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The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law

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Erie and the Rules of Evidence

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Jay Tidmarsh offers an intriguing new test for drawing the all-important line between procedure and substance for purposes of *Erie*.¹ The Tidmarsh test is attractively simple, yet seemingly reaches the right result in separating out truly “procedural” rules from more substantive ones.

Since I am not a proceduralist, in this Response I will leave the Tidmarsh test’s explanatory power and practical workability vis-à-vis general civil procedure rules to others more qualified than I. Instead, I want to focus on the implications of the Tidmarsh test for the Federal Rules of Evidence. Like others in the evidence world, I have long harbored concerns about a potential conflict between *Erie* and *Daubert* because of *Daubert*’s profound impact on toxic tort cases.² Professor Tidmarsh’s article offers an opportunity to revisit this concern, as well as a chance to think broadly about the relationship between *Erie* and evidentiary rules.

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1. Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 880–81 (2011); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

2. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). For example, in toxic tort litigation, in which plaintiffs frequently need expert testimony to prove causation, an adverse *Daubert* ruling can be highly outcome determinative and a means by which federal courts alter state tort claims. See *infra* note 6.

I. APPLYING THE TIDMARSH TEST

The Tidmarsh test has potentially radical ramifications for the Federal Rules of Evidence in diversity cases. Straightforward application of the test declares all (or nearly all) of the Federal Rules of Evidence violative of *Erie*. Almost all evidence rules inhibit a party's ability to present favorable evidence, so any discrepancy between federal and state evidentiary rules will change the ex ante value of a legal claim. According to the Tidmarsh test, federal courts must thus apply state evidentiary rules.

This result is extremely bad news for the test's explanatory power. In practice, of course, the Federal Rules of Evidence govern federal diversity proceedings. While some federal courts have applied state evidentiary rules when they are deemed substantive,³ so far as I can tell, no case has ever found a Federal Rule of Evidence to violate *Erie*.⁴ The concern has surfaced from time to time, but courts have never jumped on it.⁵ For example, some *Daubert* commentators,⁶ and even the petitioners in *Daubert*,⁷ have raised concerns about *Daubert*'s compatibility with *Erie*. After all, expert evidence about general causation is critical in toxic tort cases, and excluding it effectively determines the outcome. *Daubert* and Rule 702 nevertheless continue to be routinely applied in diversity cases.

Of course, even if the Tidmarsh test does not work observationally for the Federal Rules of Evidence, one cannot deny that it has some normative appeal. Perhaps evidence rules should not be getting a free pass from *Erie*-type scrutiny, and the Tidmarsh test is precisely the reform that the system needs. As federal courts have recognized, states do implement substantive policies through evidentiary mechanisms.⁸ For example, the parol evidence rule is "not merely a rule of evidence but part of the law of contract,"⁹ and to

3. See *infra* notes 8–9.

4. Cf. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) ("The *Erie* rule has never been invoked to void a Federal Rule [of Civil Procedure].").

5. E.g., *Daubert*, 509 U.S. at 589 n.6 (declining to reach the *Erie* question).

6. See, e.g., Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 289, 308–21 (criticizing federal courts for ignoring the potential relationship between *Daubert* and *Erie*).

7. Brief for Petitioners at 41–42, *Daubert*, 509 U.S. 579 (No. 92-102), 1992 WL 541269.

8. LINDA S. MULLENIX, 17A MOORE'S FEDERAL PRACTICE § 124.09 (3d ed. 2012). But see *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 879 (10th Cir. 2006) (rejecting these precedents on the theory that *Erie* does not apply to the Federal Rules of Evidence, at least as originally enacted, because they were enacted by Congress).

9. *Rock-Ola Mfg. Corp. v. Wertz*, 282 F.2d 208, 210 (4th Cir. 1960) (applying the Virginia rule rendering parol evidence inadmissible).

eliminate the “seat belt defense” in torts, some legislatures have declared evidence of the failure to wear a seat belt inadmissible.¹⁰ Federal courts should not be able to subvert state substantive policy in diversity cases merely by raising the evidentiary talisman. They should apply state rules with substantive effect, whether they are labeled “evidentiary” or not. Similarly, they should *not* apply federal rules with substantive effect, whether they are labeled “evidentiary” or not. After all, if any doctrine has the pedigree to see through the formalism between substance and procedure, it is *Erie*.

But even viewed as a banner for reform, the Tidmarsh test arguably reaches too far. At its core, *Erie* demands that federal courts apply state substantive rules—the rules governing behavior.¹¹ It does not demand that federal courts analyze issues in the same way or reach identical results as potentially biased or misguided state courts. The original motivation behind diversity jurisdiction was to eliminate in-state bias.¹² If federal courts aspired only to replicate their state counterparts, there would not be much point to diversity jurisdiction.

II. ACCURACY-BASED RULES

The above discussion begs the question: Just when does the *Erie* principle require the use of state rather than federal evidence rules? It seems to me that the answer rests critically on the purpose behind the specific evidentiary rule. Rules motivated by accuracy concerns do not conflict with *Erie*. They are attempts not to manipulate policy, but rather to improve the decisionmaking process. By contrast, rules motivated by non-accuracy-based policy concerns fall directly in *Erie*’s purview if they affect claim value, regardless of their “evidentiary” label.

One instance in which Congress has implicitly embraced this division between accuracy-based and policy-based evidentiary rules is Federal Rule of Evidence 501, which governs privileges: “[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”¹³ The House Judiciary Committee Report on Rule 501 remarks that in such cases, federal

10. See N.Y. Veh. & Traf. Law § 1229-c(8) (McKinney 2011), La. Rev. Stat. Ann. § 32:295.1(E) (2002); *Potts v. Benjamin*, 882 F.2d 1320, 1324 (8th Cir. 1989) (characterizing Arkansas’s seat belt law as substantive).

11. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Congress has no power to declare substantive rules of common law applicable in a state . . .”).

12. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010) (characterizing the basic rationale of diversity jurisdiction as preventing local prejudice against out-of-state parties).

13. Fed. R. Evid. 501 (2011).

interests are weak, and that the rule discourages forum shopping¹⁴—reasonable arguments to be sure. However, privileges are also arguably the one definitive subset of evidence rules motivated by policy, not accuracy.¹⁵

Other, heretofore largely unexposed evidentiary rules may also fall on the policy side of the divide. Many of the specialized relevance rules, while justifiable on accuracy grounds, are more naturally classified as policy-based rules. For example, one can justify Rule 407, which excludes subsequent remedial measures, as eliminating evidence that does not *necessarily* prove negligence and that *may* be outweighed by a jury. However, subsequent remedies can often be probative, and courts can police unfair prejudice on a case-by-case basis under Rule 403. A far more compelling justification for Rule 407's blanket exclusion is to encourage (or at least not *discourage*) prosocial improvements. Its most famous treatment, Justice Mosk's opinion in *Ault v. International Harvester Company*,¹⁶ drips of such incentive-based arguments.¹⁷

III. A FRIENDLY AMENDMENT

So where does this analysis leave us with the Tidmarsh test? The original Tidmarsh test states:

In a diversity case, in the absence of a federal statute or constitutional provision requiring a different result, a federal court must use its own rules to process a claim, except that it must apply any rule that a state court sitting in that district would apply if (a) the state court's rule would yield an ex ante expected value for the claim different from the ex ante expected value that the federal court's rule would yield, and (b) the federal court's rule does not describe a part of the post-filing process by which the court, the lawyers, or the parties change the ex ante expected value into its final value.¹⁸

While the test may elegantly describe *Erie's* relationship with procedural rules, it is overly restrictive with regard to evidentiary ones, both as a descriptive and normative matter. The goal, therefore, becomes proposing a friendly amendment that handles the problem.

14. H.R. REP. NO. 93-650, at 9 (1973).

15. See, e.g., GEORGE FISHER, EVIDENCE 842 (2d ed. 2008) (singling out the privilege rules as being unlike other evidentiary rules because they "exclude evidence that suffers from no suspicion of irrelevance or unreliability").

16. 528 P.2d 1148, 1151-52 (Cal. 1974).

17. *Id.* at 1151-52 (arguing that the rule should not be applied to design defect cases because product manufacturers will make design improvements irrespective of the rule).

18. Tidmarsh, *supra* note 1, at 908.

(1) **Definition.** The “ideal claim value” is the value of a state claim as decided by a perfect decisionmaker using all information available to the parties.

(2) **Test (*Erie*).** Under diversity jurisdiction, federal courts may apply their own rules provided that, in a costless, outcome-neutral world, the rule either

- (a) does not affect, or
- (b) is intended to decrease

the distance between the expected value of the state claim and the ideal claim value.

Figure 1: Proposed Test

The most noticeable difference between the original and proposed tests is the definition of “ideal claim value.” The Tidmarsh test, by focusing only on expected claim value, eschews any notion of “correct” or “ideal” result. To define ideal claim value, the proposed test relies on a perfect decisionmaker, who finds facts and applies governing state law without cognitive limitations or bias, obviating the need for any accuracy-motivated evidentiary rules.¹⁹ Notably, this decisionmaker is not omniscient, but rather is a perfect “weigher” of evidence.

Actual decisionmakers, of course, are not perfect and introduce error. The expected value of a claim is therefore not the same as the ideal claim value, and the amended test focuses on precisely this difference to unify procedure and evidence under one *Erie* rule. Section (2)(a) merely translates the Tidmarsh test into this framework. If a federal rule does not change a claim’s expected value, then it necessarily does not alter the distance between the expected value and the ideal. Section (2)(b) captures the accuracy-policy distinction. If the federal rule’s purpose is to decrease the distance (i.e., enhance accuracy), then it too does not violate the *Erie* principle.

The amended test coheres well with existing precedent. Through (2)(a), it preserves the Tidmarsh test’s success in explaining *Erie* precedent in the procedural sphere. Through (2)(b), most of the Federal Rules of Evidence survive, since most are accuracy based and thus attempt to decrease the distance between the expected claim

19. The test is purposely agnostic as to the attributes of this perfect decisionmaker. To some, the decisionmaker probably approximates a perfect Bayesian, while others may prefer the decisionmaker to do inference to the best explanation. See Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223 (2008). I have suggested elsewhere that these two perspectives may not be as diametrically opposed as commonly thought. Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. (forthcoming 2013).

value and the ideal. Policy-based rules like privileges, in contrast, violate the test, and so federal courts must apply state privilege laws. Presumptions, burdens of proof, and doctrines such as the parol evidence rule and seat belt evidence rules also fail to meet the test requirements, which accords with current case law.

A. A Question of "Intent"

One might wonder why the proposed test incorporates the notion of "intent." After all, shouldn't the rule only allow federal rules that *in reality* make factfinding more accurate? The proviso is driven largely by practical concerns. Whether an accuracy-motivated rule actually improves decisionmaking is generally difficult to ascertain. (If a rule were shown definitively to harm accuracy, hopefully it would be short lived.) Since no one knows for sure, a federal court should have the prerogative to make good-faith efforts toward greater accuracy.

Given that intent is only an administrative "fudge factor," we theoretically should be comfortable with a rule that operates based on actual outcomes, rather than intentions. For example, if one could *indisputably* demonstrate that application of a federal privilege (or symmetrically, disregard of a state privilege) in a diversity case would achieve better accuracy, should *Erie* permit a federal court to do so? Presumably yes. As previously argued, getting closer to the ideal claim value is the goal of *Erie*, not replicating state proceedings or satisfying party expectations. Nothing in *Erie* suggests that the federal courts may not build a better mousetrap.

But shouldn't federal courts respect this state privilege (that indisputably results in less accuracy) out of deference for the state policies surrounding it? Perhaps. However, the reason for federal courts to observe such a state privilege would be comity, not *Erie*. For one thing, arguments about state policies extend well beyond diversity cases to encompass federal question cases, a fact demonstrated in *Jaffee v. Redmond*.²⁰ For another, *Erie* is not a general doctrine about promoting state policies writ large. It is only about respecting a state's ability to define the ideal value of state-law-based claims.

In any event, though a useful sanity check, such "indisputable" scenarios are purely imaginary, and thus need not trouble us further. In practice we know neither the ideal claim value nor whether a rule will get us closer to it, so the test relies on intentions, rather than actual outcomes.

20. 518 U.S. 1, 12–14 (1996) (recognizing a federal psychotherapist-patient privilege in part because failure to do so would negatively impact the policies of the fifty states that did).

B. Some Theoretical Implications

At first blush, the amended test may seem like a pedantic band-aid for the Tidmarsh test: Since no viable *Erie* test can seriously eliminate the Federal Rules of Evidence, add an exception. However, the proposed test is much more than a patch. It coherently and straightforwardly describes when differences between federal and state rules are benign and therefore acceptable under *Erie*. If the federal rule does not change the distance to the ideal claim value, then no harm, no foul. If the intent of the rule is to decrease the distance, then even better.

Further, the introduction of an ideal claim value into the analysis marks an important shift in perspective. The original Tidmarsh test embodies a strong realist cast, a fitting tribute to the spirit that motivated *Erie*. To the original test, all that matters is the expected value of the claim. It is Holmesian in flavor: just as the “law” is what courts actually enforce,²¹ the “value” of a legal claim is what courts actually award. In contrast, by embracing an *ideal* claim value, the amended test is more circumspect.

There are two reasons why an *Erie* test should concede this ground. The first goes back to the purpose of diversity jurisdiction itself, which is to provide a (more) neutral venue for out-of-state litigants. To repeat, the goal of a federal court sitting in diversity is not to replicate state court, but rather to do the best job possible in ascertaining the ideal claim value.

The second reason comes from evidence law, which focuses on facts. Whereas most procedural and substantive laws have diverse, disputed, and conflicting purposes, accuracy-motivated evidence rules ideally only have one—better factfinding. Viewing evidence through a strong realist lens reduces it to a collection of arbitrary rules for a high-stakes game called “Litigation,” a perhaps plausible, but uninspiring world view. Establishing ideal claim value as the evidentiary goal is thus rather natural.

C. Practical Application

Finally, it is worth noting that the amended test is clearly not as easy to apply as the original because it requires an inquiry into a rule’s intended purpose. Although some evidentiary rules have obvious answers, some have split personalities, like the character evidence rules or the rule prohibiting subsequent remedial measures. The

21. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

inquiry, however, does not seem any more difficult than the multitude of other purpose-based inquiries in law.

Critics may claim that analyzing the relationship between *Erie* and evidence rules is largely unnecessary, or merely a theoretical exercise. The vast majority of states have adopted the Federal Rules of Evidence,²² and since American evidence law arises from a common tradition, federal and state law will seldom conflict. For many cases, that critique is undoubtedly true, but there will be cases where the difference will be critical, not only in terms of ex ante discounted value, but in terms of actual trial outcome. And in those cases, we need a proper answer.

Even beyond the practical ramifications, getting the structural details right always matters. Having an *Erie* test that renders all current evidentiary practice in diversity cases unconstitutional is highly unsatisfying. *Erie* in many ways helps to define the federal courts as an institution. Providing them the power to process and adjudicate claims in their own way provides them respect as independent adjudicatory bodies.²³ As Tidmarsh eloquently notes, while the underlying law may derive from the states, a federal court may “choose its own rules to transmute [a] claim from [its] expected value to its actual value”²⁴—so long as the federal rules do not take us away from the ideal claim value.

In conclusion, let me reemphasize that my amendment to Professor Tidmarsh’s test is friendly in every sense of the word. He is to be commended for producing a thought-provoking article, and I am indebted to him for sparking my own renewed interest in *Erie*. The relationship between *Erie* and evidentiary rules is often neglected, but with our combined effort, hopefully it will be no longer.

22. FISHER, *supra* note 15, at 3 (“At last count, forty-two states and Puerto Rico have adopted the Federal Rules in whole or in great part.”).

23. See *Hanna v. Plumer*, 380 U.S. 470, 473–74 (1965) (“To hold that a Federal Rule of Civil Procedure 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.”).

24. Tidmarsh, *supra* note 1, at 881.