

July 2015

Military Rules of Evidence: Adoption or Abrogation of the Common Law?

Richard H. Mills

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Common Law Commons](#), [Evidence Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Mills, Richard H. (1989) "Military Rules of Evidence: Adoption or Abrogation of the Common Law?," *Akron Law Review*: Vol. 22 : Iss. 3 , Article 4.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol22/iss3/4>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

MILITARY RULES OF EVIDENCE: ADOPTION OR ABROGATION OF THE COMMON LAW?

by

HONORABLE RICHARD H. MILLS*

It is told that Justice Oliver Wendell Holmes and Judge Augustus Hand of the U.S. Court of Appeals often walked together on their way to their respective courts in the nation's capital.

On one particularly delightful spring day, as they approached the Washington intersection where each would make their separate way, Judge Hand said: "Good day' And do justice, Your Honor."

"Oh," replied Justice Holmes, "It's not my duty to do justice-- just to see that the rules are complied with."¹

Posit: What role should the common law of evidence play in a military judge's decisions under the present rules of evidence?

My conclusion is that the answer to this question is of bedrock importance to military justice.

The Annual Reports of the Code Committee on Military Justice--for the last several fiscal years--make it graphically clear that the interpretation and application of the Military Rules of Evidence accounted for a large share of the work of the Courts of Military Review.² Those reports use the phrases "numerous cases," "a large portion of the docket" and "a significant portion of the Court's calendar."³

*United States District Judge for the Central District of Illinois. Prior to his appointment, Judge Mills was State's Attorney for four years, an Illinois Circuit Judge for 10 years, and a Justice of the Appellate Court of Illinois for nearly 9 years. He holds a B.A. from Illinois College, a J.D. from Mercer University (Editorial Board, *Mercer Law Review*), and an LL.M. from the University of Virginia.

Just after taking the federal bench, Judge Mills retired as Colonel, JAGC, U.S. Army Reserve, after over 30 years service, and was appointed a Brigadier General in the Illinois Militia. During the Korean War, General Mills served 14 months in Korea with the 3rd Infantry Division and received the Bronze Star. He is a graduate of the U.S. Army Judge Advocate General's School, the Command and General Staff College and the Industrial College of the Armed Forces.

(The material for this article was originally presented as the keynote address to the 14th Interservice Military Judges' Seminar at Maxwell AFB, Alabama, sponsored by the U.S. Air Force. The author is indebted to his Law Clerk, Donald Shawler, for the excellent research and stimulation leading to both the content and exposition of this subject.)

¹ A Washington, D.C. legal folklore.

² *Annual Report of the Code Committee on Military Justice* (Oct. 1, 1985 - Sept. 30, 1986), (Oct. 1, 1984 - Sept. 30, 1985); (Oct. 1, 1983 - Sept. 30, 1984).

³ *Id.*

Definition

“Evidence” may be defined as information which is offered for the purpose of establishing the required degree of persuasion, either positive or negative, in the minds of the court members (the jury) or the law officer (the judge) concerning the truth of any matter of fact which must be determined during trial. The law of evidence consists of those rules under which it is determined that information may or may not be presented for consideration by the court members or law officer, and what weight is to be given the information that may be presented.⁴

THE MILITARY RULES OF EVIDENCE - AN INTRODUCTION

While still providing the certainty necessary for a worldwide criminal practice, the Military Rules of Evidence largely correspond to the Federal Rules of Evidence. The minor modifications contained in the military rules incorporate specialized military practices and terms--for example, “court members” and “military judge” instead of “jury” and “court.”⁵ The sections of the Military Rules, I--General Provisions, II--Judicial Notice, IV--Relevancy and its Limits, VI--Witnesses, VII--Opinions and Expert Testimony, VIII--Hearsay, IX--Authentication and Identification, X--Contents of Writings, Records, and Photographs, and, XI--Miscellaneous Rules follow the federal pattern, except sections III and V which differ significantly.

Section III of the military rules represents a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. Its drafters believed this material should be codified because of the large number of lay personnel holding important roles within the military legal system and the relative inaccessibility of attorneys and law libraries to non-lawyer legal officers. These rules represent a judgment that it would be impractical to operate without them.⁶ The same section of the federal rules, on the other hand, pertains to presumptions in civil actions. Because no presumption may be given a binding effect in criminal proceedings, there was no need to place a like section in the military rules as they apply only to courts-martial.⁷

In contrast, section V of both sets of rules addresses privileges, but the military's version promulgates specific guidelines, while its federal counterpart leaves the issue of a privilege's applicability to the common law alone. Congress did

⁴ J. MUNSTER & M. LARKIN, *MILITARY EVIDENCE* 1-2 (1959).

⁵ *MANUAL FOR COURTS-MARTIAL*, A22-1 (1984) (hereinafter *Manual*).

⁶ *Id.* at A22-5.

⁷ MIL. R. EVID. 101(a); Blackmar, *The Proposed Federal Rules of Evidence--How Will They Affect the Trial* *http://www.akronlawreview.org/akronlawreview/vol22/iss3/4* (1979).

not accept the Supreme Court's proposed privilege rules because the lawmakers could not achieve a consensus as to the desirability of a number of specific privileges.⁸ The military rules deem the federal approach impractical within the armed forces due again to the need for stability in view of the system's dependence upon laymen and temporary courts, as well as its inherent geographical and personnel changes.⁹

Yet despite these differences, an understanding of the Federal Rules of Evidence and the common law precedents from which they evolved is imperative if the majority of the military rules is to be properly employed. Military Rule 101(b) recognizes as much:

Secondary sources. If not otherwise prescribed in this Manual [for Courts-Martial] or these rules, and insofar as practicable and not inconsistent with or contrary to the [Uniform] Code [of Military Justice] or this Manual, courts-martial shall apply:

- (1) First, the Rules of Evidence generally recognized in the trial of criminal cases in the United States district courts; and
- (2) Second, when not inconsistent with subdivision (b)(1), the Rules of Evidence at common law.

In 1983, the Court of Military Appeals in *United States v. Clemons*¹⁰ construed this provision to mean that where article III federal court precedent is not inconsistent with military practice, the trial judge should consider such authority. The drafters' analysis to the military rules similarly recognizes that although not binding, "specific decisions of the Article III courts involving rules which are common both to the Military Rules and the Federal Rules should be considered very persuasive.... [A] significant policy consideration in adopting the Federal Rules of Evidence was to insure, where possible, common evidentiary law."¹¹

Of course, Rule 101(a) makes clear that the Military Rules of Evidence are the primary, binding source of evidentiary law for military courts. Perhaps a literal reading of the rule would indicate what the 1985 concurring opinion argues in the Navy/Marine Court of Military Review case of *United States v. McConnell*: "It is only where the military rules do not dispose of an issue [that] the Article III federal practice, when practicable and not inconsistent or contrary to the Military Rules,

⁸ S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 200-01 (2d ed. 1977).

⁹ Manual, *supra* note 5, at A22-35.

¹⁰ 16 M.J. 44 (C.M.A. 1983).

¹¹ Manual, *supra* note 5, at A22-2.

shall be applied."¹² However any approach which arguably attempts to restrict the use of federal precedent to a situation where no military rule is on point unduly limits the authority on which the military judge can rely in reaching a decision--especially when few military courts may have had the opportunity to pass on the issue at bar.

Admittedly, when a military court looks to the federal rules and their construction as a source of guidance, it must be careful to distinguish the provisions which the military rules have explicitly or implicitly rejected from those they have not. The admonishment for caution, however, does not alter the path which the United States Court of Military Appeals set out in *United States v. Nivens* even before the enactment of Rule 101: "This court has repeatedly held that federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment."¹³

FEDERAL RULES OF EVIDENCE

"In law as in life, lines have to be drawn."

--Justice Frankfurter¹⁴

In March 1961, the Judicial Conference of the United States approved the proposal of the Standing Committee on Rules of Practice and Procedure that an Advisory Committee on the Rules of Evidence be established by appointment from the Chief Justice of the United States.¹⁵ The Chief Justice, however, first designated a special committee to study and report on the advisability and feasibility of adopting uniform rules of evidence in the federal courts, and thus postponed naming a committee to undertake the task of actually drafting the rules.¹⁶ This special committee submitted its report to the Standing Committee in December 1961.¹⁷

At that time, the law pertaining to evidence in criminal trials was prescribed in Federal Criminal Rule 26:

The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of

¹² 20 M.J. 577 (N.M.C.M.R. 1985), *aff d.*, 24 M.J. 127 (C.M.A. 1987).

¹³ *United States v. Nivens*, 21 C.M.A. 420, 423, 45 C.M.R. 194, 197 (1972). See generally S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL*, 7-8 (2d ed. 1986).

¹⁴ *Pearce v. Commissioners of Internal Revenue*, 315 U.S. 543, 558 (1942).

¹⁵ See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 175-76 (1969) (hereinafter Preliminary Draft).

¹⁶ *Id.* at 176.

¹⁷ See Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73 (1962).

reason and experience.

The rule applicable to civil proceedings, however, Federal Civil Rule 43(a), followed a different theory:

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. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in a like manner.

Because of the double burden placed on courts and practitioners by these divergent standards, and the desire to organize and simplify the developed principles, precedents and procedures, the report found a need for improvement in federal *evidence* law.¹⁸

After receiving comments from the legal profession, the Chief Justice proceeded to select an advisory committee to promulgate the proposed rules. This task was completed in early 1965. The committee consisted of fifteen members, of whom eight were litigation attorneys, four were federal judges, two were professors, and one was a member of the Department of Justice.¹⁹ The committee's distinguished reporter was Law Professor Edward Cleary, a recognized authority on the law of evidence, later the founding Dean of the Arizona State University School of Law.²⁰

The Judicial Conference sent the committee's preliminary draft of the proposed rules to the Supreme Court for comment in 1969. The report was later returned to committee and in 1971 a revised version was circulated.²¹ In 1972, the Supreme Court prescribed Federal Rules of Evidence effective July 1, 1973, unless Congress disapproved within 90 days. Justice Douglas, however, dissented, saying: "There are those who think that fashioning of rules of evidence is a task for the legislature, not for the judiciary. Wigmore thought the task was essentially a judicial one, and I share that view, leaving the problem for case-to-case development by the courts or

¹⁸ *Id.* at 115-16.

¹⁹ Preliminary Draft, *supra* note 15, at 178.

²⁰ *Id.*

²¹ See Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 115 (1971).
 Published by IdeaExchange@UAkron, 1989

by Congress.’’²²

At this point, the smooth passage of the Rules became involved in Watergate, complete with its controversy surrounding the executive privilege. Because Congress had other matters to which it was required to attend, it promptly adopted Public Law 93-12 deferring the rules' effective date until legislative approval. Over a year later, in his message to Congress on November 14, 1974, President Gerald Ford said:

Earlier this session, the House passed a bill to codify for the first time in our history, evidentiary rules governing the admissibility of proof in Federal courts. This bill is the culmination of some 13 years of study by distinguished judges, lawyers, Members of the Congress and others interested in and affected by the administration of justice in the Federal system. The measure will lend uniformity, accessibility, intelligibility and a basis for reform and growth in our evidentiary rules which are sadly lacking in current law. I strongly urge final action on this important bill prior to the conclusion of this Congress.²³

Following extensive study and much legislative debate by both houses, a conference committee reached agreement and the bill was adopted during the week of December 16, 1974. The President signed the law on January 2, 1975, effective July 1, 1975.²⁴

MILITARY RULES OF EVIDENCE

The power source for the promulgation of military rules is found in article I, section 8 of the United States Constitution: "The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval forces...."²⁵ Accordingly, Congress enacted in 1950, and revised in 1956, the Uniform Code of Military Justice.²⁶ Although the Code contains some provisions relating to evidentiary law, particularly section 831 dealing with the right against self-incrimination, and section 849, addressing depositions, its most important provision is undoubtedly article 36--or section 836--which states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which

²² Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185 (1973) (Douglas, J., dissenting).

²³ See J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE x (1986).

²⁴ *Id.* at viii-x.

²⁵ U.S. CONST. art. I, § 8.

shall so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.²⁷

The President's regulations prescribed under this article are located in the Manual for Courts-Martial given effect by Executive Order No. 10214 dated February 8, 1951.²⁸

Chapter XXVII of the 1951 manual was entirely devoted to various rules of evidence applicable in cases before courts-martial. Its coverage, however, was limited to a statement of broad rules with little interpretation.²⁹ To correct this shortcoming, the manual further provided at paragraph 137 of the chapter: "So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules, at common law will be applied by courts-martial."³⁰ Thus, in the absence of a specific governing provision in the manual, the former Federal Criminal Rule 26, previously quoted, regulated the admissibility of evidence in military trials prior to 1975.

However, with the adoption of the Federal Rules of Evidence, a change in this approach was inevitable. In view of the language of article 36 of the Uniform Code of Military Justice³¹ and chapter XXVII, paragraph 137 of the Manual for Courts-Martial providing for the application of federal criminal evidentiary law in military courts, it was only a matter of time until the President specifically directed that the federal rules, albeit with modification, be used in courts-martial.³²

The Military Rules of Evidence, published in 1980 as chapter XXVII of the manual by virtue of Executive Order No. 12198, resulted from a two year effort of the Department of Defense, the United States Court of Military Appeals, the Military Departments and the Department of Transportation.³³ The Evidence Working Group of the Joint-Service Committee on Military Justice initially drafted the rules.³⁴ They were then reviewed, and, as modified, approved by the Joint-Service Committee.³⁵ In 1984, the Manual for Courts-Martial was revised and the rules now appear in part III.

²⁷ *Id.* at § 836.

²⁸ J. MUNSTER & M. LARKIN, *supra* note 4, at 5.

²⁹ *Id.* at vii.

³⁰ *Id.* at viii.

³¹ 10 U.S.C. § 836 (1985).

³² See S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 13, at vii.

³³ Manual, *supra* note 5, at A22-1.

³⁴ *Id.*

APPLICATION OF THE RULES

*Being a trial judge is like playing bridge. It's a game of decisions. You make 'em right, and you make 'em wrong, but you make 'em NOW!*³⁶

To insure that those individuals charged with deciding the facts of a particular case were presented with the most reliable, trustworthy and accurate information available, courts long ago began to develop rules of evidence. As these rules evolved to meet new situations, they became part of the common law of evidence. This process has literally consumed hundreds of years and continues today.³⁷

In principal, no common law of evidence remains under the federal and military rules. Rule 402 of both the Federal and Military Rules provides that "All relevant evidence is admissible except as otherwise provided"³⁸ However realistically, "the common law remains as a source of guidance in identifying problems and suggesting solutions, within the confines of the rules."³⁹ No other reasonable conclusion may be reached when one considers the vast collection of common law precedents that constituted the earth from which the rules grew. While the "rules are in final analysis legislative in nature ... [t]he basic relevant interpretive materials are the common law background and the legislative history" which continually refers to it.⁴⁰

One example of this approach to interpreting the rules is found in the 1980 Third Circuit case of *Carter v. Hewitt*⁴¹ where the Court expressly relied on the common law to construe Rule 404 dealing with the admissibility of character evidence.⁴² The Court said: "These ... cases, cited by Carter in support of his position, were decided before the Federal Rules of Evidence were issued. Rule 404, however, is in essence a codification of the common law approach, and these pre-rule cases may be regarded as authority for interpreting the rule."⁴³ Yet another of the numerous instances in which courts have utilized pre-rule case law to interpret the rules may be located in *Cann v. Ford Motor Co.*⁴⁴ In *Cann*, the Second Circuit held that although Rule 407, prohibiting the use of subsequent remedial measures to infer

³⁶ Author's original quote.

³⁷ BASIC MILITARY JUSTICE HANDBOOK, 1-1 (rev. ed. 1986).

³⁸ FED. R. EVID., 402; Mil. R. Evid., 402.

³⁹ Federal Rules of Evidence of United States Courts and Magistrates v. (1984) (introduction by Professor Cleary).

⁴⁰ *Id.* at iii-iv. See e.g., FED. R. EVID. 403 (advisory committee's note) (rule of legal relevancy does not enumerate surprise as ground for exclusion, in this respect following Wigmore's view of the common law); FED. R. EVID. 612 (advisory committee's note) (treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine).

⁴¹ 617 F.2d 961 (3d Cir. 1980).

⁴² *Id.* at 968 § n. 6.

⁴³ 617 F.2d 961, 968 n.6 (3d Cir. 1980).

⁴⁴ 638 F.2d 54 (2d Cir. 1980), *cert. denied*, 456 U.S. 960 (1982).

negligence or culpable conduct, did not explicitly refer to strict liability actions, it nevertheless applied to such claims.⁴⁵ Here is the way the Court put it:

When Congress enacted the Federal Rules of Evidence, it left many gaps and omissions in the rules in the expectation that common law principles would be applied to fill them. The application of those principles convinces us that although negligence and strict products liability causes of actions are distinguishable, no distinction between the two justifies the admission of evidence of subsequent remedial measures in strict products liability actions.⁴⁶

The drafters realized that what took Wigmore ten volumes to say could not reasonably be condensed into a set number of rules without--as Professor Cleary phrased it--"some play in the joints."⁴⁷ Thus, Rule 102 was included in the federal rules, and later incorporated without change into the military rules. Heady wine. "These rules shall be construed to secure fairness in administration, elimination of unjustified expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁴⁸ Rule 102 recognizes that a codified law of evidence cannot possibly address every situation that might arise. In this regard, it negates the precept that statutes in derogation of the common law are subject to a strict construction.⁴⁹ The rule instead permits courts to mold evidentiary law to insure its growth and refinement so that the fact-finder might reach a proper result. As Law Professor Weissenberger of the University of Cincinnati states:

A system of rules that does not allow for some discretion on the part of a trial judge in making evidentiary rulings lays the ground work for its own obsolescence. As methods of communication and interaction between individuals change, the Rules of Evidence must accommodate this progress. Rule 102 is designed to insure the continued viability of the Federal Rules of Evidence by providing that the evidence as to the disputed relationship between the parties is available to the trier of fact.⁵⁰

But a word of caution. Judges must remember that Rule 102 serves only to guide them in their construction of other rules. It certainly is not a license to override the dictates of other rules so that a desired result can be obtained.⁵¹ Being unduly innovative and crafting out new theories of evidence is like breeding porcupines.

⁴⁵ *Id.* at 59-60.

⁴⁶ *Id.* at 60.

⁴⁷ Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

⁴⁸ *Id.*

⁴⁹ M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE*, 3-4 (1981).

⁵⁰ G. WEISSENBERGER, *FEDERAL EVIDENCE* 5-6 (1987).

⁵¹ *Id.* Manual, *supra* note 5, at A22-2, § 3; Saltzberg, L. Schinasi & D. Schlueter, *supra* note 9, at 12-13.

You proceed *very* carefully. Because the reviewing court may indeed remind you of the fortunes of war-- if you seek the battle, don't complain of the wounds. At best, Rule 102 may be deemed to authorize "the court to interpret the Rules creatively so as to promote the growth and development in the law of evidence in the interest of justice and reliable factfinding."⁵²

The Fifth Circuit's decision in *United States v. Bibbs*⁵³ provides an example of the proper use for Rule 102. In that case, the issue involved whether Rule 613's provisions for using *prior* inconsistent statements should affect the admissibility of *subsequent* inconsistent statements.⁵⁴ The Court found that because the rule did not address the matter, the trial judge could properly fashion an evidentiary approach under the guidance of Rule 102.⁵⁵ Another case where the D.C. Circuit Court of Appeals invoked the spirit of Rule 102, although not specifically citing it, is *United States v. Burkley*.⁵⁶ There, the Court held that evidence of other crimes was admissible to show the existence of a common scheme or plan, or to prove predisposition even though Rule 404(b) did not specifically permit such use.⁵⁷

Consistent with the rationale underlying Rule 102 to guarantee that all relevant facts are brought to the attention of the factfinders, the jury or court members, "congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules."⁵⁸ While the present rules codify much of what had been previously established and, as noted, should be interpreted accordingly, in some instances they permit the admission of evidence that may have been excluded under prior practice.⁵⁹

Consider the following illustrations: Under Rule 601, everyone is considered competent to testify except where privilege applies or where the individual is unwilling or unable to take an oath to be truthful. Eliminated from the law are the categorical disabilities, such as extreme youth, which previously existed.⁶⁰ Another: Rule 703 broadens considerably the permissible basis for expert opinions and "brings the judicial practice into line with the practice of the experts themselves when not in court."⁶¹ Thus, under Rule 703, an expert can discuss as the basis for an opinion, facts or data, which are otherwise inadmissible hearsay, if of a type reasonably relied on by experts in the field.⁶²

⁵² *United States v. Jackson*, 405 F. Supp. 938, 943 (E.D.N.Y. 1975) (per Weinstein J. & member of the advisory committee on the rules).

⁵³ 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

⁵⁴ *Id.* at 1169.

⁵⁵ *Id.*

⁵⁶ 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979).

⁵⁷ *Id.* at 920-21.

⁵⁸ Fed. R. Evid., 402 (advisory committee's note).

⁵⁹ S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 13, at xii.

⁶⁰ See *United States v. Lemere*, 16 M.J. 682, 685-86 (A.C.M.R. 1983), *aff'd*, 22 M.J. 61 (C.M.A. 1986).

⁶¹ Fed. R. Evid., 703 (advisory committee's note).

⁶² *Soden v. Freighliner Corp.*, 714 F.2d 498, 502 (5th Cir. 1983).

Or this example: The common law required that before impeaching his own witness by use of a prior inconsistent statement a party show that the testimony surprised him as well as substantially harmed his case. In view of Federal Rule 607 which provides that either party may impeach any witness, surprise is no longer a viable requirement.⁶³ Other examples do exist but they are far too numerous to efficiently lend themselves to an exhaustive list. Suffice it to say that the overwhelming majority of modifications to the common law is consonant with the "Rules' spirit of broadening admissibility."⁶⁴

CONCLUSION

Like Mark Twain's comment on Wagner's music: "*It's better than it sounds.*"

Perhaps Chief Judge Jack Weinstein of the Eastern District of New York--who incidentally served on the advisory committee for the rules--best summarizes the appropriate outlook for a trial judge when confronted with evidentiary questions:

A trial judge's approach to the Rules of Evidence is often of greater practical importance than the technical rules themselves in their administration. It is my view that it is generally better for the trier--whether judge or jury--to have available as much of the non-repetitive evidence as possible. The conviction that the Federal Rules are better interpreted and applied--whenever it is reasonable to do so--so as to permit the trial judge to admit rather than to exclude evidence is reflected throughout [the rules].⁶⁵

A trial judge's disposition to admit rather than exclude becomes stronger with experience. Most jurors, or military court members, have good sense and dedication to their calling. These mature individuals, many of whom have college educations, are perceptive and knowledgeable. The Court should treat them with respect. Judge Weinstein noted that:

Excluding information on the ground that jurors are too ignorant or emotional to evaluate it properly may have been appropriate in England at a time when a rigid class society created a wide gap between royal judges and commoner jurors, but it is inconsistent with the realities of our modern American informed society and the responsibilities of independent thought in a working democracy.⁶⁶

⁶³ United States v. Long Soldier, 562 F.2d 601, 605 (8th Cir. 1977).

⁶⁴ United States v. Groves, 19 M.J. 804, 807 (A.C.M.R. 1985), *rev'd*, 23 M.J. 374 (C.M.A. 1987).

⁶⁵ *Mills v. The Board of Governors of the Army*, 16 Mil. J. 100 (1988).

⁶⁶ *Id.*

Extensive pretrial discovery likewise supports the argument for liberal admissibility. Today, attorneys should always be aware of the opponent's evidence before trial. If they object, the Court can insist on motions *in limine*. With the element of surprise no longer a viable objection, all parties are then able to present their cases in a manner by which the trier of fact can properly evaluate probative force without the fear of being misled.

The key ingredients to reaching the proper decision in any instance are flexibility and discretion. No two lawsuits are exactly alike. A judge needs to keep a tight check on some counsel; others warrant little interference from the court. Court members at times may require shielding from argument suggesting inadmissible lines of proof, while others can sort the good from the bad themselves. "[L]itigation psychodynamics, but dimly if at all perceived from the record, are nevertheless critical in trial supervision. In dealing with them, the oral tradition of the bar and a sense of what is proper, often furnish the best guide. In this sense, the rules provide only the skeleton of the trial."⁶⁷

Unlimited discretion may unquestionably lead to bad habits and abuse, while increasing the difficulty of preparing for trial. A lawyer should be able to read the rules with some certainty of outcome in mind. However there is nothing requiring the court to "adhere blindly to a rule of evidence, which is by its nature arbitrary, when there is danger that the very purposes of the Rules of Evidence would be abrogated."⁶⁸

As a final example, Military Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members"⁶⁹

It is, of course, in this atmosphere that all evidence must ultimately be analyzed.

A final caveat: We must constantly bear in mind that there is no such commodity in this life as perfection. As the late theologian, Dr. Reinhold Niebuhr, once wrote: "The tragedy of man is that he can conceive perfection but he cannot achieve it. Man's reach is always beyond his grasp."⁷⁰

The *perfect* trial has yet to be tried. And I venture to suggest that it never will be. For any creation of man is merely a reflection of himself--imperfection. All we can reasonably and logically strive for is a fair trial--the "cutting edge" to our

⁶⁷ *Id.*

⁶⁸ *United States v. Narciso*, 446 F.Supp. 252, 290 (E.D. Mich. 1977).

⁶⁹ *MIL. R. EVID. 403.*

⁷⁰ *People v. Parisie*, 5 Ill. App. 3d 1009, 287 N.E.2d 310 (1972).

system of criminal justice.⁷¹

And the Military Rules of Evidence is a new and powerful tool in our constant quest to hone that edge for yet better justice.

