. 1966); *McDonald v. United Airlines, Inc.*, 365 F.2d 593 (10th Cir. 1966); *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965); *Bolick v. Prudential Ins. Co.*, 249 F. Supp. 735 (D.S.C. 1966).

376. The text of Federal Rule 44.1 is set out in note 5 *supra*.

377. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109 (1943). See also *Follenfant v. Rogers*, 359 F.2d 30 (5th Cir. 1966); *Garcia v. Bernabe*, 289 F.2d 690 (1st Cir. 1961).

378. Prior to the advent of FED. R. CIV. P. 44.1, at least two cases held that federal pleading rules governed the manner of pleading foreign law in the federal courts regardless of a divergent state practice. *Telesphore Couture v. Watkins*, 162 F. Supp. 727, 730 (E.D.N.Y. 1958); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649, 650 (S.D.N.Y. 1944).



Even before *Byrd* and *Hanna*, the lower federal courts held that *Erie*, with certain exceptions not presently relevant, did not affect matters of proof or admissibility and believed themselves free, *inter alia*, to determine the proper scope of cross-examination<sup>379</sup> and to consider evidence that would have been excluded by a state court.<sup>380</sup> Moreover, resort to federal rather than state practice will not be outcome determinative when the new Rule is consistent with the local practice regarding the receipt of foreign-law materials, as is the case in an ever-increasing number of states. Even in a state in which the cumbersome common-law methods of proving foreign law continue in vogue or a judicial-notice statute is in force, the possibility of a case turning on a differential between the materials that can be received and examined by state and federal judges is as remote and incalculable as was the likelihood of an outcome differential in the *Byrd* case. The mere fact that a different caliber of proof is needed to

379. *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950).

380. *Peoples Gas Co. v. Fitzgerald*, 188 F.2d 198, 201 (6th Cir. 1951); *Franzen v. E. I. du Pont de Nemours & Co.*, 51 F. Supp. 578 (D.N.J. 1943), *aff'd*, 146 F.2d 837 (3d Cir. 1944). See Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435-39 (1957); Comment, *Federal Rule 43(a): The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine*, 62 COLUM. L. REV. 1049 (1962). But see Sibley, *Delimitations of Erie Railroad Co. v. Tompkins*, 29 Ky. L.J. 172, 174-75 (1941). For a post-*Byrd* pre-*Hanna* decision to the same effect, see *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960). See also *Rain v. Pavkov*, 357 F.2d 506 (3d Cir. 1966). Questions relating to the burden of proof have fallen prey to *Erie*. See *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939); *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940). But cf. text accompanying notes 407-28 *infra*.

The same fate probably is in store for at least some of the privileges, although the Supreme Court never has passed on the question. See, e.g., *Krizak v. W. C. Brooks & Sons, Inc.*, 320 F.2d 37 (4th Cir. 1963); *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955); *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953). See also *Fraser v. United States*, 145 F.2d 139 (6th Cir. 1944). A fundamental dispute exists among the commentators as to the impact of *Erie* on questions of privilege in the federal courts. For the views of those who believe that the federal courts are not bound to apply state privileges, see, e.g., 5 MOORE, FEDERAL PRACTICE ¶ 43.07, at 1333 (2d ed. 1951); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483 (1957); Pugh, *Rule 43(a) and the Communication Privilege Under State Law: An Analysis of Confusion*, 7 VAND. L. REV. 556, 568 (1954). For the contrary view, see, e.g., WRIGHT, FEDERAL COURTS § 93 (1963); Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 347 (1960); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 102 (1956); Weinstein, *Recognition in the United States of the Privilege of Another Jurisdiction*, 56 COLUM. L. REV. 535 (1956); Comment, *Evidence Rules in the Federal Courts: A Time for a Change*, 38 TEXAS L. REV. 451, 463-65 (1960); Note, *The Admissibility of Evidence Under Federal Rule 43(a)*, 48 VA. L. REV. 939, 943 (1962). The parol-evidence rule, *res ipsa loquitur*, the statute of frauds, and various presumptions have been categorized with privileges and burdens of proof. See *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952); *Patterson-Ballagh Corp. v. Byron Jackson Co.*, 145 F.2d 786 (9th Cir. 1944); *Hotel Dempsey Co. v. Tell*, 128 F.2d 673 (5th Cir. 1942).

establish foreign law in a state court than is needed in a federal court is not a variance of sufficient magnitude to raise an *Erie* problem; indeed it seems indistinguishable from divergences between state and federal practices as to required pleading detail or the availability of pretrial discovery. The *Erie* doctrine, especially as reformulated in *Hanna*, cannot be invoked whenever different state and federal procedural rules reflecting the same broad objectives do not lead to identical results in particular contexts.<sup>381</sup> Finally, since it is unlikely that a party ever will realistically expect the mode of proving foreign law in a federal court to produce a different outcome than would result under the forum state's proof-of-foreign-law procedures, the availability of the liberal practice under the second sentence of Rule 44.1 will have "scant, if any relevance to the choice of a forum."<sup>382</sup> Thus, the mode of proof aspects of the second sentence of Rule 44.1 seem immune from debilitation by the *Erie-York* outcome-determination approach and seem even more secure given the *Byrd-Hanna* assertions of federal power to regulate the penumbral area between substance and procedure.

Moving on to the last sentence of Rule 44.1, both its statement that a determination of a foreign-law issue is to be treated as a ruling of law and a federal-court practice of having such issues judicially determined rather than jury tried seem to be unimpeachable by *Erie* or *York*. It is difficult to perceive how the precepts of these cases are violated by according the process of ascertaining foreign-law all the indicia of a ruling on a question of law or by permitting a United States court of appeals to use a review standard different from the one employed by the forum state's appellate courts. It is highly unlikely—probably to the point of being speculative—that a case's ultimate result will change because the scope of review in the federal courts is narrower or broader than that available in the state courts.<sup>383</sup> The remote possibility that a variance of this type will be outcome determinative or will encourage forum shopping renders any *Erie* or *York* challenge to the final sentence of Rule 44.1 relatively impotent.

Even if *Erie* and *York* were thought relevant to the matters covered by the last sentence of Rule 44.1, its explicit text, as reinforced by the Advisory Committee's Note, expresses a federal policy in favor of treating foreign-law issues in a certain manner. Assuming the Rule is a valid exercise of the Supreme Court's rulemaking power

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381. Cf. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 412 (5th Cir. 1960).

382. 380 U.S. at 469.

383. See generally Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 323-24 (1958).

under the Rules Enabling Act,<sup>384</sup> *Hanna* requires it to be given effect in diversity litigation even when the forum state's practice is markedly different. The problem becomes somewhat more complex if federal appellate courts decide to exercise the same flexibility that Rule 44.1 now gives to federal trial courts with regard to ex parte research and begin to consider foreign-law materials presented to the court for the first time on appeal.<sup>385</sup> In that eventuality, the arguments advanced for immunizing the trial courts from an *Erie* challenge for comparable conduct under the second sentence of Rule 44.1 can be advanced to defend the practice of the appellate courts.<sup>386</sup> Admittedly, the absence of an express statement of federal appellate policy in the Rule would attenuate any argument premised on *Hanna*. Nonetheless, a court's freedom to consider any relevant legal materials and to engage in independent research are incidents of the review given a trial court's domestic-law findings and the review given foreign-law findings should be similarly viewed in light of the new Rule's statement that a determination of foreign law is to be treated as a "ruling on a question of law." It is extremely doubtful that a litigant could convince the Second Circuit that *Erie* requires it to review the conclusions on New York law that were reached in a diversity action by the District Court for the Southern District of New York in the same way that a New York appellate court would review comparable conclusions by a New York trial court. The same should be true when sister-state or foreign law is involved.

The possibility that judicial rather than jury determination of foreign law will create an *Erie-York* problem is minimal since issues of foreign law are outside the jury's domain in almost every state.<sup>387</sup> Moreover, it is unlikely that, in the few states that permit some form of jury involvement on foreign-law issues, state jury decisions would vary from federal judicial determinations on the same issues with any frequency or in any predictable way.<sup>388</sup> Although *Bernhardt* did indicate that altering the character of the adjudicatory tribunal might lead to "a radical difference in ultimate result,"<sup>389</sup> that case is distinguishable from the question of leaving foreign-law issues to the judge. Judicial adjudication rather than arbitration of a dispute under an employment contract, the choice involved in *Bernhardt*, is

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384. The bases for this conclusion are found at text accompanying notes 515-19 *infra*.

385. See text accompanying notes 299-300 *supra*.

386. See text accompanying notes 379-83 *supra*.

387. See text accompanying notes 291-92 *supra*.

388. See *Occidental Life Ins. Co. v. Kielhorn*, 98 F. Supp. 288 (W.D. Mich. 1951).

389. 350 U.S. at 203.

more likely to produce a difference in outcome than federal judicial determination as opposed to state jury trial on an issue of foreign law because the difference in the character of the two tribunals is of greater magnitude in the former case than it is in the latter.

Actually, the situation presented by *Byrd* is more closely related to the potential *Erie* impedimenta to judicial determination of foreign law under Rule 44.1 than is *Bernhardt*. A federal practice calling for the denial of jury trial on a particular issue is as much a part of "the federal system of allocating functions between judge and jury"<sup>390</sup> as is a practice requiring that an issue be submitted to the jury.<sup>391</sup> This proposition had some acceptance in the federal courts even before *Byrd*. In *Diederich v. American News Co.*,<sup>392</sup> the Tenth Circuit affirmed a directed verdict on the issue of assumption of the risk despite a passage in the Oklahoma constitution requiring that the issue be given to the jury. The court stated that a federal trial court's obligation to discharge judicial functions and its *puissance* to determine certain questions as a matter of law were essential elements of the seventh amendment.<sup>393</sup> Inasmuch as the Supreme Court did not rest its decision in *Byrd* on the Constitution, it is possible to conclude that a federal practice of judicial determination of foreign-law issues supervenes a contrary state practice without reaching the question whether trial by court instead of by jury is a constitutional right.

There are several additional *Erie* questions lurking at the periphery of the Rule that warrant discussion. First, does the total effect of Rule 44.1 create *Erie* implications not revealed by a dissection of the Rule's text? Second, is the new Rule contrary to the *Klaxon* imperative that in diversity actions a federal court is bound to apply the conflicts rules of the forum state?<sup>394</sup> Finally, does *Erie* disenable a

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390. 356 U.S. at 538.

391. For example, in *Kirby Lumber Corp. v. White*, 288 F.2d 566 (5th Cir. 1961), the court said that "the quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment . . . , the Federal Rules of Civil Procedure and the decisions of the Courts of the United States. . . ." *Id.* at 573.

392. 128 F.2d 144 (10th Cir. 1942). See also *Herron v. Southern Pac. Co.*, 283 U.S. 91 (1931).

393. See also *McDonald v. United Airlines, Inc.*, 365 F.2d 593 (10th Cir. 1966); *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575, 582 (5th Cir. 1957); *Bowie v. Sorrell*, 209 F.2d 49 (4th Cir. 1953); *Ettelson v. Metropolitan Life Ins. Co.*, 137 F.2d 62 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943); *Shenandoah Life Ins. Co. v. Hawes*, 256 F. Supp. 366 (E.D.N.C. 1966); *Hollingsworth v. General Petroleum Co.*, 26 F. Supp. 917 (D. Ore. 1939); *cf. Reynolds v. Pegler*, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955).

394. *Klaxon* requires a federal court to apply the forum state's conflicts principles in diversity litigation in the interstate situation. *Quaere* whether the Supreme Court

federal court from developing a series of flexible rules for allocating the task of proving foreign law and for fixing the consequences of a failure to discharge that obligation?

One of the basic objectives of Federal Rule 44.1 is to maximize the ability of counsel and the court to prove the content of foreign law. It is reasonable to assume, therefore, that there will be instances in which a federal court will do its own research or accept foreign-law materials that would be excluded by the forum state's less sensitive procedures for proving foreign law. The result of this discrepancy will be occasions on which a federal court would be able to ascertain foreign law and adjudicate the case on the merits but a state court would have to declare a failure of proof and direct the entry of judgment against the party relying on foreign law. Thus, it may not be accurate to say that Federal Rule 44.1 merely deals with the mechanics of raising, proving, and determining issues of foreign law and neither intrudes upon the forum's substantive law or public policy nor upsets the equilibrium between the administration of justice in the federal and state courts.<sup>395</sup> Although a federal judge's ability to decide a higher percentage of foreign-law issues than his state counterpart seems too weak a foundation to support an *Erie* argument, undoubtedly there are circumstances in which it will be outcome determinative or a factor in the plaintiff's choice of forum. In a jurisdiction adhering to the *Crosby* philosophy,<sup>396</sup> for example, the difference to a plaintiff whose right of action is based on foreign law will be the difference between winning and losing.

At first glance, the dialectic in favor of federal court freedom of action under Rule 44.1 does not seem to be enhanced by the *Hanna* reconstruction of what constitutes outcome determination. Unlike a divergence between state and federal practice with regard to serving process, which, as Mr. Chief Justice Warren pointed out, does not cause a difference in outcome as long as the plaintiff adheres to the procedural rules of the chosen forum, a divergence between the respective practices regarding proof of foreign law may lead to a totally different outcome even if the litigant does comply with the practice of the forum. Arguably, therefore, the ability to establish foreign law in a federal court and the inability to do so in a state

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would, or should, extend *Klaxon* to the international situation, especially in the context of a case in which the forum state has little or no interest in the outcome of the litigation. *Klaxon* is described briefly at text accompanying notes 345-47 *supra*.

395. See *Baltimore & O.R.R. v. Reaux*, 59 F. Supp. 969 (N.D. Ohio 1945); *Peterson v. Chicago, G.W. Ry.*, 3 F.R.D. 346, 348 (D. Neb.), *aff'd*, 138 F.2d 304 (8th Cir. 1943). See also *Wade v. Lynn*, 181 F. Supp. 361 (N.D. Ohio 1960). *But cf.* *Krasnow v. National Airlines, Inc.*, 228 F.2d 326, 327 n.3 (2d Cir. 1955) (*dictum*).

396. *Crosby* is discussed at text accompanying notes 78-82 *supra*.

court may well, in the words of the *Hanna* opinion, have "relevance to the choice of a forum" and "raise the sort of equal protection problems to which the *Erie* opinion alluded."<sup>397</sup>

One reply to this attack on Rule 44.1 can be extrapolated from the fact that the broad federal discovery practice poses the same type of variance between state and federal procedure as does Rule 44.1 but has not fallen prey to *Erie* challenges.<sup>398</sup> Additional succor may be derived from the idealistic notion that, since every state does provide a mechanism for establishing foreign law, all a litigant need do is work with it diligently, avoid becoming depressed by the spectre of the *Crosby* and *Walton* cases, and truth will out. Thus viewed, the only difference between state and federal practice is the relative ease with which foreign law can be established. It also might be argued that a lawyer would need the prescience of a Nostradamus to choose a forum on the basis of a difference in outcome resulting from disparate foreign-law practices, which again reduces the divergence between state and federal practice to one of methodology. Although these assertions are idyllic circumlocutions of the outcome-determinative quagmire and offer some solace to those who would preserve the virtue of the Federal Rules against the rapacious qualities of the *Erie* doctrine, they do not completely vitiate the concern that Rule 44.1 may violate, at least the spirit of, the important limitations on federal power articulated in *Erie* and *York*.

Further analysis of *Hanna*, assuming the case is not viewed as sufficiently distinguishable from the problem under discussion to render it irrelevant, does offer a satisfactory thesis for protecting Rule 44.1 from *Erie* and the outcome-determination test. In *Hanna*, the Supreme Court made it clear that violation of one or both of the so-called "twin aims" of *Erie*—discouraging forum shopping and preventing the inequitable administration of the law<sup>399</sup>—does not necessarily emasculate a Federal Rule in diversity litigation. As previously noted,<sup>400</sup> the Court in *Hanna* takes the position that a Rule is valid unless shown to transgress the terms of the Enabling Act or some constitutional restriction.<sup>401</sup> For reasons detailed below,<sup>402</sup> the first avenue of attack on a Federal Rule left open by *Hanna*—a chal-

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397. 380 U.S. at 469. The *Hanna* notion of "inequitable administration of the laws" is discussed in *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 63-64 (4th Cir. 1965).

398. See *Hill v. Greer*, 30 F.R.D. 64 (D.N.J. 1961); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1046-49 (1961). *But cf.* *Reeves v. Pennsylvania R.R.*, 8 F.R.D. 616 (D. Del. 1949).

399. 380 U.S. at 468.

400. See text accompanying notes 368-75 *supra*.

401. 380 U.S. at 471.

402. See text accompanying notes 429-519 *infra*.

lenge based on the Rules Enabling Act—is not likely to be a fruitful endeavor with respect to Rule 44.1. The second possible point of vulnerability—encompassed by the reference to “constitutional restrictions”—is somewhat difficult to isolate. The structure of the Court’s opinion indicates that these words may apply to Mr. Justice Brandeis’ discussion in *Erie* of the impropriety of promulgating federal rules of decision regarding matters that do not fall within one of the specific constitutional grants of power to the national government.<sup>403</sup> If this is the case, the reference to “constitutional restrictions” does not affect Rule 44.1, which comes under the aegis of the provision for a federal court system in article III of the Constitution, as reinforced by the necessary and proper clause.<sup>404</sup> However, the words may refer to the type of equal-protection problem that also troubled Mr. Justice Brandeis in *Erie*. This construction would support the argument that even though a Federal Rule is a legitimate exercise of federal power, it may be invalid if its application leads to the unequal administration of the law. The possibility that a Federal Rule might be invalid in diversity litigation because it causes a federal case to “stray from the course it would follow in state courts” is faced squarely in *Hanna* as follows:

To hold that a Federal Rule . . . must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.<sup>405</sup>

This passage precludes the revitalization of the outcome-determination test under the guise of the equal-protection doctrine, at least as to any matter covered by a Federal Rule. Moreover, the concept of equal protection has not been applied to prohibit variations in practice or to prevent the forum from using its own “procedure” even though a different outcome might result.

The *Klaxon* problem is easily resolved. Although the draftsmen of Rule 44.1 might have been inclined to deal with the choice-of-law problem and the consequences flowing from a failure to prove foreign law had *Hanna* antedated their efforts, the Rule as promulgated presupposes that the governing foreign law is determined in accordance with state conflict of laws principles. Reliance on the forum state’s choice-of-law rules will minimize the possibility of a clash between the Rule and the forum state’s substantive law. Abrasion between the

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403. See text accompanying notes 332-37 *supra*.

404. U.S. CONST. art. I, § 8.

405. 380 U.S. at 473-74.

two is especially unlikely when the forum's policy is to utilize its own law absent a strong reason to apply foreign law. Even when the local conflicts rules direct the application of the law of a foreign country, tension between the Rule and state law is improbable except when the Rule enables foreign law to be ascertained and state practice does not. Inasmuch as the forum state's interest is minuscule when a foreign cause of action is being litigated and the forum's substantive policies are not in issue, any thesis calling for the invocation of state procedures for ascertaining foreign law as an incident or intrinsic element of the forum's choice-of-law system is weak.<sup>406</sup>

Two much more difficult analytical problems are whether a federal court is obligated to treat a failure to establish foreign law as a state court would and whether a federal tribunal is required to use state standards to quantify the evidence when ascertaining if a failure of proof has taken place. These inquiries, which turn out to have labyrinthine qualities, are intertwined with a further conundrum: What freedom does *Erie* leave a federal court in diversity cases to depart from state practice and manipulate the burden of proving the content of foreign law?

The case for complete federal control over the consequences of a failure of proof is premised on the assumption that Rule 44.1 is intended to equate the process of determining foreign law with the treatment of questions of domestic law. The result of this approach together with the involvement of the trial judge is to dissipate the adversarial character of the procedure and, as suggested earlier,<sup>407</sup> to render the burdens of production and persuasion used in connection with factual issues inapposite to the proof of foreign law. Thus, both the state burdens relating to the proof of foreign law and the attendant set of consequences for failing to meet those burdens, which were formulated on the basis of the fact characterization of alien law, are irrelevant to the federal procedure for ascertaining foreign law. As a result, *Erie* considerations are not germane to the distribution of the various tasks involved in determining foreign

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406. This approach, of course, lends support to the argument for federal conflicts rules in interstate and international cases, in which the interest of the forum state presumably is *de minimis*; it also would permit the development of a federal practice on the consequences that flow from a failure to establish the applicable foreign law. See generally Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958). The view that international and interstate conflicts problems should be treated differently has been expressed by at least two leading scholars. CAVERS, *THE CHOICE-OF-LAW PROCESS* 117-19 (1965); EHRENZWEIG, *CONFLICT OF LAWS* § 6 (1962); Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957). The interrelationship between *Klaxon* and the separation of international and interstate conflicts is not dealt with in the cited materials.

407. See text accompanying notes 325-31 *supra*.



law in the federal courts under Rule 44.1. This theme will be renewed shortly.<sup>408</sup>

Even if the traditional fact burdens of proof are considered relevant, federal court independence in the realm of foreign law can still be premised on the argument that *Erie* does not require a federal court to apply state burdens on foreign-law issues or state standards for deciding when there has been a failure of proof and the consequences of such a failure. The effect of *Erie* on burdens of proof has been before the Supreme Court on three occasions. On the first, *Cities Service Oil Co. v. Dunlap*,<sup>409</sup> the question was whether the Texas federal courts were obliged to follow a Texas rule placing the burden of proving a bona fide purchase on the party challenging the legal title to property and asserting a superior equity. The Supreme Court, reversing both lower courts, held yes. According to Mr. Justice McReynolds, the state rule "relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely."<sup>410</sup> The second case presented a situation closer to the problem being discussed. In *Palmer v. Hoffman*<sup>411</sup> the Supreme Court held that Federal Rule 8(c) "covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply."<sup>412</sup> The third case, *Dick v. New York Life Insurance Co.*,<sup>413</sup> involved the application of a North Dakota practice that under certain factual circumstances an insured's death is presumed to be accidental and not suicide. No *Erie* issue was involved since both parties assumed North Dakota law governed. However, the Court, through Mr. Chief Justice Warren, did comment: "Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial."<sup>414</sup>

A burden of proof is outcome determinative within the meaning of *York* when no proof is adduced or the proof presented is in equilibrium; in either situation, the case will turn on the allocation of the burden. It is questionable whether the importance of the burden in these exceptional cases warranted the broad pronouncements by the Court in *Dunlap*, *Palmer*, and *Dick*. Burdens certainly are not

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408. See text accompanying notes 416-28 *infra*.

409. 308 U.S. 208 (1939). See also *Francis v. Humphrey*, 25 F. Supp. 1 (E.D. Ill. 1938).

410. 308 U.S. at 212.

411. 318 U.S. 109 (1943).

412. *Id.* at 117.

413. 359 U.S. 437 (1959).

414. *Id.* at 446.

outcome determinative in the run of the mine case or when they only identify the party who must come forward with proof on a particular issue. Nonetheless, reflecting on the matter in 1967, the presence of three Supreme Court decisions and a substantial body of scholarly opinion to the same effect<sup>415</sup> make it unprofitable to argue that the impact of *Erie* on burdens of proof should be limited to cases in which it is highly probable that the burden allocation will be outcome determinative. Indeed, the uncertainty generated by such a standard might well make its adoption unwise as a policy matter.

Perhaps a somewhat narrower exception to the application of state burdens of proof in diversity cases can be articulated. The burden issues in *Dunlap*, *Palmer*, and *Dick* can be readily distinguished from the burden questions likely to arise under Rule 44.1. In each of the Supreme Court cases, both the burden and the substantive rules on which the burden operated were formulated by the same jurisdiction.<sup>416</sup> Since the process of molding a substantive right takes account of the identity of the litigant who will be called upon to establish various elements of the right or the defenses to its assertion, it is entirely proper for a federal court to honor the forum state's allocation of the relevant burdens. Although application of the forum's burdens makes eminent sense when the forum also created the substantive right to which the burden attaches, it makes less sense to require a federal court to impose the forum state's burdens of proof on a cause of action or defense created by the law of another jurisdiction and it is even less justifiable when the forum's burden simply identifies the party who must establish the law of the other jurisdiction. In the latter context the burden, even though it is technically part of the forum's choice-of-law system, is not bound up with the foreign substantive right. By definition, the

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415. See Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 283, 298-99 (1962); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 117 (1956). See also Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692 (1963). The study that preceded the formation of an Advisory Committee to draft rules of evidence for the federal courts concluded that the subject of burdens of proof was beyond the rule-making power. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 39-40 (1962).

416. In *Dunlap* and *Dick* the law of the forum state governed both the cause of action and the burden of proof. In *Palmer* the federal trial court in New York was directed to follow New York's conflicts rule, which required the court to apply the Massachusetts burden on contributory negligence to two Massachusetts statutory causes. Two Massachusetts common-law causes also were involved but the court did not resolve the burden question with regard to them because a proper exception had not been taken below.

burden of proving the existence and content of foreign law, as opposed to the burden of proving a right to recover under that law, is not inextricably interwoven with substantive rights and duties created by the forum's law or, for that matter, with rights and duties created by the foreign country's law. It is simply the forum's mechanism for assigning responsibility for establishing the legal framework in a particular class of lawsuits. Only after this has been accomplished are the traditional functions of burdens of proof, called into play to determine if the elements of the previously ascertained substantive law have been proven.

It therefore seems unwise to extend *Dunlap*, *Palmer*, and *Dick* and require a federal court to pay obeisance to a state burden dealing with the proof of foreign law in all circumstances. At the least, resort to state law should depend upon the results of an inquiry as to whether the forum's burden reflects a legitimate state policy of sufficient importance to be honored by a federal court at the expense of countervailing federal procedural norms. In jurisdictions adhering to the vested-rights approach to conflicts, the burden is a concomitant of the view that the plaintiff cannot succeed unless he establishes a valid cause under the law of the territory in which his cause of action accrued. Quite logically this burden is placed on the party with the affirmative and fulfills at least one traditional function ascribed to burdens—insuring that one party is obligated to come forward with evidence;<sup>417</sup> note, however, that the placement of the burden seems to be a matter of trial administration and has no necessary nexus with the substantive elements of the plaintiff's cause.

In jurisdictions that presume an identity between local and foreign law, the justification for imposing the burden on the party asserting a difference between the two is not immediately apparent. It is unlikely that the forum is attempting to favor one class of litigants—citizens, for example—over other classes. The adventitious way in which parties become aligned in litigation, as exemplified by the *Walton* case,<sup>418</sup> would make such a goal difficult, if not impossible, to achieve. But even assuming that the forum state's goal, or one of them, is to favor a particular group at the expense of another, a federal court is not obligated to promote this discrimination absent some substantial and rational justification for it. Since the identity presumption is based on an assumption, ap-

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417. See Note, *State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine*, 66 HARV. L. REV. 1516, 1518-19 (1953).

418. See text accompanying notes 83-84 *supra*.

parently unsupported by any empiric data, that local and foreign law are identical, the explanation for the burden allocation may be the forum's desire to minimize the expenditure of judicial time and effort in ascertaining and applying foreign law. If so, *Erie* does not oblige federal judges to expend their time and energy the way state judges consume theirs. Going one step further, even if we assume that the state's policy of frugality with regard to devoting resources to foreign-law issues includes a desire to conserve the energies and assets of litigants, neither the *Erie* principle nor its derivative postulates require a contest in the federal courts to cost a party the same sum and take the same time as would a corresponding proceeding in the local courts. To generalize, in any situation in which a state's burden of establishing the content of foreign law simply reflects administrative considerations, the state does not have a legitimate interest in how the burden of ascertaining foreign law is allocated in the federal courts. Nor is the efficacy of this conclusion altered when one of the litigants is a citizen of the forum state.

The impropriety of encumbering the national courts with the forum state's notions of how to expend judicial and party resources is manifest whenever there is a competing federal interest. If *Byrd* and *Hanna* preach anything, it is that federal policies, particularly those germane to the functioning of the federal judicial system, should not be cavalierly shunted aside in favor of state practices simply to pursue the grail of result identity. If a significant federal policy is discernible, whether its substance is captured in a federal statute or court rule or is merely an unarticulated or inherent characteristic of a judicial system, it should be given effect despite a contrary state rule; certainly this is true when the federal policy is pitted against a fragile state interest of the type apparently at the root of state-created burdens of proof on foreign-law issues.

A number of policies concerning the treatment to be given foreign-law issues in the federal courts are embodied in the text of Federal Rule 44.1. First, the Rule reflects the belief that litigants should be able to raise foreign-law issues with a minimum of formality and without "unfair surprise." Second, it purports to establish an optimum environment in which everything relevant to a foreign-law issue can be brought to the court's attention. Third, it gives federal trial judges the freedom to do independent research, thereby indicating that the accurate determination of foreign law is a sufficiently important and desirable goal to warrant the expenditure of federal judicial resources. Fourth, it insures plenary appellate review by dealing with determinations of foreign and domestic law

in the same fashion, thus reaffirming the judgment that the accurate resolution of foreign-law issues is considered a worthy utilization of a federal judge's time and energy.

The cumulative effect of these points is that Rule 44.1 expresses a philosophy that federal courts should ascertain foreign law accurately whenever possible. Consequently, the use of state burdens of proof and presumptions that do not insure the best possible presentation of foreign-law materials is antithetical to the federal approach to the determination of alien law. Accordingly, it is desirable for federal judges to exercise the type of discretion previously suggested<sup>419</sup> in assigning functions concerning the proof of foreign law in order to secure optimum advantage from the flexibility provided by Rule 44.1. Liberating federal judges from the constraints of burdens of proof that are part of foreign-law practices differing markedly from Rule 44.1 will maximize their ability to utilize the subtle pressures associated with proof burdens and help to insure as effective a foreign-law presentation as the parties can muster. Much the same reasoning dictates that the federal courts should be free to treat a failure of proof of foreign-law in the discretionary manner suggested earlier<sup>420</sup> and should not be tied to what often are Draconian state rules.

Admittedly, the panoply of federal policies distilled from Federal Rule 44.1 do not have the magisterial dignity of the judge-jury relationship involved in *Byrd*. Nonetheless, the Rule was recommended by a federal commission, was adopted by the Supreme Court pursuant to a federal statute, and does represent a directive from the nation's highest court—augmented by whatever congressional imprimatur can be attributed to the latter's silent acquiescence in the Rule's promulgation—that federal trial judges treat the determination of foreign law in a certain manner. Of equal importance is the fact that the existing *potpourri* of state techniques does not appear to articulate any significant counterbalancing policies.<sup>421</sup> Moreover, the argument that the mantle of *Hanna* is not broad enough to cover the burden-of-proof aspect of determining foreign law because Rule

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419. See text accompanying notes 320-31 *supra*.

420. *Ibid.*

421. A broad interpretation of *Byrd* that seems to be in harmony with the views expressed in the text appears in Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 292-301 (1962). It may be more difficult to characterize a state's interest as *de minimis* when the foreign law relates to a collateral issue than when it governs the rules of decision for the entire case. When a case is controlled by forum law and foreign law must be established to prove a given factual element, the state's burden on the issue may be of considerable importance to the enforcement of the substantive right.

44.1 fails to deal specifically with the problem is not persuasive. *Hanna* should not be limited to those matters expressly dealt with in the Federal Rules of Civil Procedure; its philosophy applies to numerous aspects of federal practice that are found in the interstices and beyond the language of the Federal Rules. Even if *Hanna* technically does not apply in the present context, nothing in that case suggests that the interest-balancing technique of *Byrd* has been displaced on matters outside the ambit of *Hanna* or that *Byrd* does not provide an adequate framework for a federal approach to the problem of a failure to prove foreign law.<sup>422</sup>

Many of the contentions and conclusions offered in the preceding pages are reinforced by an analysis of the problem in terms of several situations in which a collision between state and federal practice is conceivable. Friction is most likely to occur when the party in a federal diversity action who is required under the law of the forum state to establish foreign law fails to do so, but the court, exercising its prerogatives under Rule 44.1, is able to ascertain the applicable law on its own. Even though the party has not discharged his burden, there probably has not been a "failure of proof" of the type that normally brings the state's sanctions into play. Thus, the federal court should proceed to apply foreign law and adjudicate the case, either on the theory that there is no conflict with state law inasmuch as foreign law has been revealed or on the premise that Federal Rule 44.1 controls.

But suppose that neither the parties nor the court are able to unearth enough information to ascertain foreign law despite diligent efforts to do so. Must the federal judge impose the state consequences of a failure of proof? To the extent that the state practice regarding failure of proof is based on the notion that foreign law is a fact and that one of the parties has the responsibility for establishing that fact, the state rule is inapplicable in a federal court. Federal practice is governed by a Rule that treats foreign law as an issue of law and purports to socialize the process of ascertaining foreign law; Rule 44.1 does not pivot on the concept of party responsibility. Since it is within the competence of the national government to promulgate a rule recasting the traditional characterization and treatment of any element of procedure, the federal courts are not obliged to follow a state practice formulated to operate in an environment completely different from that encountered in the federal courts. Thus, whenever a state's attitudes regarding the burden of proving foreign law and the consequences of failing to discharge

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422. See note 375 *supra*.

that burden are based on assumptions and conditions markedly different from those prevailing in the federal courts, they need not be honored despite a possibility that a difference in outcome will result.<sup>423</sup>

A more difficult case is presented when the forum state has a provision identical to Federal Rule 44.1 or Article IV of the Uniform Interstate and International Procedure Act and its courts have concluded that a plaintiff whose cause of action is predicated on foreign law must lose if neither the parties nor the court are able to ascertain foreign law. A strong argument can be made that the *Erie-York* doctrine, as embellished by *Klaxon*, requires a federal court to impose the same consequences on the plaintiff as would have befallen him had he litigated in a state court. A contrary result is plausible only if the federal court is willing to assume that the goals of Rule 44.1 are not identical to those of a comparable state enactment and that the federal courts' right to control their own trial procedure can be best effectuated by allowing them to reach their own conclusions as to the consequences of a failure of proof. A decision to this effect should be reached only after a careful analysis of the premises for the state's dismissal of an action for failure of proof and an appraisal of the role played by Rule 44.1 and its state equivalent. If the federal courts use Rule 44.1 to develop their own allocation of functions relating to the proof of foreign law, it would be desirable to permit the federal practice to prevail as against a contrary state practice even though the effect might be outcome determinative, especially if there is no strong policy basis for the state practice. This result is amply supported by the theoretical foundation provided by the *Byrd* and *Hanna* decisions.

Keeping the burden of proof on foreign-law issues outside the *Erie* arena also finds support in the attitude of many federal courts toward judicial notice and a variety of foreign-law presumptions. The post-*Erie* decisions have been virtually unanimous in sanctioning a federal court's continued application of the practice of taking judicial notice of the law of all the states without pleading or proof.<sup>424</sup>

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423. Much of the Supreme Court's discussion of outcome determination in *Hanna* seems to support this conclusion. The same thinking is implicit in the use of Federal Rule impleader in *D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904 (1st Cir. 1958), despite the absence of impleader in Rhode Island practice and even though it enabled the federal court to adjudicate a case that could not have been determined by the Rhode Island state courts within the applicable state limitations period.

424. In *Erie* itself, the Supreme Court remanded the case for the application of Pennsylvania law, although at that time New York, the forum state, did not judicially notice the law of sister states. See Goodrich, *Mr. Tompkins Restates the Law*, 27 A.B.A.J. 547 (1941).

regardless of the forum state's rule on the subject.<sup>425</sup> In a number of instances counsel's invocation of the *Erie* doctrine has been expressly rejected.<sup>426</sup> In another group of cases, federal courts have not followed state presumptions as to the content of sister-state law or as to the identity of sister-state law and the law of the forum state.<sup>427</sup> Although special policy considerations underlie a federal court's taking judicial notice of state law,<sup>428</sup> the strong analogy between that practice and the suggested practice of permitting a federal court to ignore a state's burden-of-proof rules and sanctions for an inability to prove the law of a foreign country cannot be ignored.

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425. See *Schultz v. Tecumseh Prods., Inc.*, 310 F.2d 426 (6th Cir. 1962); *J. M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77 (5th Cir. 1962); *Reeves v. Schulmeier*, 303 F.2d 802 (5th Cir. 1962); *Jannenga v. Nationwide Life Ins. Co.*, 288 F.2d 169 (D.C. Cir. 1961); *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958); *Wm. J. Lemp Brewing Co. v. Ems Brewing Co.*, 164 F.2d 290 (7th Cir. 1947), *cert. denied*, 333 U.S. 863 (1948); *Alcaro v. Jean Jordeau, Inc.*, 138 F.2d 767 (3d Cir. 1943) (*Goodrich, J.*, concurring); *Zell v. American Seating Co.*, 138 F.2d 641, 643 n.6 (2d Cir. 1943), *rev'd on other grounds per curiam*, 322 U.S. 709 (1944); *Newman v. Clayton F. Summy Co.*, 133 F.2d 465 (2d Cir. 1942); *Gallup v. Caldwell*, 120 F.2d 90 (3d Cir. 1941); *Tarbert v. Ingraham Co.*, 190 F. Supp. 402 (D. Conn. 1960); *Mullaly v. Carlisle Chem. Works, Inc.*, 177 F. Supp. 588 (D.N.J. 1959). See also 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 963 (Wright ed. 1961); 1A MOORE, FEDERAL PRACTICE ¶¶ 0.316[2], [4], [5] (2d ed. 1961); 5 *id.* ¶ 43.09; Comment, *Judicial Notice of Foreign Law*, 38 WASH. L. REV. 802, 817 (1963). *But see* Keefe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 686-88 (1950). A contrary view was expressed in *Waggaman v. General Fin. Co.*, 116 F.2d 254 (3d Cir. 1940), but this case appears to have been overruled by later decisions in the Third Circuit. In the Second Circuit, at least three cases have relied on state practice, thereby overlooking the traditional federal practice and other authority in the Circuit. *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 544 n.6 (2d Cir. 1962); *Anderson v. National Producing Co.*, 253 F.2d 834 (2d Cir.), *cert. denied*, 357 U.S. 906 (1958); *Affiliated Enterprises, Inc. v. Courter Amusement Co.*, 32 F. Supp. 11 (E.D.N.Y. 1940). See also *Budget Rent-A-Car Corp. v. Fein*, 342 F.2d 509 (5th Cir. 1965). On occasion, judicial notice is taken without reliance on the established federal practice. For example, in *Eliscu v. Fiber*, 157 F.2d 136 (3d Cir. 1946), the Third Circuit authorized judicial notice of New York law but only referred to the New Jersey enactment of the Uniform Judicial Notice of Foreign Law Act. The complete absence of any discussion of the proper basis for taking judicial notice in a federal court indicates that the court may not have adverted to the question. See also 14 STAN. L. REV. 162, 166 (1961). Moreover, in a later case the Third Circuit affirmed *per curiam* a district court decision stating that judicial notice of the law of the states is a question of federal law. *Hassenplug v. Victor Lynn Lines, Inc.*, 71 F. Supp. 70 (E.D. Pa.), *aff'd per curiam*, 163 F.2d 828 (3d Cir. 1947).

426. *E.g.*, *Baltimore & O.R.R. v. Reaux*, 59 F. Supp. 969 (N.D. Ohio 1945); *Petersen v. Chicago, G.W. Ry.*, 3 F.R.D. 346 (D. Neb.), *aff'd*, 138 F.2d 304 (8th Cir. 1943). See also *Wade v. Lynn*, 181 F. Supp. 361 (N.D. Ohio 1960).

427. In *Tarbert v. Ingraham Co.*, 190 F. Supp. 402, 406 (D. Conn. 1960), the court remarked that "such presumptions are not 'substantive' in the sense of shifting evidentiary burdens; they are more in the nature of judicial notice taking by the court." The court then proceeded to reject application of the state presumptions on the ground that their use would be inconsistent with the Federal Rules and would adversely affect the functioning of the pretrial process in the federal courts. *But see* *Budget Rent-A-Car Corp. v. Fein*, 342 F.2d 509 (5th Cir. 1965).

428. See text accompanying notes 149-51 *supra*.



### E. *The Rule-Making Power and Foreign Law*

To conclude this discussion of Federal Rule 44.1 it is appropriate, especially in view of the doubts raised as to the Rule's integrity in diversity of citizenship cases,<sup>429</sup> to investigate the possibility that the new Rule exceeds the power delegated to the United States Supreme Court by Congress in the Rules Enabling Act to prescribe rules of practice and procedure for the district courts.<sup>430</sup> If the Rule is vulnerable at all, its weakness lies in the second and third sentences. The first sentence deals with traditional practice and procedure subjects—pleading and notice giving—that are well within the language of the Enabling Act even if that statute is narrowly construed. However, the second sentence affects matters of evidence and the mode of proof in the federal courts; the third sentence pertains to the relationship between the trial and appellate courts and, by implication, to the interaction between federal trial and appellate courts and federal juries. Since these are matters of considerable significance, a closer analysis of the Rule's status under the Enabling Act seems justified.

#### 1. *An Historical Prologue*

Historical examination of civil procedure in the federal courts begins with section 34 of the Judiciary Act of 1789, the Rules of Decision Act, which originally provided that, absent a supervening federal regulation, "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States . . . ."<sup>431</sup> The text of the statute as enacted—it has since been modified—precluded its application to equity proceedings. Other sections of the Judiciary Act that dealt with procedure include section 17(b),<sup>432</sup> which gave the courts rule-making power for "conducting business" in an orderly way, and section 30,<sup>433</sup> which provided that the "mode of proof" in civil actions be by oral testimony and that witnesses be examined in open court.<sup>434</sup>

The Rules of Decision Act was augmented by the Process Act of

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429. See text accompanying notes 376-428 *supra*.

430. 28 U.S.C. § 2072 (1964). Similar delegations have been enacted for admiralty causes, 28 U.S.C. § 2073 (1964), criminal cases, 18 U.S.C. § 3771 (1964), and bankruptcy matters, 28 U.S.C. § 2075 (1964).

431. 1 Stat. 73, 92 (1789).

432. 1 Stat. 73, 83 (1789).

433. 1 Stat. 73, 88 (1789).

434. Section 30 of the Act initially applied to equity and admiralty cases as well as common-law cases, but subsequently was restricted to actions at common law. REV. STAT. § 861 (1875).

1792,<sup>435</sup> which directed that "the forms and modes of proceedings" in common-law actions conform to those in the state in which the federal court was sitting; the lower federal courts were given "discretion" to depart from state practice, and the Supreme Court presumably could do the same under the grant of rule-making power in section 17(b) of the earlier act. One of the effects of the 1792 act was that federal courts in the original states had to conform to local practice as it existed in September, 1789. Federal courts in states admitted to the Union after that date generally were instructed by statute to follow state procedures as of later, but equally arbitrary, dates;<sup>436</sup> in the case of states joining the Union between 1842 and 1872, the conformity principle was incorporated directly into the enactments granting statehood or was extended by judicial construction of those statutes.<sup>437</sup>

The Supreme Court's rule-making power was strengthened in 1842 by a statute giving it

full power and authority . . . to prescribe, and regulate, and alter, . . . the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity . . . and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, . . . and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein. . . .<sup>438</sup>

Despite this expansive delegation, rules regulating the practice on the law side of the federal courts were not promulgated for almost another century. Further legislative development also was sparse. Between 1842 and 1872 Congress saw fit to enact only three relatively narrow statutes dealing with the competency of witnesses in federal civil actions.<sup>439</sup>

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435. 1 Stat. 275, 276 (1789).

436. See, e.g., 4 Stat. 278 (1828); 5 Stat. 499 (1842). These statutes were a reaction to the Supreme Court's decision in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), in which Chief Justice Marshall applied the Process Act of 1792 to an execution on a judgment despite a post-1789 Kentucky statute on the subject. See also HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 582-84 (1953); Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 436 (1930).

437. See, e.g., 5 Stat. 742-89 (1842), construed in *United States v. Council of Keokuk*, 73 U.S. (6 Wall.) 514 (1867); 12 Stat. 128 (1861), construed in *Smith v. Cockrill*, 73 U.S. (6 Wall.) 756 (1867).

438. 5 Stat. 516, 518 (1842).

439. The first provided that the laws of the state in which the federal court was sitting were to be the rules of decision as to the competency of witnesses. 12 Stat. 588 (1862). The second prohibited the exclusion of a witness because of his color or because he was a party to or interested in the litigation. 13 Stat. 351 (1864). See also

The inadequacy of the static conformity created by the various Process Acts and unrelieved by the 1842 rule-making delegation became intolerable in the third quarter of the nineteenth century when the states began to promulgate new procedural codes patterned after New York's Field Code of 1848.<sup>440</sup> Because the federal courts adhered to state practice as it existed on fixed dates prior to the advent of these codes, the notion that the procedure in a given federal court was identical to that employed by the courts in the state in which it was sitting was a chimera.<sup>441</sup>

In response to this degenerating situation, Congress, in 1872, enacted the Conformity Act, section 5 of which provided:

That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes . . . shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.<sup>442</sup>

In addition to the rejection of static conformity, the Act is noteworthy because it does not reaffirm the 1842 delegation of rule-making power to the Supreme Court. Other than the existence of a firm congressional desire for procedural uniformity between state and federal courts within each state, there is no apparent explanation for this omission.

The proviso at the end of the section is another curiosity. Under section 34 of the Judiciary Act of 1789, the federal courts, including the Supreme Court, applied state rules of evidence in the absence of a federal statute.<sup>443</sup> The Process Act of 1792 and the enactments supplementing it generally were not relied on as sources of rules of evidence. Inasmuch as the Conformity Act did not vitiate the practice under the Rules of Decision Act, the pre-1872 practice would have continued in the proviso's absence. Its inclusion, therefore, supports the argument that rules of evidence were viewed as matters of

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13 Stat. 374 (1864) (District of Columbia). The third limited the testimony of a survivor in actions involving a dead man's representative. 13 Stat. 533 (1865). The three acts were later combined. REV. STAT. § 858 (1875).

440. See CLARK, CODE PLEADING § 8 (2d ed. 1947).

441. See generally Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 546, 557-70 (1930).

442. 17 Stat. 196, 197 (1872).

443. See, e.g., *Ryan v. Bindley*, 68 U.S. (1 Wall.) 66 (1863); *Vance v. Campbell*, 66 U.S. (1 Black) 427 (1861); *Sims v. Hundley*, 47 U.S. (6 How.) 1 (1848); *McNeil v. Holbrook*, 37 U.S. (12 Pet.) 84 (1838).

federal concern in 1872 and that Congress intended federal-court uniformity rather than conformity to state practice in this area, although, as pointed out below,<sup>444</sup> this does not appear to be the judicial interpretation uniformly given the Conformity Act. In any event, the proviso was eliminated in 1878,<sup>445</sup> which arguably gives rise to a diametrically opposite inference.<sup>446</sup>

The early federal decisions intimating that evidence in the federal courts was governed by state law under the Rules of Decision Act were buttressed by similar language in opinions written after the Conformity Act was passed and the proviso in section 5 removed.<sup>447</sup> In later decisions, however, it was concluded that the Conformity Act governed evidence.<sup>448</sup> An additional deviation from the pre-Conformity Act doctrine took place when several circuits, presumably influenced by *Swift v. Tyson*,<sup>449</sup> concluded that only state statutory rules of evidence were binding on the federal courts and applied "general" federal law absent a statute; other circuits, however, continued to adhere to the prior practice and used state rules of evidence, whether statutorily or judicially enunciated.<sup>450</sup> The un-

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444. See text accompanying notes 447-51 *infra*.

445. REV. STAT. § 914 (1875). Federal evidence statutes prevailed over state practice in *Ex parte Fisk*, 113 U.S. 713 (1885) (Mode of Proof Act); *Potter v. National Bank*, 102 U.S. 163 (1880) (Competency of Witnesses Act).

446. In *Bryant v. Leyland*, 6 Fed. 125, 127 (C.C.D. Mass. 1881), the court commented on the removal of the proviso as follows: "The reason for omitting it may be assumed to be that the rules of evidence are no part of the practice, or forms or modes of proceeding, as they certainly are not in general, though the mode of obtaining evidence is."

447. See *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U.S. 221 (1903); *Bucher v. Cheshire R.R.*, 125 U.S. 555, 582 (1888); *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 250 (1884). See also *Pure Oil Pipe Line Co. v. Ross*, 51 F.2d 925 (10th Cir. 1931).

448. See, e.g., *De Soto Motor Corp. v. Stewart*, 62 F.2d 914 (10th Cir. 1932); *Keur v. Weiss*, 37 F.2d 711 (4th Cir. 1930).

449. 41 U.S. (16 Pet.) 1 (1842).

450. Compare *Franklin Sugar Ref. Co. v. Luray Supply Co.*, 6 F.2d 218 (4th Cir. 1925) (complete conformity), with *Camden & S. Ry. v. Stetson*, 177 U.S. 172 (1900) (statutory conformity), and *Louisville & N.R.R. v. McClish*, 115 Fed. 268 (6th Cir. 1902) (statutory conformity). See also DOBIE, FEDERAL PROCEDURE § 160 (1928). Some courts applied "general" law across the board. See, e.g., *Bates v. Preble*, 151 U.S. 149 (1894); *Arkansas Natural Gas Co. v. Sartor*, 78 F.2d 924 (5th Cir.), *cert. denied*, 296 U.S. 656 (1935); *Hawthorne v. Eckerson*, 77 F.2d 844 (2d Cir. 1935). See also JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 4-6 (1962); Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 627-30 (1936); Leach, *State Law of Evidence in the Federal Courts*, 43 HARV. L. REV. 554, 569-77 (1930); Note, *The Admissibility of Evidence in Federal Courts Under Rule 43(a)*, 46 COLUM. L. REV. 267 (1946). An apparent conflict on the subject existed within the Eighth Circuit, compare *Chicago & N.W. Ry. v. Kendall*, 167 Fed. 62 (8th Cir. 1909), with *von Crome v. Travelers' Ins. Co.*, 11 F.2d 350 (8th Cir.), *cert. denied*, 271 U.S. 664 (1926), although in the latter case the court cited one statute but apparently

certainty as to the source of evidence rules for the federal courts in actions at law was symptomatic of numerous difficulties encountered under the Conformity Act.<sup>451</sup> Because the act only required conformity "as near as may be," it was doomed from the outset to a variegated interpretation by the lower federal courts.

Practice in equity initially was governed by the Process Act of 1789,<sup>452</sup> which provided that "the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law."<sup>453</sup> Three years later Congress enacted the following statement as part of the Process Act of 1792:

That the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits . . . in . . . equity . . . [shall be] according to the principles, rules and usages which belong to courts of equity . . . , subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe. . . .<sup>454</sup>

The conformity principle presumably was not extended to equity because several states did not develop any substantial equity jurisprudence until long after the Revolution.<sup>455</sup> The Process Act of 1792 remained the primary directive regarding federal equity procedure until the fusion of law and equity in 1938.<sup>456</sup>

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intended to apply the other. At least one decision seemed to indicate that the matter was one of judicial discretion. *Royal Ins. Co. v. Eastham*, 71 F.2d 385 (5th Cir.), cert. denied, 293 U.S. 557 (1934). See also DOBIE, FEDERAL PROCEDURE §§ 139, 160 (1928).

451. See generally HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 584-86 (1953); Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 401-11 (1935).

452. 1 Stat. 93, 94 (1789).

453. Although the Rules of Decision Act applied only to actions at common law, equity courts generally looked to the law of the states for rules of substantive law. See, e.g., *Meade v. Beale*, 16 Fed. Cas. 1283 (No. 9371) (C.C.D. Md. 1850). This was not the situation, however, with remedies and matters of practice, which generally were considered to be matters of federal uniformity. See *Guffey v. Smith*, 237 U.S. 101 (1915); *Neves v. Scott*, 54 U.S. (13 How.) 268 (1851); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648 (1838). See also Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1024-31 (1953); Note, *The Equitable Remedial Rights Doctrine: Past and Present*, 67 HARV. L. REV. 836 (1954). As a result of the fusion of law and equity and the traditional application of state substantive law in equity, the Rules of Decision Act was made applicable to equitable actions in 1948. See Revisor's Note, 28 U.S.C. § 1652 (1964).

454. 1 Stat. 275, 276 (1792).

455. See Fisher, *The Administration of Equity Through Common-Law Forms in Pennsylvania*, 1 L.Q. REV. 455 (1885), reprinted in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 810 (1908); Woodruff, *Chancery in Massachusetts*, 5 L.Q. REV. 370 (1889).

456. The only other noteworthy enactments relating to equity were a restatement of the Supreme Court's rule-making power, 5 Stat. 516, 518 (1842), its consolidation into the Mode of Proof Act in 1878, Rev. Stat. § 862 (1878), and the three Compe-

The first equity rules were promulgated in 1822.<sup>457</sup> They did not refer directly to rules of evidence or to the proof of foreign law but they did provide for the taking of testimony by commission,<sup>458</sup> gave the circuit courts power to promulgate further rules and regulations,<sup>459</sup> and stated that in all matters not covered by the rules "the practice of circuit court shall be regulated by the practice of the high court of chancery in England."<sup>460</sup> The rules of 1822 were supplanted in 1842 by more detailed provisions,<sup>461</sup> which included rules for the taking of testimony and explicit provisions on examination, cross-examination, and admissibility.<sup>462</sup> The courts were empowered to appoint masters to regulate proceedings, including matters of evidence,<sup>463</sup> and the reference to practice in the High Court of Chancery was retained.<sup>464</sup> The Supreme Court's final equity rule-making effort took place in 1912 when it promulgated a set of extremely comprehensive rules.<sup>465</sup> Rule 46 detailed the manner in which evidence was to be presented, objected to, and its admissibility reviewed on appeal,<sup>466</sup> the 1842 provisions for pretrial discovery and court-appointed masters were expanded, a number of rules dealing with matters of evidence were added,<sup>467</sup> and the reference to English chancery practice was deleted (probably because of the unification of the English courts in 1873).<sup>468</sup> Little equity rule-making activity occurred between 1912 and 1938.<sup>469</sup>

The nature and source of the evidence rules to be applied in the

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tency of Witnesses Acts, which were combined in 1878, Rev. Stat. § 858 (1878). See note 439 *supra*. The Mode of Proof Act specifically gave the Supreme Court power to prescribe rules for "the mode of proof in causes of equity."

457. See RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 20 U.S. (7 Wheat.) xvii (1822).

458. Equity R. 24-26, 20 U.S. (7 Wheat.) xvii, xix-xx (1822).

459. Equity R. 32, 20 U.S. (7 Wheat.) xxi (1822).

460. Equity R. 33, 20 U.S. (7 Wheat.) xxi (1822).

461. See Rules of Practice in Suits in Equity in the Circuit Courts of the United States, 42 U.S. (17 Pet.) xli (1842).

462. Equity R. 67-70, 42 U.S. (17 Pet.) xli, lxxii-lxxiii (1842). See also Equity R. 80-81, 42 U.S. (17 Pet.) xli, lxxv (1842).

463. Equity R. 77, 42 U.S. (17 Pet.) lxxv (1842).

464. See Equity R. 90, 42 U.S. (17 Pet.) lxxvi (1842).

465. See Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). Between 1842 and 1912 the rules were modified sporadically but by and large the changes were of a trivial nature.

466. See also Equity R. 47-49, 51, 64, 226 U.S. 627, 661-63, 668 (1912).

467. See, *e.g.*, Equity R. 62, 64-65, 226 U.S. 667-68 (1912).

468. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66. See Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516-57 (1907); Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

469. See generally Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638 (1933); Talley, *The New and the Old Federal Equity Rules Compared*, 18 VA. L. REV. 663 (1913).

federal equity courts under the 1822, 1842, and 1912 Rules raised questions that were never satisfactorily resolved, in part because of the dearth of federal equity decisions on points of evidence.<sup>470</sup> Authority existed for the proposition that the rules of evidence in equity were the same as those applied at law, the only difference being that an objection to evidence was noted on the record for purposes of appeal.<sup>471</sup> This view was supported by one reading of the ambiguous statement in Rule 46 of the 1912 Rules to the effect that "the court shall pass upon the admissibility of all evidence offered as in actions in law." A second hypothesis was that the English rules of 1842 were the source of evidence rules in federal equity courts,<sup>472</sup> a proposition supported by the reference to English chancery practice in the 1822 and 1842 Rules. Furthermore, the text of the Process Act of 1792 and the inapplicability of the conformity principle in equity could be interpreted as indicating that Congress desired uniformity in the federal equity courts—a goal most easily accomplished by the incorporation of English practice.<sup>473</sup> A third approach was based upon the premise that federal equity practice was not encumbered by any rules of evidence, especially those dealing with admissibility; the theory was that there is no reason to exclude any potentially relevant material absent a jury.<sup>474</sup> This view has the attraction, as does the second, of being consistent with the notion that the federal equity courts were an independent legal system, unfettered by the conformity principle and free to develop a unitary national practice. In the end, no single theory achieved ascendancy over the others.

## 2. *The Rules Enabling Act of 1934*

The Rules Enabling Act of 1934<sup>475</sup> empowers the Supreme Court to prescribe general rules governing "the forms of process, writs,

470. The lack of judicial opinions on the subject results from the fact that improperly admitted and improperly excluded evidence, which was required to be set forth in the record, usually was ignored on appeal or considered by the court without comment, and rarely served as a basis for reversal. See 1 WIGMORE, EVIDENCE § 6, at 172-73 (3d ed. 1940). For a statistical analysis indicating the unimportance of questions of admissibility in federal equity cases, see Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 625 (1936).

471. See, e.g., *Harmer v. Gwynne*, 11 Fed. Cas. 551 (No. 6,075) (C.C.D. Ohio 1851); 1 BATES, FEDERAL EQUITY PROCEDURE § 388 (1901); GRESLEY, LAW OF EVIDENCE IN THE COURTS OF EQUITY 2-6 (2d ed. 1848); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 201-02 (1941).

472. See 1 WIGMORE, EVIDENCE § 6, at 172 (3d ed. 1940) (opinion of Russell Wiles, Esq.).

473. Cf. *United States v. American Lumber Co.*, 85 Fed. 827, 829 (9th Cir. 1898).

474. See *Carson v. American Smelting & Ref. Co.*, 25 F.2d 116, 119 (W.D. Wash. 1928); Callahan & Ferguson, *supra* note 470, at 625; cf. *Manhat v. United States*, 220 F.2d 143 (2d Cir.), *cert. denied*, 349 U.S. 966 (1955).

475. 48 Stat. 1064 (1934), as amended, 28 U.S.C. § 2072 (1964). The language of the act was revamped in 1948 to take account of the merger of law and equity.

pleadings, and motions, and the practice and procedure in civil actions at law" in the United States District Courts and the courts of the District of Columbia. The rules cannot "abridge, enlarge, or modify" the substantive rights of any litigant. Section 2 of the original act gave the Court authority to merge law and equity "provided . . . that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."<sup>476</sup>

At first glance, the Enabling Act merely reinstates the Supreme Court's rule-making power, which had existed with respect to the law courts before the Conformity Act and had been in force in equity after the Process Act of 1792, and grants the power to fuse law and equity. The efforts entailed in securing the enactment of the act and the conditions that motivated those efforts, however, belie the simple language of the statute. The Enabling Act was the culmination of more than twenty years of concerted pressure by the bar to eliminate the uncertainties of federal practice under the Conformity Act and the Equity Rules of 1912.<sup>477</sup> Its failure to trumpet any grandiose legislative purpose merely reflects the indecision of the act's draftsmen and sponsors as to whether uniformity of practice among the state and federal courts in the same jurisdiction was more desirable than uniformity among the federal courts throughout the country. This ambivalence ultimately was resolved and a plan emerged to adopt uniform rules for the federal district courts that also would serve as a model for procedural reform in the states.<sup>478</sup>

There always has been a consensus among the commentators that the Rules Enabling Act delegates sufficient authority to the Supreme Court to permit the promulgation of rules of evidence for the federal courts<sup>479</sup> (and for the moment Rule 44.1 is being subsumed

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476. The first legislative step toward fusion was the Law and Equity Act of 1915, 38 Stat. 956, which made equitable defenses available at law and permitted the transfer of cases brought on the wrong side of the court.

477. See Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934); Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34 (1922).

478. Debate over the primary goal of the reform movement continued until the statute actually was passed. *Hearings Before the House Committee on the Judiciary*, 75th Cong., 3d Sess., serial 17, 1-26 (1938). See generally Sunderland, *supra* note 477. The decision to unify law and equity and to appoint an Advisory Committee was not made until mid-1935. See generally 1A MOORE, FEDERAL PRACTICE ¶¶ 0.501[2], 0.511 (2d ed. 1966).

479. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 29-36 (1962); Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 277-87 (1962); Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341 (1960); Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24



under the rules of evidence). This also appears to have been the conclusion of the Advisory Committee that drafted the original Federal Rules of Civil Procedure.<sup>480</sup> The Committee did not incorporate rules of evidence in its draft primarily because its members considered the task beyond their energies and one better left to another group or to gradual judicial development. In addition, it was felt that the delay resulting from an attempt to formulate evidence rules might have jeopardized the expeditious adoption of the other rules. Thus, Rule 43(a) was inserted as a temporary expedient.<sup>481</sup> Actually, several other Rules touch upon matters of evidence, including Rule 44, which governs the admissibility of official documents, and Rules 26-37, 41(b), 43(b)(c)(d)(e), 45, 46, 50, 59(a), 60, 61, 68, and 80.<sup>482</sup> None of these Rules has been challenged successfully as being beyond the scope of the Enabling Act.

Obviously, however, the Enabling Act is not infinitely elastic. The jugular issue in determining the validity of a Federal Rule under the act's rule-making delegation is whether the rule relates

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F.R.D. 331 (1960); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429 (1958); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 484 (1957); Riedl, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601 (1940); Sullivan, *Evidence Rules in the Federal Courts: A Time for a Change*, 38 TEXAS L. REV. 451 (1960); Sunderland, *Character and Extent of the Rule Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 406-07 (1935); Sweeney, *Federal or State Rules of Evidence in Federal Courts*, 27 ILL. L. REV. 394, 398 (1932). *But see* Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEXAS L. REV. 1, 23-25 (1934); Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 462-64 (1937). The early Supreme Court decisions in *Doe ex dem. Patterson v. Winn*, 30 U.S. (5 Pet.) 233 (1831), and *Mills v. Bank of the United States*, 24 U.S. (11 Wheat.) 431 (1826) (dictum), in which evidence rules promulgated by lower federal courts were invalidated, are not relevant because of the absence of any congressional delegation of rule-making power to those courts.

480. See AMERICAN BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 186 (1938) (Cleveland meetings). That the Advisory Committee realized it was dealing with matters of evidence is made abundantly clear by the following passage from its note to Rule 43(a):

The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-examination modify U.S.C., Title 28, § 725 (Laws of states as rules of decision) in so far as that statute has been construed to prescribe conformity to state rules of evidence. . . . The last sentence modifies to the extent indicated U.S.C., Title 28, § 631 (Competency of witnesses governed by state laws).

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE 37 (1938). Thus, the Congress was on notice prior to its approval of the Federal Rules that the Advisory Committee had construed the Enabling Act as extending to matters of evidence. An excellent analysis of the circumstances surrounding the enactment of the Enabling Act and the adoption of the Federal Rules is found in Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 278-82 (1962).

481. See Clark, *Foreword to Symposium on the Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956).

482. See generally JUDICIAL CONFERENCE OF THE UNITED STATES, *op. cit. supra* note 479, at 12-14; 1 WIGMORE, EVIDENCE § 6c (3d ed. 1940).

to "practice and procedure" or affects "substantive rights." The legislative history is inconclusive as to how these words apply to rules of evidence. A version of the statute submitted to Congress many years before the Enabling Act's ultimate enactment specifically provided for "taking and obtaining evidence"<sup>483</sup> but the absence of this passage in the final enactment is of *de minimis* probative force. The Revisor's Note to the Rules Enabling Act for admiralty<sup>484</sup> states that a reference to "modes of proof," which historically encompassed rules of evidence, was deleted because it was believed covered by the words "practice and procedure." A transmutation of this reasoning to the Civil Rules context supports the conclusion that evidence is within the compass of the Rules Enabling Act.

Nonetheless, the history of federal procedure prior to the Enabling Act does not foreclose the argument that rules of evidence were "rules of decision" under section 34 of the Judiciary Act of 1789, rather than matters of "practice, pleadings, and forms and modes of proceedings" within the meaning of the Process, Mode of Proof, and Conformity Acts. The thrust of this thesis is that rules of evidence deal with "substantive rights" and are outside the delegation in the Rules Enabling Act. Recall that pre-Conformity Act decisions relied upon the Rules of Decision Act to bind federal courts to state rules of evidence absent a federal statute, and that a number of federal courts reached the same conclusion even after the Conformity Act was enacted.<sup>485</sup> Furthermore, a sharp distinction occasionally was drawn in the post-Conformity Act cases between practice and rules of evidence. In *Chicago & Northwestern Ry. v. Kendall*,<sup>486</sup> it was held that a federal court's power to compel a plaintiff to submit to a physical examination was a matter of practice and not of evidence. The Eighth Circuit, citing the Supreme Court's decision in *Wayman v. Southard*,<sup>487</sup> went on to state that the Rules of Decision Act did not apply to the process and practice of the federal courts. In *Wayman* the Supreme Court had remarked that "the thirty-fourth section . . . has no application to the practice of the court, or to the conduct of its officer, in the service of an execution."<sup>488</sup> Unfortu-

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483. See S. REP. NO. 892, 64th Cong., 2d Sess. 1 (1917). Judicial rule-making in the realm of evidence on the state level is discussed in Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 562-73 (1956); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

484. 28 U.S.C. § 2073 (1964).

485. See text accompanying notes 443-51 *supra*.

486. 167 Fed. 62, 65 (8th Cir. 1909).

487. 23 U.S. (10 Wheat.) 1 (1825).

488. *Id.* at 6.

nately, the passage's punctuation renders it ambiguous. One commentator has argued that *Wayman* supports the proposition that the Rules of Decision Act did not require conformity to state practice.<sup>489</sup> This view is bolstered by language in *United States v. Eckford*,<sup>490</sup> which appears to be a lineal descendent of the statement in the *Wayman* syllabus that section 34 "does not apply to the process and practice of the [federal] courts. It is a mere legislative recognition of the principles of universal jurisprudence as to the operation of the lex . . . ."<sup>491</sup> It is doubtful, however, that the Court's opinion in *Wayman* actually supports the passage in the syllabus. In addition to *Kendall*, at least one other post-Conformity Act case held that although methods for obtaining evidence were matters of practice and procedure, rules of evidence were not.<sup>492</sup>

Given this historical background the following syllogism can be constructed: if matters of evidence were governed by the Rules of Decision Act, and if the Rules of Decision Act did not extend to matters of practice and procedure, then evidence is not a matter of practice and procedure. Although the judicial opinions on the status of evidence prior to the Enabling Act do not use the terms "substance" and "procedure," the allocation of matters between the Rules of Decision and Conformity Acts may reflect a primordial substance-procedure dichotomy for ascertaining the source of governing law in the federal courts.<sup>493</sup> If the syllogism is correct and evidence is within the ambit of the Rules of Decision Act,<sup>494</sup> the failure to modify that statute at the time the Enabling Act was passed coupled with the similarity of the language in both the Enabling and Conformity Acts lends additional textual support for characterizing evidence as "substantive" and beyond the scope of the Enabling Act's delegation.

This hypothesis clearly is quite tenuous, however. In contrast to the views expressed in cases such as *Kendall*, several Supreme Court<sup>495</sup> and lower federal court<sup>496</sup> decisions contain dicta to the

489. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEXAS L. REV. 1, 24 (1934).

490. 73 U.S. (6 Wall.) 484 (1867).

491. 23 U.S. (10 Wheat.) at 2; cf. 1 WIGMORE, EVIDENCE § 6b, at 195 (3d ed. 1940).

492. *Bryant v. Leyland*, 6 Fed. 125 (C.C.D. Mass. 1881); cf. *Easton v. Hodges*, 8 Fed. Cas. 271 (No. 4258) (C.C.E.D. Wis. 1877), *rev'd on other grounds*, 106 U.S. 408 (1882). See also *McKeon v. Central Stamping Co.*, 264 Fed. 385 (3d Cir. 1920); *McBride v. Neal*, 214 Fed. 966 (7th Cir. 1914); DOBIE, FEDERAL PROCEDURE § 139 (1928).

493. See Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 938 (1951).

494. The limited legislative history of section 34 of the Judiciary Act of 1789 sheds no light on the intended significance or compass of its reference to state law. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81-88 (1923).

495. See *Thompson v. Missouri*, 171 U.S. 380, 385 (1897); *Kring v. Missouri*, 107 U.S. 221, 231 (1882).

496. See *De Soto Motor Corp. v. Stewart*, 62 F.2d 914 (10th Cir. 1932); *Keur v.*

effect that the Conformity Act and not the Rules of Decision Act governed evidence rules. It also seems reasonably clear that whether a court relied on one statute rather than the other depended upon considerations other than a perception of the demarcation between "substance" and "procedure."<sup>497</sup> Judicial resort to the Rules of Decision Act on points of evidence before the enactment of the Conformity Act is understandable, since utilization of the static conformity of the Process Acts would have compelled the federal courts to follow state practices as of wholly arbitrary dates. In *McNeil v. Holbrook*,<sup>498</sup> for example, had the Supreme Court relied on the Process Act of 1792, rather than on the Rules of Decision Act, an extremely relevant Georgia statute enacted in 1810 (twenty-eight years before the case reached the Supreme Court) probably would not have been applied. Inasmuch as numerous pre-1872 opinions referred to the Rules of Decision Act on matters of evidence, it is not surprising that these pronouncements continued after 1872, especially since it usually was of no moment which act served as a source of law for evidence rules.

Finally, even if evidence matters were controlled by the Rules of Decision Act, that alone is an insufficient basis for concluding that rules of evidence are "substantive" under the Rules Enabling Act of 1934. Although a substance-procedure analysis was applied to several legal problems before the Enabling Act,<sup>499</sup> it was not used with reference to evidence or, for that matter, to determine the source of law governing actions in the federal courts. Utilization of the dichotomy to ascertain the governing law in the federal courts is largely a post-1934 phenomenon stemming from the Enabling Act's wording and the amplification of the attention given the substance-procedure syndrome following the decisions in *Erie* and *York*.<sup>500</sup> Indeed, there is no evidence that the Advisory Committee appointed to draft the original Federal Rules of Civil Procedure considered the line between the Rules of Decision Act and the Conformity Act of consequence in determining the boundaries of its mandate under the Enabling Act.

The foregoing analysis makes it difficult to conclude that rules of

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Weiss, 37 F.2d 711 (4th Cir. 1930); *Battaglia v. United States*, 9 F. Supp. 360 (N.D. Ill. 1935).

497. See 5 MOORE, FEDERAL PRACTICE ¶ 43.02[2] (2d ed. 1966).

498. 37 U.S. (12 Pet.) 84 (1838).

499. See RESTATEMENT, CONFLICT OF LAWS §§ 585, 595-98 (1934).

500. The writers who have alluded to the possibility of evidence falling within the Rules of Decision Act rather than the Conformity Act have taken the position that this allocation would not preclude the conclusion that evidence is a branch of procedure. 5 MOORE, FEDERAL PRACTICE ¶ 43.02[2] (2d ed. 1966); Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 407 (1935).

evidence are substantive and beyond the scope of the Enabling Act. Construing the statute to exclude evidence is inconsistent with the Enabling Act's purpose of providing a foundation for an effective revision of federal practice. Furthermore, the thesis for classifying evidence as substantive is unidirectional. It focuses entirely on the history of practice on the law side of the federal courts and overlooks the fact that neither the Rules of Decision nor the Conformity Act applied to equity, which after 1822 was governed by rules promulgated by the Supreme Court pursuant to a grant of authority similar to the Enabling Act. It also is doubtful that Congress concerned itself with what the precise contours of "practice and procedure" in the federal courts should be when it enacted the Enabling Act, or that it intended to constrict the Supreme Court's rule-making power in accordance with any classification scheme supposedly in existence before 1934. Congress appears to have been much more desirous of wiping the slate clean and eliminating the statutory goulash created by the Rules of Decision Act, the Process Acts, the Conformity Act, the Competency of Witnesses Act, and the Mode of Proof Act.<sup>501</sup>

The Supreme Court has examined the scope of the Enabling Act on only a few occasions since the adoption of the Federal Rules of Civil Procedure.<sup>502</sup> In *Sibbach v. Wilson & Co.*,<sup>503</sup> the plaintiff refused to comply with an order under Rule 35 to submit to a physical examination, contending that although Rule 35 and the mechanism for its enforcement in Rule 37 were rules of procedure, they were beyond the Enabling Act's delegation to the Supreme Court because they affected well-recognized "important" or "substantial" rights. The Court rejected this contention in a five-to-four decision, stating:

The asserted right . . . is no more important than many others enjoyed by litigants . . . before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. . . . If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test 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.<sup>504</sup>

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501. See S. REP. 1174, 69th Cong., 1st Sess. 1-2 (1926).

502. The Supreme Court failed to approve a proposed rule on the registration of judgments, which appeared as Rule 77 of the Advisory Committee's 1937 draft. Conceivably, the Court felt that this rule affected substantive rights. See 2 MOORE, FEDERAL PRACTICE ¶ 1.04[2] (2d ed. 1966).

503. 312 U.S. 1 (1941).

504. *Id.* at 14. The question before the Court in *Sibbach* was raised again in

The dissenting opinion, written by Mr. Justice Frankfurter, did not dispute the conclusion that matters involving the "economic and fair conduct of litigation" are within the Enabling Act; instead, it argued that Rule 35 impairs the historic immunity of the person.

In *Mississippi Publishing Corp. v. Murphree*,<sup>505</sup> a unanimous Supreme Court upheld the validity of the provision in Rule 4(f) permitting a federal court's process to run throughout the state in which it sits. The Court acknowledged that the Rule affected the corporate petitioner because it might not have been subjected to suit outside a particular district in a multi-district state under prior practice, but concluded that the Rule related only to the manner and means of enforcing the respondent's claim and did "not operate to abridge, enlarge or modify the rules of decision by which . . . [the district court] will adjudicate its rights."<sup>506</sup>

Most recently, in *Hanna v. Plumer*,<sup>507</sup> which already has been considered in detail,<sup>508</sup> Mr. Chief Justice Warren indicated that a Federal Rule can be invalidated "only if the Advisory Committee, this Court and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."<sup>509</sup> The Chief Justice's opinion unfortunately offers few insights into what "transgresses . . . the terms of the . . . Act." A sentence at the close of the opinion that may apply only to the *Erie* aspect of the case but nonetheless does demonstrate the elevated status given the Rules, states: "To hold that a Federal Rule . . . must cease to function whenever it alters the mode of en-

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Schlagenhauf v. Holder, 379 U.S. 104 (1964), with similar results and without any dissent on the question of the Rule's validity.

505. 326 U.S. 438 (1946).

506. *Id.* at 446. In *Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959), *cert. denied sub nom. Carlin v. Iovino*, 362 U.S. 949 (1960), the Second Circuit made it clear that the substance-procedure analysis employed in diversity litigation under *Erie R.R. v. Tompkins* before *Hanna v. Plumer* does not apply to the process of defining the scope of the Rules Enabling Act. In *Iovino* the court upheld Rule 25(a)(1) against the contention that the substitution of parties permitted by the Rule would not be permitted under state practice. The court stated:

[I]t would unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights.

*Id.* at 46. The opposite conclusion regarding the same Rule had been reached in the pre-*Byrd* decision in *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956). See also *Bendix Aviation Corp. v. Glass*, 195 F.2d 267 (3d Cir. 1952); *Hart v. Knox County*, 171 F.2d 45 (6th Cir. 1948); *United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D.N.Y. 1964). *But cf. Provident Traders Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 365 F.2d 802 (3d Cir. 1966), 80 HARV. L. REV. 678 (1967); 65 MICH. L. REV. No. 5 (to be published March, 1967).

507. 380 U.S. 460 (1965).

508. See text accompanying notes 364-75 *supra*.

509. 380 U.S. at 471.

forcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."<sup>510</sup> Despite the lack of elaboration in *Hanna*, that case clearly gives extremely wide latitude to those who formulate the rules for the federal courts.

The history of practice and procedure in the federal courts and the criteria derived from the cases construing the Rules Enabling Act leave little doubt that the vast majority of evidentiary matters relate to practice and procedure or to "the manner and means of enforcing" rights, and therefore are within Congress' delegation to the Supreme Court. Principles of admissibility and competency historically have evolved judicially, either gradually by the decisional process or pursuant to rule-making delegations from legislative bodies.<sup>511</sup> Certain quasi-evidentiary subjects, such as privileges and burdens of proof, have been thought to require special treatment<sup>512</sup> because they frequently represent a conscious attempt to balance one litigant's ability to enforce a right against another litigant's ability to defend against the assertion of that right. Furthermore, privileges and burdens of proof frequently have a legislative genesis, as is especially true when they are associated with a statutory cause of action,<sup>513</sup> or embody important policies as to the handling of certain information and confidential relationships by the courts. In these sensitive areas, Congress may not have intended the Enabling Act to give the Supreme Court power to overturn state or federal legislative judgments. With these exceptions, the Supreme Court's present effort to develop federal evidence rules appears to be a proper exercise of their rule-making power.<sup>514</sup>

### 3. Rule 44.1 and the Enabling Act

In light of the foregoing, it seems reasonable to conclude that if Federal Rule 44.1 is viewed as a rule of evidence, it is well within the ambit of the Rules Enabling Act. Certainly the second sentence

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510. *Id.* at 473-74. In a concurring opinion, Mr. Justice Harlan took exception to what he believed to be the Court's "arguably procedural, ergo constitutional test." *Id.* at 476.

511. See Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429 (1957).

512. See, e.g., Louisell & Crippens, *Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483-84 (1957).

513. See Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 346-48 (1959).

514. See 1961 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31; Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A.J. 772 (1961).

of the Rule falls in this category, given the strong analogy between it and the general admissibility provision in Rule 43(a). Even if the second sentence is not subsumed under the rules of evidence but is classified as a sharp departure from the historic treatment accorded foreign-law issues by the federal courts, it does not violate the Enabling Act. The rejection of one practice and the substitution of another conceived to be better suited to current conditions is a permissible form of rule-making as long as substantive rights are not affected, and such rights do not seem to be affected by this portion of the Rule. A litigant does not have a substantive right to prove foreign law or to have his opponent do so in a certain mode any more than a litigant has a vested right to have contributory negligence pleaded in a stylized manner by a particular party or to have a "cause of action," rather than a "claim for relief," set forth in his adversary's pleadings.<sup>515</sup> Thus, the fact that the Rule permits the court to consider foreign-law material that may be inadmissible under traditional evidence notions or to engage in its own research excursions does not "abridge, enlarge or modify any substantive right" of the litigants.

The new Rule's final sentence also seems invulnerable. It does not exceed the Supreme Court's power to promulgate rules governing the procedure "of the district courts," even though its content tangentially affects the conduct of the appellate courts by shaping the scope of review to be given a trial court's determination of foreign law. The last sentence's characterization of a foreign-law determination as a ruling on a question of law is directed primarily at the district courts. Its purpose is to define the methodology to be employed by the trial judge in handling foreign-law issues in such contexts as motions for summary judgment, new trial, and judgment notwithstanding the verdict. Moreover, the last sentence of the new Rule has no more impact on the appellate process than does the provision in Rule 54(b) for final judgment on less than all the claims in an action and the passage in Rule 73 dealing with appeals to the courts of appeals, both of which have survived Rules Enabling Act challenges.<sup>516</sup> To the extent that the last sentence in Rule 44.1 affects the scope of review given a trial court's determination of foreign law, it is indistinguishable from the "clearly erroneous" standard in Rule 52(a). Admittedly, the new Rule may alter the pre-1966 scope of review in several circuits but the amplification of the appellate court's obligations *vis-à-vis* issues of foreign

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515. See FED. R. CIV. P. 8.

516. See *Bendix Aviation Corp. v. Glass*, 195 F.2d 267 (3d Cir. 1952) (Rule 54(b)); *Hart v. Knox County*, 171 F.2d 45 (6th Cir. 1948) (Rule 73).



law cannot be said to "modify the substantive rights of any litigant" in a way that differs from numerous other procedural changes effected by the Federal Rules, including the expansion of discovery, the territorial reach of the district court's process, and the role of the trial judge on post-trial motions.<sup>517</sup>

Finally, using Rule 44.1 as a fulcrum for developing a federal standard with respect to allocating proof functions among the parties or dealing with a failure to prove foreign law or for justifying judicial resolution of foreign-law issues without jury involvement will not generate Enabling Act difficulties. By analogy to *Cohen* and *Ragan*, and their *ex post facto* rationalization in *Hanna*,<sup>518</sup> these practices are not covered by Rule 44.1 and their validity will not be tested under the rule-making power. Instead, they raise issues as to the proper scope of federal power under the Constitution to regulate matters pertaining to the functioning of the national courts and therefore should be tested by the same factors that were explored in the discussion of the *Erie* doctrine and the interest balancing analysis of *Byrd*.<sup>519</sup>

#### IV. CONCLUSION

The rigid insistence by American courts upon the formal pleading and proof of foreign law during the nineteenth and early part of the twentieth centuries was the by-product of the common-law fetish of characterizing issues of foreign law as questions of fact. This classification, which originally was employed by the English courts for purposes that in retrospect appear to have little relevance to existing conditions, permeated the entire process of proving alien law and obfuscated the functional similarity between domestic and foreign-law issues. The fact theory became so pervasive in the United States that even the enactment of statutes designed to relieve courts

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517. Since Rule 44.1 does not deal explicitly with the question whether foreign law should be determined by a judge or jury, it does not run afoul of the express preservation of trial by jury in the Enabling Act. A federal-court practice of judicial determination of foreign-law issues would not abridge the seventh amendment's jury-trial guarantee. See text accompanying notes 231-92 *supra*.

518. See text accompanying notes 368-70 *supra*.

519. Cf. *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858, 862 (5th Cir. 1966) ("the unit of time type of argument is not proscribed by federal statute or by the federal rules"; "the propriety of the argument is a federal question"; "it is a matter of federal trial procedure"; citing *Byrd*). There are several intimations in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), that federal law can be used to fill the interstices of the Federal Rules. Presumably, the *Byrd* analysis will be superimposed on questions of this type. The *Erie* doctrine, its modification by *Byrd*, and the relevance of the two cases to Rule 44.1 are discussed at text accompanying notes 332-428 *supra*.

and litigants of much of the burden of pleading and proof failed to liberate the judicial mind from established patterns of doctrine and nomenclature. Not surprisingly, the federal courts fell heir to much of the dogma and it was not until the promulgation of the Federal Rules of Civil Procedure that any attempt was made to chip away the encrustation that had formed on judicial habits in this area.

The adoption of Federal Rule 44.1 in 1966 has presented the federal courts with a blueprint for handling foreign-law issues that extricates them from the formalism and inefficiency of the fact approach. The new Rule offers parties and trial judges a highly malleable scheme for raising, proving, and determining foreign law that is compatible with the clarion for the "just, speedy, and inexpensive" administration of justice sounded in Federal Rule 1. If the conceptual underpinnings and *modus operandi* of the Rule are given effect by the federal judiciary, the pleading and proof of foreign law will be modernized and brought into the mainstream of Federal Rule practice. Given the increased incidence of foreign-law issues in federal litigation during the past quarter century, it is imperative that this be done in order to secure the full benefits of the new Rule.

Rule 44.1 does not deal explicitly with many of the problems that are bound to arise in the future—some of these will be the timing of the notice required by the Rule's first sentence, the allocation of proof functions, the relative roles of the trial judge and the jury, the consequences of failing to prove foreign law, and the precise scope of appellate review. The expectation is that the various lacunae in the Rule will be closed by the courts in ways consistent with the norms established in analogous areas of federal procedure to the extent that the peculiarities of proving foreign law permit. This burden of innovative cross-fertilization and integration of the Rule has appropriately been left to the federal bench.

In the event that Rule 44.1 is challenged under the *Erie* doctrine or the Rules Enabling Act, due account should be taken of the federal policies, both expressed and implicit, embodied in the Rule, the extensive effort that has been expended in the last decade in every quadrant of the federal government and by the bar to upgrade the United States' international judicial co-operation practices, and the fact that the new Rule is a working element of a comprehensive civil procedure system. Distortion of the practice under Rule 44.1 may have an adverse affect on other parts of the adjudicatory process and on the federal government's overall schema for promoting international judicial assistance. In short, faithful and creative employ-

ment of the new procedure for determining foreign law are highly desirable policy objectives. Since the Supreme Court decisions in *Byrd* and *Hanna*, doctrinal bases for achieving these objectives and for preventing the emasculation of Rule 44.1 are available.