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John W. Strong*

Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System

The invitation to deliver a lecture sponsored by the Order of the Coif¹ came at a particularly opportune time for me, as it afforded the opportunity to organize my thoughts on some issues which, though long recognized² and of some importance,³ have never received adequate systematic analysis either by the courts⁴ or the commentators.⁵ The title I have chosen for my efforts in this direction is Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System,

I start from the proposition, well known to all those trained in the Anglo-American legal tradition, that we have an adversary system, which is quite different from those employed in much of the non-English speaking world.⁶ The distinctiveness of the adversary system, as

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1. This writing is a slightly modified and annotated version of a lecture by the same title sponsored by the Order of the Coif and delivered November 6, 2000, at the University of Nebraska College of Law. The author wishes to thank the Order of the Coif for its support.
 2. See, e.g., *Gold v. Death*, 79 Eng. Rep. 325 (K.B. 1616).
 3. See *infra* note 16 and accompanying text.
 4. “[J]udicial opinion in modern times has treated some sorts of stipulations with suspicion and disparagement, while giving sanction to others; and different courts have taken opposite views of the same type of transaction. Variant reasoning has been put forth to justify these inconsistent rulings. No general survey of the problem of stipulations seems to have been taken.” 1 JOHN HENRY WIGMORE, *EVIDENCE* § 7a, at 563 (Peter Tillers ed. 1983).
 5. Wigmore appears to be the only major commentator to give the question extended treatment. See *id.* § 7a. For other brief but helpful sources, see 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5039 (1st ed. 1977 & Supp. 2001); Note, *Judicial Admissions*, 64 COLUM. L. REV. 1121 (1964); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).
 6. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

its name would suggest, lies in its allocation to the adversaries in the dispute the basic responsibility for discovering, marshalling, and presenting the facts of the case to the decision maker, either judge or jury, rather than assigning these tasks to a non-partisan official. Essentially two complementary justifications have been presented for this mode of proceeding. First, the adversary system is a sort of analog of laissez-faire economics,⁷ in the sense that, as according to Adam Smith, individual pursuit of personal economic advantage will ultimately redound to the general public benefit. This places the burden of fact development and presentation upon those most interested in the result and will tend to ensure the fullest and ultimately most accurate depiction of the facts. A second justification sometimes asserted is that this allocation of responsibility is essentially fair, in the sense that those most immediately affected by judicial decisions should be given every reasonable opportunity to participate in the resolution process.⁸

Consistent with these rationales, parties to litigation are, for the most part, given great latitude in the manner in which they choose to assert their rights in court. This autonomy is slightly less in criminal matters,⁹ where it is said that the state possesses a significant interest. But even here, the overriding interest in allowing self-determination will often prevail even to the extent of allowing the criminal defendant to make choices which would generally be thought to be undesirable and even foolish.¹⁰

Not surprisingly, the rules of evidence, which are themselves part and parcel of the adversary system,¹¹ generally also operate upon the

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7. "Classical' laissez-faire economic theory assumed that, when each individual, as an 'economic man,' strives rationally, in the competitive economic struggle . . . to promote his own self-interest, we attain public welfare through the wisest use of resources and the most socially desirable distribution of economic goods. The 'fight' theory of justice is a sort of legal laissez-faire." JEROME FRANK, COURTS ON TRIAL 92 (1949). Judge Frank, of course, proceeds to argue that total reliance upon adversarial discretion is unwise, a position consistent with the thesis advanced here.
 8. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.2, at 5 (2d ed., 1965).
 9. See *Young v. United States*, 315 U.S. 257, 259 (1942) ("[T]he proper administration of the criminal law cannot be left merely to the stipulation of parties"); *State v. Tangalin*, 657 P.2d 1025, 26 (Haw. 1983) ("[M]atters affecting the public interest cannot be made the subject of stipulation so as to control the court's action Criminal cases are per se matters affecting the public interest" (internal citations omitted)).
 10. An outstanding example is the constitutional right to represent oneself in a criminal proceeding established in *Faretta v. California*, 422 U.S. 806 (1975). The holding is criticized by Justice Blackmun in dissent as conferring on the defendant "a constitutional right on one to make a fool of himself." *Id.* at 852 (Blackmun, J., dissenting).
 11. Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURIS. 279 (1996) ("Every system of adjudication resting upon the Anglo-American legal tradition

principle of party responsibility. By that I mean it is usually the responsibility of the parties to see that the rules are applied. This responsibility is most clearly embodied in the so-called contemporaneous objection rule, which requires the party wishing to see a rule of evidence enforced to lodge an objection as soon as an impending violation of the rule is reasonably to be anticipated.¹² Failure to make an objection will, in the great majority of instances, mean that the rule goes unenforced at trial. In addition, such a violation of the rule will provide no ground for claiming error on appeal.¹³ In other words, the usual result is that any rule not insisted upon by a party wishing to see it applied is waived.

And, of course, in addition to waiver, there are several other avenues by which the parties may forego enforcement of the usual rules. Foremost among these are pre-dispute contracts in which the parties specify what rules will apply in the event a dispute develops between them,¹⁴ and stipulations, which will sometimes constitute an agreed modification of the rules or represent mutual acceptance of a fact which otherwise would need to be established by ordinary evidentiary means.¹⁵

Now, given the great deference to party autonomy within the adversary system, it might seem almost axiomatic that whenever *all* parties agree that a particular rule of evidence shall not be enforced that will be the end of the matter. In reality, however, the matter is not so simple nor the answer so obvious. For, despite the fact that the issue has been mooted for over 400 years, no clear resolution of it has ever emerged.

Several reasons can be advanced as to why a renewed consideration of the question is warranted. Wigmore, the only commentator to address the matter in any detail, recommended its further consideration, among other reasons, as a remedy for the long-standing confusion of authority on the question. Clarification will in turn serve to more fully advise the parties to litigation on exactly how far they may consensually modify the rules,¹⁶ and the trial courts as to what limita-

contains a framework of rules, principles, and doctrines which governs the admission . . . of evidence.”)

12. 1 MCCORMICK ON EVIDENCE § 52, at 220-221 (John W. Strong ed., 5th ed. 1999).

13. FED. R. EVID. 103(a).

14. See 1 WIGMORE, *supra* note 4, § 7a (voluminous collection of such cases).

15. Alteration of a rule by pre-dispute contract differs from alteration by waiver or stipulation in that the latter take place in a judicially supervised context and thus may be thought relatively immune from the types of infirmities discussed in the text *infra* at note 21. But with respect to examination of the policies limiting party autonomy, the specific mechanism by which party agreement is expressed is largely immaterial. See Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139 (treating “stipulations and contracts” in *pari materia*).

16. Agreements to modify evidentiary rules may stem from an extensive variety of concerns. See, e.g., John M. Kobayashi, *Too Little, Too Late: Use and Abuse of*

tions are properly to be imposed on such attempted exercises of party autonomy.¹⁷ Finally, a consideration of whether party autonomy is ever properly to be constrained in this context may provide some valuable and more general cautionary lessons concerning the types of values and interests which may be threatened by the untrammelled operation of the adversary system.

Unfortunately, the confusion of precedent noted by Wigmore in 1940 still persists.¹⁸ A seeming majority of courts have now retreated from the position, earlier common, that the parties are powerless to affect the rules by consensual agreement.¹⁹ The prevalent view today, by contrast, is that while the parties have wide latitude in modifying the rules for their mutual purposes, they are nonetheless constrained in this by limitations of public policy.²⁰ No systematic investigation of what sorts of policies will be viewed to have this effect has come to my attention. While it is no doubt impossible, and even undesirable, to attempt to collate an exhaustive list of public policy prohibitions in this regard, it would nevertheless seem appropriate to arrive at some clearer definition of the types of interests likely to be impinged upon by unimpeded party autonomy.

Innocuous Yet Dangerous Evidentiary Doctrines, C607 A.L.I.-A.B.A. COURSE OF STUDY 1127, 1141 (1991) ("Stipulations to admit or exclude evidence and contracts to exclude evidence are evidentiary and procedural techniques that will, in the author's opinion, become increasingly important in mass tort and multi-jurisdictional actions.")

17. As reflecting the trial courts' need for such clarification, see *Estate of Burson*, 124 Cal. Rptr. 105, 109 (Ct. App. 1975) ("A court is free to disregard a stipulation only if it is 'illegal' or 'contrary to public policy.'") and *Colorado River Water Conservation District v. Bar Forty Seven Co.*, 579 P.2d 636 (Colo. 1978) (finding error for trial court to refuse effect to stipulation without providing reason).
18. "Wigmore's hopes for a systematic exposition of the subject of agreements to vary rules of evidence have not been realized. The subject is rarely discussed in the scholarly literature, and the little discussion that exists is quite limited in scope." See 1 WIGMORE, *supra* note 4, § 7a, at 577.
19. The attitude prevalent earlier is well reflected in the frequently cited case of *American Benefit Life Ass'n v. Hall*, 185 N.E. 344, 345 (Ind. Ct. App. 1933) ("It is far better for the courts to make the rules for all cases, as it is only by such method that any uniformity can be attained and any degree of certainty assured."). This view continues to find expression in some recent cases. See, e.g., *State v. Downey*, 2 P.3d 191, 200 (Kan. Ct. App. 2000) ("The parties . . . are precluded from devising their own rules of evidence.").
20. 1 WIGMORE, *supra* note 4, § 7a, at 577 ("[T]he courts still largely content themselves with speaking in a conclusory way of the limitations imposed by 'public policy' and the inability of the parties to make 'unreasonable' agreements."). Cases of this sort are legion. See, e.g., *Kempton v. Hurd*, 713 P.2d 1274, 1279-80 (Colo. 1986) ("[P]arties may stipulate away valuable rights, provided the court is not required to abrogate inviolate rights of public policy."); *Kraker v. Roll*, 474 N.Y.S.2d 527, 535 (App. Div. 1984) ("[W]ith a stipulation parties can chart their own course, if that course is not unreasonable, or against good morals or public policy.").

Before attempting to identify the principal policies which may place limits on the parties' ability to modify the rules of evidence, it is helpful to distinguish between cases in which the parties have understandingly concurred in an alteration of the rules, and cases in which an agreement has apparently been reached, but only because one party has been imposed upon by another or has acquiesced in a violation of the rules through ignorance or ineptitude. Imposition, ignorance, and ineptitude are old familiars of the law, and here as elsewhere the law has developed procedures to prevent their intrusion where possible, and to remedy their consequences when they appear.²¹ For example, failure through ineptitude to satisfy the contemporaneous objection rule which I mentioned earlier can, in extreme cases, be salvaged through operation of the doctrine of plain error.²² This doctrine allows an appellate court to recognize and remedy a violation of the rules of evidence even though no contemporaneous objection was made.²³

All too frequently, however, cases properly calling for treatment as instances of party overreaching have mistakenly been classified as examples of attempted party modification of the rules of evidence. Because this type of case has arisen with some frequency and has caused some unfortunate confusion, I will take the time to offer a brief explanation. The insurance cases offer the best example of an agreement which veils what is properly a question of substantive law in the guise of an agreement to modify the rules of evidence. In a variety of insurance contracts, the insurer seeks to limit the scope of the risk insured against by providing that proof of loss must be made by, and only by, certain types of proof.²⁴ For example, a policy of burglary insurance might provide that there must be physical evidence of forcible entry before coverage is afforded. Since burglary might quite conceivably be proved in a variety of other ways, such a provision invites classification as an attempt to modify the ordinary rules of relevancy.

21. *United States v. Montgomery*, 620 F.2d 753 (10th Cir. 1980) (holding that a court may relieve a party from the effect of a stipulation on basis that it was obtained by fraud or was the product of mistake or inadvertence).

22. CHRISTOPHER B. MUELLER ET AL., *EVIDENCE* § 1.8, at 29 ("The plain error principle is best understood as a device for mitigating the harshness of the adversary system . . .").

23. *United States v. Young*, 470 U.S. 1, 15 (1984) (noting that plain error "tempers . . . a rigid application of the contemporaneous-objection requirement.").

24. Note, *supra* note 15, at 141 ("Accident insurance policies frequently provide that the insurer shall not be liable in the event of death or injury from the discharge of firearms unless the accidental cause shall be established by the testimony of an eyewitness other than the insured or claimant. Similarly, life insurance policies attempt to avoid the seven year presumption of death by providing that disappearance alone shall not constitute proof of decease of the insured."). Such provisions can be, and frequently are, drafted as "coverage" provisions.

In reality, however, these agreements are best viewed not as contracts to stipulate different rules of evidence, but as problematic insurance contracts which require interpretation in light of the reasonable expectations of the insured. Thus, the ultimate question to be resolved in applying such a provision, as in the burglary policy example, is whether the reasonable expectations of a purchaser of "burglary" insurance are met by a policy which actually limits recovery to burglaries accomplished by external forced entry which leaves physical traces. If this is viewed as a reasonable definition of coverage, then it is inaccurate to say that the parties are, by their agreement, forcing the court to apply a limitation of relevancy which contravenes logic and good sense. For it does not require the perceptiveness of a Yogi Berra to discern that a burglary leaving physical signs of forced entry can only be proved by adducing evidence that there were physical signs of a forced entry. On the other hand, if it is viewed as overreaching to sell an insured something called a burglary policy which covers only burglaries leaving particular kinds of evidence, then the court should construe the contract to afford a broader coverage which accords with the reasonable expectations of the insured.²⁵

Clearly the law should, through the use of both substantive and evidentiary doctrines, attempt to prevent the sacrifice of significant rights through either overreaching by the opponent or excusable ignorance of a party. It should even, in extreme cases, attempt to set aside the results of such misadventures when they do occur. But the question remains, what should be the attitude of the law toward the modification of evidentiary rules which are understandingly and mutually desired by the parties?

As I previously noted, this question has received widely differing responses. Today, though a contrariety of statements can still be found, the most common judicial formulation is that the parties are allowed wide discretion in determining what rules of evidence are to be enforced in a judicial proceeding, but may not by party agreement violate public policy.²⁶ Beyond this very general statement, the decisions give only sketchy suggestions as to what the limitations of public policy may be. But while it is probably impossible and certainly unwise to try to announce *a priori* all conceivable policies which might be implicated by party modifications of the rules, certain major themes are nevertheless identifiable and worth stating.

25. The facts of the illustration are taken from *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169 (Iowa 1975), in which the court's holding was in accord with the analysis advocated here. See also *Garden State Plaza Corp. v. S.S. Kresge Co.*, 189 A.2d 448, 457 (N.J. 1963) (suggesting that many decisions voiding consensual modifications stem from "abhorrence at the substantive unfairness of contractual conditions for recovery").

26. See, e.g., Note, *supra* note 15, at 138-143.

A first limitation upon the parties' ability to set their own rules would appear to be courts will not condone modes of proceeding which defy existing ideas of rationality. Thus, it is fairly common for both courts²⁷ and commentators²⁸ to observe that party agreements, which resolve their disputes by resort to methods which are essentially nothing more than appeals to chance will not be entertained or furthered by the courts. And, as what might be considered a cognate principle, it has been held that the parties may not stipulate to the contrary of judicially noticed facts²⁹ or to "facts" contradictory of those unequivocally shown by the evidence.³⁰ An apparent justification for such a limitation would seem to be the commonly asserted public interest in maintaining the dignity and repute of the courts,³¹ which would understandably suffer from the conduct of proceedings or acceptance of facts which were commonly viewed as irrational.

Happily, cases in which all parties agree to modes of proceeding which, by common understanding would be irrational, are rare. They do occur, however, and one such in southern Arizona recently served to remind me that I had intended to look at this topic. In the Arizona case,³² a group holding some rather unusual beliefs brought suit for defamation against the defendant for publicly saying that the members of the group were "devil worshipers." Apparently, in an effort to prove that the tenets of the group did not include devil worshiping, the

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27. See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").
 28. See, e.g., 21 *WRIGHT & GRAHAM*, *supra* note 5, § 5039, at 207 ("Of course, there are limits [to party ability to alter the rules]. Few courts would preside over an episode of trial by battle simply because both parties were agreeable.").
 29. See *T.L. Wright Lumber Co. v. Ripley County*, 192 S.W. 996 (Mo. 1917).
 30. See *Swift & Co. v. Hocking Valley Ry.*, 243 U.S. 281 (1917); *Montgomery v. Mardis*, 416 So. 2d 1042 (Ala. Civ. App. 1982); cf. *United States v. Benally*, 756 F. 2d 773 (10th Cir. 1985) (holding that a jury could consider evidence contradictory to stipulation); *Abendroth v. Nat'l Farmers Union Prop. & Cas. Co.*, 363 N.W.2d 785 (Minn. Ct. App. 1985) (noting that courts can sometimes contemplate existing evidence in addition to stipulated evidence).
 31. *United States v. Mezzanatto*, 115 S.Ct. 797, 803 (1995) ("[T]here may be some evidentiary provisions that are so basic to the reliability of the fact-finding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" (quoting 21 *WRIGHT & GRAHAM*, *supra* note 5, § 5039, at 207-08)); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 *LAW & CONTEMP. PROBS.*, Autumn, 1988 at 243, 245 ("We could resolve disputes expeditiously and unambiguously by tossing a coin to decide liability. Or we could submit our cases to an oracular examiner of chicken entrails. An answer would emerge. But such decision processes would quickly erode public confidence and would soon be abandoned.").
 32. The details of the case which follow are drawn from Plaintiff's Petition for Special Action, *Church of Immortal Consciousness v. Superior Court*, Arizona Court of Appeals, Division 2, No. 2 CA-SA 94-0118.

plaintiffs proposed to call the founder of the group as an expert witness on the group's beliefs. This course of action presented certain logistical problems since the proposed witness had been deceased since the 15th century, and would testify, if permitted, by speaking through one of the current leaders. Not surprisingly, the defendant did not raise any objection.

The trial judge's reaction, however, was in my opinion entirely correct. After an initial period of disbelief that the plaintiffs were offering the testimony of a spirit, the judge refused to allow such a proceeding. Unfortunately, this was not the end of the matter, as the plaintiff filed a special action in the appellate court and learned briefs were prepared on the question of whether spirits can qualify as competent witnesses, lay or expert, under the Arizona Rules of Evidence.

And, ultimately, the case cannot be said to represent a vindication of the principle of judicial rationality. Upon the return of the action to the trial court, and its trial before a different judge, the spirit was allowed to testify. Following the testimony, and the settlement of the case, one local attorney was quoted as observing, "this sends a very strange message to people."³³ This is a comment with which I would entirely agree.

But, as I have said, cases in which the parties wish to concur on a matter or mode of proceeding which contravenes popular belief are rare. Ironically, the greater danger to public respect for the rationality of the judicial process may lie in judicial unwillingness to give effect to party stipulations. The outstanding example, of course, is the polygraph or "lie detector," which has accounted for by far the greatest number of modern cases in which courts have refused to honor party stipulations on admissibility.³⁴ I do not want to venture far into the thicket of polygraph jurisprudence,³⁵ nor even to express a view on the device's proper evidentiary status. There are clearly many cogent questions concerning the compatibility of machine-determined credibility within our judicial system.³⁶ But to refuse to accept stipulated

33. Whitehouse, *Spirit Testimony Raises Legal Questions*, PAYSON ARIZONA ROUNDUP, July 28, 1995, at 1. One student attending this lecture afterward strongly urged the contention that admitting the spirit testimony was justified by the psychological benefit to the plaintiffs achieved by impressing them with the fairness of the procedure. Cf. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

34. See 1 WIGMORE, *supra* note 4, §7a, at 601-02 n.35 (listing cases that recognize that virtually every state has had the opportunity to pass upon the question).

35. See 1 McCORMICK, *supra* note 12, § 206, at 768 (summarizing the various positions).

36. See, e.g., *State v. Lyon*, 744 P.2d 231 (Or. 1987) (Linde, J., concurring) (suggesting that ultimate justification for exclusion of stipulated polygraph results may have nothing to do with concerns over reliability); Saks, *supra* note 31, at 262 ("[P]erhaps the problem [of the polygraph] is not the perceived level of inaccuracy but rather the perceived level of accuracy.").

polygraph results, as many courts have done,³⁷ on the ground that their stipulated admission would bring the courts into disrepute actually risks public derision at a time when wide-spread reliance on the device is a matter of common knowledge.³⁸

Let me turn now to a second type of rule which, in general, should be immune from modification by the parties. I will call this type of rule systemic, since rules of this type are indispensable, if not to operate any system of fact determination, at least to operate one recognizable as within the Anglo-American tradition. So what am I talking about here? Certainly not such evidentiary favorites as the hearsay rule, or the best evidence rule, or even the concept of relevancy.³⁹ These rules only serve to limit the types of grist which is to be processed in the legal mill. They are the usual subject of waiver by the parties, and their sacrifice causes no particular difficulty to anyone. By contrast, rules which regulate the operational processes of the court, which determine who decides what and by what standards, can only be marginally modified without altering the basic character of the proceeding or, at the very least, rendering it hopelessly inefficient.⁴⁰ As examples of this type of rule I would suggest many of the so-called common law powers of the court, such as the power to rule on evidentiary sufficiency, to take judicial notice of legislative facts, and to control the order of the proceedings.

Since time prevents a canvas of such rules, I will content myself by considering one rule of this type which the parties sometimes elect to modify, the rules concerning the burden of persuasion.⁴¹ Over the centuries the law has developed three relatively well defined burdens of persuasion, and their three correlative burdens of production. So long as the parties are content to utilize one or another of these three, even if the chosen standard is not that which the law would ordinarily deem applicable to the particular controversy, no administrative difficulties result.⁴² But what if the parties deliberately choose some idio-

37. 1 WIGMORE, *supra* note 4, § 7a, at 603 n.35 ("Courts at times appear to have regarded a stipulation by the parties regarding polygraphic evidence as being roughly akin to a stipulation that the testimony of an astrologer is admissible to establish the significance of various celestial events and conjunctions.").

38. *See United States v. Scheffer*, 523 U.S. 303 (1998) (Stevens, J., dissenting) (discussing data on the governmental use of the polygraph). And as this writing is completed the FBI has just been widely criticized for not protecting its security by *greater* use of the polygraph.

39. These types of rules have long been viewed as readily waivable. *See Note, Contracts to Alter the Rules of Evidence*, *supra* note 5.

40. *See, e.g., Kardibin v. Associated Hardware*, 426 A.2d 649 (Pa. Super. Ct. 1981) (noting that in a civil action, parties may stipulate as they please, so long as the stipulation neither affects the court's jurisdiction nor its convenience and efficiency).

41. 2 McCORMICK, *supra* note 12, §§ 338-341, at 416-33.

42. *See supra* note 25 and accompanying text.

syncratic standard of their own? For an example, I need go no further than the Constitution of the Order of the Coif, sponsor of this lecture, which set the evidentiary standard for consideration for establishment of a new chapter at a "presumptive likelihood."⁴³ Should a court be put to the necessity of deciphering the implications of a novel standard of this sort? There are at least some expressions of judicial opinion that they will not.⁴⁴

The types of limitation on party autonomy I have discussed to this point are ones that come into play only occasionally and in special types of situations. This is mainly because the parties do not have a mutual interest in modifying them. There are two types of rules, however, which the parties may well share an interest in modifying. These rules are designed to limit or condition the adversary process itself and are rules directed toward the protection of the interests of a non-party.

The first type of rule generally rises from a recognition that the adversary system, despite its strengths, can occasionally lead to less than optimum results. Where this is the case, we have tended to create rules to fine-tune the adversary system by supplementing or restricting it.⁴⁵ The notion that this is an ongoing process is demonstrated by the fact that some rules of this character are quite old, while others are of quite recent origin.

One long-standing example of this type of rule is allowing the trial judge to intervene and question witnesses. This is a function almost always left to the adversaries and one highly prized by them. But this will not infrequently occur for a variety of reasons. Mainly because the parties are not performing the function in such a way as to bring out the facts fully or comprehensibly, and in such cases the court has long had the authority to supplement the witness' examination by questions of its own.⁴⁶ Exercise of this prerogative by the judge is, of course, not generally welcomed by the parties, which leads to the apocryphal story of the lawyer, who, after having his questioning of witnesses repeatedly interrupted by the judge's interventions, finally approached the bench to say, "Your honor, I certainly do not object to the court's trying this case for me, but I do have one request. Don't lose it!" Obviously, where the concept underlying the rule is supplementation of the adversary process, the option to alter the rule should not be open to adversaries, even if done by mutual consent.

43. CONST. OF THE ORDER OF THE COIF, art. III, § 3.1(b) (amended 1985).

44. *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (expressing view that parties' contractual specification for standard of judicial review of an arbitration award was permissible because "[t]he review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies").

45. 1 McCORMICK, *supra* note 12, § 8, at 26.

46. *See* FED. R. EVID. 614(b).

An example of more recent vintage is Federal Rule of Evidence 706, which is probably the rule most generally disliked by the parties, or at least by their lawyers, even though only a few courts invoke it frequently. This is the rule which authorizes the trial court to appoint expert witnesses of its own choosing, not infrequently because the experts presented by the parties are highly compensated and not at all impartial.⁴⁷ Moreover, even those experts who make an effort to be relatively objective in their testimony frequently feel impeded in their efforts by the adversary process and would prefer to respond directly to the court. Rule 705 is clearly one intended to supply an available corrective to these deficiencies of the adversary process, and thus, should be immune to party agreement.

A final category of rules which should not be susceptible to waiver or modification by party agreement are rules which seek to protect the interests of some third person or entity not a party to the proceeding in which the rule is applicable. The most obvious example of evidentiary rules of this sort are the rules of privilege, which may not infrequently be applicable in litigation to which the holder of the privilege is not a party. Wigmore and others have cursorily noted that parties A and B should not be allowed to vitiate a privilege held by C, a non-party to their dispute.⁴⁸ But though the theory is plain, the law in this area has long been somewhat unsatisfactory. By definition, the situation is one in which the person potentially most interested in the enforcement of the privilege will not necessarily or even usually be present to raise the question.⁴⁹ And while a party can "suggest" the presence of such a privilege to the court,⁵⁰ this is not likely to be done in situations where neither party sees an advantage in the enforcement of the rule. In such an instance, as indeed in many of the instances we have canvassed, the chief prospect for a correct result will rest with the trial court. It is, however, worth underscoring that Federal Rule of Evidence 103(d) as presently written does not restrict the recognition of plain error by an appellate court to invasions of party interests, but permits such a finding wherever a "substantial right" has been invaded, irrespective of whether that right has been brought to the attention of the trial court.⁵¹

In conclusion, I would concede that my list of policies and interests which should limit the parties' capacity to alter or ignore the rules of evidence is not exhaustive. No doubt the courts will continue to find the amorphous concept of public policy useful in disapproving miscellaneous future party excursions in that direction. But the list I have

47. 1 McCORMICK, *supra* note 12, § 8, at 30-31.

48. *See, e.g.*, 1 WIGMORE, *supra* note 4, § 7a, at 560.

49. 1 McCORMICK, *supra* note 12, § 73.1, at 302.

50. *See id.*

51. FED. R. EVID. 103(d).

sketched will, I think, cover a great majority of the situations likely to arise. To recapitulate, these policies are maintaining the repute of the judicial system by insuring that its procedures comport with contemporary perceptions of rationality, preserving the essential structure and efficiency of the common law fact-finding process, enforcing rules intended to control areas in which the parties are prone to a mutual tendency toward partisan excess, and protecting the rights of third persons not directly involved in the litigation.

I believe that a more specific recognition of the relatively few rules of evidence which should remain immune from party control will permit the adversary system to function with greater efficiency, as both adversaries and trial courts can more confidently realize the benefits of agreements designed to streamline and reduce the scope of litigation.