The Law Reform Commission of Canada's Evidence Code

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THE LAW REFORM COMMISSION
OF CANADA’S EVIDENCE CODE

By NEIL BROOKS*

I. INTRODUCTION

In its Report on Evidence, the Law Reform Commission of Canada included a draft Evidence Code that they recommended be enacted by Parliament.1 The Code would apply, in the main, to criminal proceedings and to proceedings before the Federal Court of Canada.2 It took four years to prepare: preliminary work began in the summer of 1971; the Code was published in the late fall of 1975. During the preparation of the Code, when the Evidence Project of the Law Reform Commission was releasing study papers on various aspects of evidence law,3 and after the Code's publication, the Commission's work on evidence law was the subject of extensive comment and criticism from the bench and bar.4

The purpose of this article is to respond to some of the general questions and concerns about the Code frequently raised by these commentators and critics. I will not deal with criticisms made of specific sections in the Code; the Report on Evidence itself contains most of the answers to these criticisms. Much of the background to the Code, however, has not been adequately explained and it may be that a greater understanding of these matters will lead to a better appreciation of the overall objectives of the Code. This article will


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2 Evidence Code, s. 86.

3 Study Papers Nos. 1 to 4 were published together in 1972: Competence and Compellability; Manner of Questioning Witnesses; Credibility; Character. Study Paper No. 5, Compellability of the Accused and the Admissibility of his Statements, appeared in 1973. Study Papers Nos. 6 to 8 were published together in 1973: Judicial Notice; Opinion and Expert Evidence; Burdens of Proof and Presumptions. The remaining studies were published individually: Hearsay (No. 9, 1974); The Exclusion of Illegally Obtained Evidence (No. 10, 1974); Corroboration (No. 11, 1975); Professional Privileges Before the Courts (No. 12, 1975).

4 The written comments are on file at the Commission and have been collected in a volume that collates them to the sections in the Code. J. L. Baudouin and N. Brooks, Written Comments Received from the Public Relating to the Laws of Evidence (Ottawa: Law Reform Commission of Canada, 1976). Many more comments were, however, made orally to the Commissioners and staff members during countless meetings with the bench and bar across the country.
survey the reasons why the Law Reform Commission of Canada undertook a study of evidence law, the reform attempts that predated the Code, the procedure followed by the Commission in studying the rules, and the philosophy underlying the substance and the drafting of the Code. It will also attempt to explain some of the criticisms made of the Code.

The aspects of the Code that I have chosen to discuss have been determined by the general tenor of the comments made about the Code. More particularly, they reflect, to some extent, the fact that the comments from the bench and bar on the Code and the Evidence Project's study papers can be fairly described as overwhelmingly hostile. Representative comments include cryptic and blunt remarks such as "unacceptable"; "[it will] introduce chaos and lead to disaster"; and, "It is difficult to take any of it seriously ..."; to more extended but no less pointed criticism: "If this proposed legislation, which wipes out the common law of evidence, is enacted every citizen of this country has a right to fear that in one stroke the Government will have swept away fundamental protections which have been developed over centuries to protect the accused from the State"; and, "... I find little merit, considerable harm and inconceivable stupidity in the reports. It seems clear that their authors have no experience of what actually happens in court and that their scales of values and priorities are foreign to the fundamental traditions and indeed life-blood of our jurisprudence."

These comments by the bench and bar might be contrasted to assessments of the Code made by Sir Rupert Cross: "The Code is the simplest and boldest that I have encountered and I commend it as preferable to any of the three comparable American productions ..."; and, "I am ... inclined to say that, were it adopted just as it is, the distinction of having the best code of evidence in the common law world would go to Canada."

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6 *Supra*, note 4 at 40.

7 A. Mewett, *Law Reform Commission of Canada Report on Evidence* (1975-76), 18 Crim. L.Q. 155 at 155. Professor Mewett, one of the few academics to comment on the Report, was, at the time he made these remarks, the director of a research team on the law of evidence under the Ontario Law Reform Commission. The research papers prepared by this team formed the basis of Ontario's *Report on the Law of Evidence* (Toronto: Ontario Law Reform Commission, 1976). Somewhat surprisingly, Professor Mewett had, six years earlier, argued that, "[a]nything relevant should be admissible, subject always to the discretion of the trial judge to exclude or discount anything the probative value of which is outweighed by its unfairness." A. Mewett, *Evidence in Criminal Cases* (1968-69), 11 Crim. L.Q. 241 at 242. This is certainly the ideal toward which the drafters of the Code strove.


II. WHY THE STUDY OF EVIDENCE WAS UNDERTAKEN

Critics of the Code often launched their assaults by questioning the need for a study of evidence law at all. A typical comment described the project as "... a make-work project for academics who are seemingly unaware of the fact that the present laws of evidence are functioning satisfactorily at least in British Columbia." A frequent variant on this theme consisted of posing the question rhetorically as an argument against the Code. For instance, in a recent article, a Judge from British Columbia asked, "Where is the demand from the public (or anyone else) for an evidence Code?"

The most important reason why the Commission undertook a study of evidence law was that the rules appeared to be in desperate need of reform. In the next section of this article the basis for this position will be considered. However, this same comment might be made of many areas of law. Thus I will here review some of the discussion leading up to the establishment of the Commission and the setting of its first priorities in order to indicate why evidence was a logical subject for the Commission to study.

1. The Government's Expectations

Under the Law Reform Commission Act, the Commission is free to carry out whatever studies it "deems necessary for the proper discharge of its functions." The Minister of Justice may, however, specifically direct that the Commission study a particular subject area. While the Minister did not formally direct the Commission to undertake a review of the laws of evidence, the government clearly contemplated at the time of establishing the Commission that the laws of evidence would receive priority in the Commission's work.

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12 Supra, note 4 at 46.
13 Supra, note 5 at 167. The Evidence Project noted in the preface to its first four study papers, supra, note 3, that "public pressure for reform of the law of evidence has not been as great as for improvement of some of the areas of substantive law. The law of evidence is, in the main, lawyer's law; laymen are affected by it only when they appear in court. Therefore, except with respect to those few rules of evidence which affect the accused person because of his special status in court, the rules have never become a public issue."
15 Id. s. 12(2).
16 Apart from the details of organization, the hiring of research staff, and related matters, the Commission did give priority to preparing our program of studies. Quite frankly, certain important questions had already been decided. It was clear, from statements made by the then Minister of Justice, the Honourable John Turner, in the House of Commons and elsewhere, that the expectation was that our most important undertakings were to be in the areas of criminal law and evidence. We were in no way dissatisfied with this understanding. The very selection of the members left no real alternative. Mr. Justice Hartt and Mr. Justice Lamer were known for their work in criminal law and Professor Martin Friedland was a distinguished criminal law teacher and scholar.


Even before the Commission was constituted it was reasonably clear that there was a widespread expectation that the major items of investigation during its initial years would fall within the broad sweep of the criminal law and the law of evidence.

On the second reading of the Law Reform Commission Bill, the then Minister of Justice, the Honourable John N. Turner, suggested that one of the immediate priorities of the Commission would be to thoroughly revise the Canada Evidence Act and to try to achieve some degree of uniformity between the criminal and civil laws of evidence throughout Canada.\textsuperscript{17} When the Bill was before the Commons Committee on Justice and Legal Affairs, he repeated his intention to refer the Canada Evidence Act and the Criminal Code to the Commission and stated that "... the appointments I intend to make would reflect that particular expertise during the first five years of the life of the Commission."

The Government's commitment to review the laws of evidence predates, however, the formation of the Law Reform Commission. In introducing amendments to the Evidence Act in 1969, Justice Minister Turner stated:

... [T]he general law of evidence in this country has tended to remain as frozen as an iceberg, while the substantive civil and criminal law has been developed largely by statute to keep in pace with changing social conditions.

This year I am initiating a general overhaul of the Canada Evidence Act which I hope will result in major reforms to that statute.\textsuperscript{18}

Many members of the House spoke at that time of the need to examine the entire law of evidence. Indeed, speakers from each party were adamant that it be reviewed without further delay. Mr. Eldon M. Woolliams (Progressive Conservative) suggested that the Standing Committee on Justice and Legal Affairs should consider the entire Canada Evidence Act.\textsuperscript{20} Mr. John Gilbert stated that "... we in the New Democratic Party welcome [Mr. Turner's] statement that it is his intention to have a general overhaul of the Canada Evidence Act in the near future."\textsuperscript{21} Mr. André Fortin (Créditiste) was the most forceful in arguing that the whole of the law of evidence should be reviewed:

Mr. Speaker, the Evidence Act was enacted 75 years ago and it has never been amended since.

... [w]hy ... must [we] be satisfied today with amending the Evidence Act—and very limited amendment indeed instead of changing entirely such an important legislation, on which rests in a way the efficient administration of justice.

\textsuperscript{17} He suggested the priority would be:

... revising on a total basis, the Canada Evidence Act and, in doing so [to] arrange that the criminal laws on evidence correspond in so far as that is possible with the civil law on evidence across Canada, both within the civil law system of Quebec and the common law system obtaining in the other nine provinces.


\textsuperscript{18} Can: H. of C., Standing Committee on Justice and Legal Affairs, April 27, 1970, vol. 22, at 20.

\textsuperscript{19} Can: H. of C., Debates, January 20, 1969 at 4494.

\textsuperscript{20} Id. at 4496.

\textsuperscript{21} Id. at 4500.
[A] complete review of the Evidence Act would certainly help improve the efficiency of our judicial system.

I therefore want him to give us the assurance that the law as a whole will be reviewed without further delay because we have already waited far too long.22

Later in the debate, Mr. Turner, in speaking of the proposal to establish a Law Reform Commission, added that "[t]he law of evidence would be a very useful reference to it . . . ."23 Thus, although the law of evidence was never specifically referred to the Commission, it was undoubtedly the government's expectation that the Law Reform Commission would undertake a complete review of this subject.

Furthermore, a study of evidence law was an appropriate if not necessary companion to the other studies that the Commission undertook. From the outset the Commission was committed to reviewing comprehensively the criminal law of Canada.24 The study of the laws of criminal evidence seemed an appropriate, if incidental, part of that larger study. However, once the Commission decided to embark on a study of criminal procedure,25 a study of criminal evidence appeared essential.26

Before finalizing its initial research programme, the Commission sent a questionnaire to lawyers, judges, and others asking them what, in their view, should be areas of priority in law reform. The questionnaire listed the law of evidence as a potential area of study.27 Although the overall response to the questionnaire was disappointing, many of the respondents noted that evidence was an area that needed reform.28 No one at that time suggested that it would be a waste of time to study the law of evidence because the rules in their present form were working satisfactorily. Thus, it understandably came as a surprise to the Commission when later it was alleged that the laws of evidence were not in need of reform, and that the Evidence Project was "a make-work project."

The Government's judgment that the time was ripe for a complete study of the rules of evidence seemed to be confirmed by the fact that practically

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22 Id. at 4502.
23 Id. at 4505.
24 Annual Report, supra, note 16.
25 Id.
26 Id. at 4502.
27 "There can be no thoroughly effective reform in law administration, however, without an adequate treatment of the matter of evidence." C. Callaghan and E. Ferguson, Evidence and the New Federal Rules of Civil Procedure (1936), 45 Yale L.J. 622 at 622.
28 Questionnaire, at 4.
29 "As a result of this consultation it was apparent that our expectation that we should undertake extensive research in criminal law and evidence was justified." Annual Report, supra, note 16 at 4-5. At the time the Commission was established, what public comments there were also urged the reform of the rules of evidence. See, for example, Mewett, Evidence in Criminal Cases, supra, note 7 at 242.
every law reform body in the common law world was studying evidence.\footnote{See the discussion, infra, Part C. See also the following reform efforts in other jurisdictions:}

The late 1960's and early 1970's have been called "a major reforming period in every area of the law."\footnote{See the discussion, infra, Part C. See also the following reform efforts in other jurisdictions:}

\textit{England}


\textit{Australia}


\textit{New Zealand}


\textit{Ireland}

The revision and codification of the law of evidence, both civil and criminal, has been a subject much discussed for many years in common law countries and there seems to be general agreement as to the desirability of a code or codes of evidence, if such should prove to be practicable. The Commission appreciates that because of the immensity of the task it would not be feasible to undertake the preparation of comprehensive codes all at once. It is proposed that particular areas of the law be examined with a view to reform and that the reforms be designed to fit into an ultimate whole without the necessity for any subsequent substantial change.

Law Reform Commission of Ireland, \textit{First Programme 8} (1976).

\textit{South Africa}

South African Law Commission, \textit{Annual Report 3} (1976) (Their intention is to revise the law of evidence as a whole and to codify it.)
in the law of evidence." In 1968 an English authority wrote that, a "hurricane" was upon us in the law of evidence. He predicted that a wind of change "of a velocity and turbulence hitherto unknown is going to sweep away common law principles hitherto regarded as fundamental."

2. The Present Rules of Evidence Are in Need of Reform

The most compelling reason for reviewing and recommending reform of the laws of evidence was simply that they are in drastic need of reform. If the laws of evidence were once rational and of assistance in furthering the objectives of the procedural system, they are no longer so. When vigorously applied, the rules result in trial delays, intimidation of witnesses, confusion of jurors and the public, unseemly bickering over trivial issues, rulings that prevent cases from being decided on their merits, and technical appeals that are both time-consuming and expensive. The rules have become rigid, complex and technical. They are a disgrace to the common law. They have been applied in case after case without reference to their original purpose or to the objectives of the system they are designed to regulate. In no area of law has the common law lawyer's sometimes simple-minded and fanatic urge to pigeonhole, conceptualize and classify so completely dominated the resolution of serious problems.

Even though it is easy to demonstrate that evidence jurisprudence suffers from the dead hand of conceptualism, it is nevertheless difficult to verify directly whether the rules are working well or not. However, given the conceptualism of the rules, along with the fact that there have been no substantial changes in the rules of evidence for over one hundred years, that most of the distinctions and assumptions upon which the rules are based are disingenuous or incorrect, and that virtually every serious and thoughtful commentator on the rules of evidence has called for drastic reform, it would be indeed surprising if the rules were working efficiently.

Every area of law has changed dramatically over the past one hundred years. A lawyer practising in 1878 would probably recognize only one area of present day law as being even remotely familiar; that area would be evidence law. Not only would he recognize the rules, but he could walk into a present day courtroom, pick up a brief, and present a case without the judge even noticing that he hailed from a previous generation. Yet, virtually every aspect of the litigation process and of daily life, upon which the rules of evidence are premised, has changed. Modern business records and methods of information retrieval bear little resemblance to the hand-written records upon

30 Panel discussion in Modification of the Hearsay Rule (1971), 45 Aust. L.J. 531 at 559 (per Harding).
31 R. Gooderson, Previous Consistent Statements, [1968] Camb. L.J. 64 at 64.
32 To be quite brutal about evidence law, as the profession has known (but not understood) it, it is presently a disgrace to the common law system. G. Murray, Evidence Reform: Some Random Thoughts (unpublished essay, Law Reform Commission of Canada, 1975).
33 In a survey of over one hundred recent cases, I have attempted to show the extent to which evidence cases are decided without reference to principle. See N. Brooks, Annual Survey of Canadian Law: Evidence (1975), 7 Ottawa L. Rev. 600.
which most of the rules of authentication and original evidence are premised. Changes in pre-trial discovery and the more extensive use of written evidence have rendered meaningless many rules designed to prevent surprise at trial. The trend towards specialized knowledge and the consequent reliance upon expert testimony has rendered obsolete rules relating to expert testimony. Finally, given the progress made in the scientific study of human behavior, and the increased sophistication of jurors, rules formulated by judges on the basis of their intuitive understanding of human behavior and of the inference-drawing abilities of illiterate jurors are out-dated.

The suspicion that rules of evidence which were formulated over one hundred years ago cannot sensibly govern the presentation of proof in a modern trial is confirmed by a review of the distinctions these rules compel judges to make and the specific empirical assumptions upon which they are premised. The rules of evidence require lawyers to debate (at enormous expense to the State and to those unfortunate souls who become entrapped in the cycle of litigation) such questions as: Whether the assertion that "he looked badly hurt" is a statement of fact or opinion? Whether the victim of a homicide had a settled and hopeless expectation of death when he uttered a statement purporting to identify his assailant? Whether a statement by the accused was made voluntarily? Whether a child understands the nature of the oath? Whether a document was made in the course of duty? Whether an opinion embraces the ultimate issue in a case? Whether the testimony of a sworn child can corroborate the testimony of an unsworn child? Whether a scream can amount to corroboration? Whether a document relates to a collateral matter? Whether a statement is part of the res gestae? Whether evidence is being offered to prove the accused's identity, in which case it is admissible, or whether it is being offered to prove his disposition to commit a particular act, in which case it is inadmissible? At first glance many lawyers would probably find nothing strange about the prospect of debating these questions before a bench of nine learned judges. Upon reflection, however, it seems evident that many of these questions assume a distinction that is epistemologically or metaphysically unsound. At the very least, not one of them draws a distinction that relates in any way to the principles that should underlie a rational body of rules used to determine whether certain evidence ought to be admissible in a judicial trial.

As well as injecting these nonsensical distinctions into the litigation pro-

34 All the leading evidence scholars have recognized the meaninglessness of these questions, so I will not footnote references. However, a remark made by one of the great common law jurists nicely states the objection which could be made to all these questions. The following anecdote was found in E. R. Thayer's teaching notes:

When counsel was attempting to introduce certain hearsay, Holmes J. presiding said "No, the hearsay rule has been a good deal nibbled round the edges, but nobody has taken quite such a bite out of as that. And I think I won't set the example." "Not as part of the res gestae?" asked counsel. Holmes J., replied: "The man who uses that phrase has lost temporarily all power of analyzing ideas. For my part, I prefer to give articulate reasons for my decisions."

cess, virtually every rule of evidence rests upon a questionable empirical assumption. These assumptions are of two kinds: some relate to the jury’s inference-drawing ability; others relate to the manner in which people behave under certain circumstances. The assumptions relating to the jury’s inference-drawing ability are often startling. The ultimate issue rule (a rule which holds that a witness cannot give direct testimony about the ultimate issue in the case) assumes that the jury is so unintelligent that, if a witness testifies as to how the ultimate factual issue in the case ought to be resolved, the jury will blindly accept the truth of such an assertion, forgetting that the resolution of the factual issues is their function. Even the assumption behind the hearsay rule, that the jury is not intelligent enough to appreciate the frailties of statements made by persons out of court who are not subject to cross-examination, must appear ridiculous to anyone who is not trained by rote to believe that the rule is an essential prerequisite to rational fact-finding.

Even if it is not accepted that many of the assumptions underlying the rules are absurd on their face, it must at least be apparent that they are frequently inconsistent. Jurors are assumed for some purposes to be imbecilic, while for other purposes they are assumed to have mental powers that operate with computer-like precision. For example, it is assumed that, from evidence of a witness’s previous consistent or inconsistent statement, the jury can draw an inference about the witness’s credibility without, at the same time, drawing an inference about the truth of the facts asserted in the previous statement. (As in all these examples, the jury is assumed to be capable of drawing the former inference, incapable of rationally drawing the latter, yet brilliant

35 Wigmore delivers a fatal blow to the ultimate issue rule in a contrived scenario in which he has an American lawyer attempt to explain to a foreign lawyer why testimony upon the ultimate issue is excluded:

So now comes the foreign lawyer, and asks his friend, “What was the reason for prohibiting that testimony?” And the friend replies, “Because that is the very question which the jury is to decide.” Whereon the foreign lawyer replies, in astonishment, “But that would seem to be the very reason for its admission. Instruction from qualified persons is what the jury want, is it not? Why call qualified persons, if not to help the jury on the very point in issue?”

“No,” answers the American friend, “our law forbids that; the jury might believe them, and thus might go wrong.”

“But if these experts were wrong, then experts could be called on the other side to say so?”

“Yes, of course; but then the jury would be confused.”

“They might; but may they not also be confused when any other witnesses on opposite sides contradict each other?”

“Yes, but that can’t be helped.”

“Then why call the experts at all?”

“No, we couldn’t very well do that, but we can call them and then stop them from being of any service; which is what our rule amounts to.”


36 I am aware that countless explanations have been given for the hearsay rule, and for every other rule of evidence for that matter. The frailty of the jury, however, is certainly the most commonly given explanation for the hearsay rule. For example: “... [In England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded because no man can tell what effect it might have upon their minds],” per Mansfield C.J., In re Berkeley (1811), 4 Camp. 402 at 416; 171 E.R. 128 at 135.
enough to be able to distinguish between them and draw the former, but not the latter, when so instructed by the judge, even though both inferences logically suggest themselves.) Another rule assumes that, from evidence of the accused's silence in the face of police questioning, the jury can make a judgment about the weight to be given to the accused's defence, but not at the same time draw a direct inference of guilt from that silence. A further assumption is that the jury can, from a statement made by one co-accused which implicates both accused, draw an inference of guilt with respect to the accused who made the statement, but put the statement completely out of its mind when considering the guilt of the other accused. Finally, we assume that the jury can draw an inference about the accused's credibility from evidence of the accused's past criminal record but not, at the same time, draw a direct inference about the accused's probable guilt.  

Other rules of evidence based on assumptions about the jury's fact-finding ability are not only wrong, but are likely to have an effect exactly opposite to that intended. The authors of one empirical study on the jury found that when the jury receives the standard instructions that it is dangerous to convict the accused on the uncorroborated testimony of an accomplice, they are in fact more likely to convict. The authors of another study found that in a tort case where the jury heard the inadmissible evidence that the defendant was insured, they gave the plaintiff a higher award of damages, if as is customary, they were instructed to ignore that fact, than if they were given no special instructions with respect to it.

Other rules of evidence, even if they have their intended effect on jury deliberations, are applied in the wrong kinds of cases. The rule in Hodge's Case is an example. This rule requires the jury to be instructed, in cases where the evidence is substantially circumstantial, that "before it can find the accused guilty, it must be satisfied that the circumstances proved in evidence are not only consistent with the accused having committed the act, but also that they are inconsistent with any other rational conclusion than that the accused is the guilty person." Assuming for a moment that the rule makes literal sense (which it does not because in every case there will always be more than one explanation which could rationally explain the evidence), and that such an instruction to the jury will affect their evaluation of the evidence (it likely does not, for irrespective of what the jury is instructed on the matter of burden of proof, they are likely to do the sensible thing and decide whether the particular accused in the particular case ought to be convicted), it is given in the wrong kinds of cases. The available empirical evidence suggests that the danger that the jury will not correctly evaluate circumstantial evidence is small. There is

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37 See, generally, R. Cross, An Attempt to Update the Law of Evidence (Jerusalem: Magnes Press, Hebrew University, 1974).


39 D. Broeder, The University of Chicago Jury Project (1959), 38 Nebraska L. Rev. 744 at 753, 754.

40 In re Hodge (1838), 2 Lew. C.C. 227 at 228, 168 E.R. 1136 at 1137.

strong evidence, however, that the jury tends to give too much weight to direct eyewitness testimony. Studies of actual cases in which a person was wrongfully convicted reveal that a wrongful conviction is much more likely to result in a case involving eyewitness testimony than in one involving any other kind of evidence. Only a very small number of recorded cases of wrongful conviction involve substantially circumstantial evidence. The familiar retort that this fact only proves that the rule in Hodge’s Case works carries no weight here because all of these studies were conducted in jurisdictions that did not have the rule.

A controlled experiment performed by an experimental psychologist has confirmed that juries are likely to give too much credence to eyewitness testimony. In the experiment, subject-jurors heard the facts of a case involving only circumstantial evidence and were asked to determine the accused’s guilt; only eighteen percent judged the defendant to be guilty. In another condition of the experiment the same facts were given to other subject-jurors, but the additional evidence of an eyewitness was introduced into the scenario; seventy-two percent of the subject-jurors who heard this scenario judged the defendant to be guilty. In the final condition of the experiment, the facts of the second condition were repeated, but the eyewitness’s testimony was completely discredited. Among other things, the fact that he had only 20/400 vision was introduced. Nevertheless, sixty-eight percent of the jurors who heard the testimony of the discredited eyewitness voted for conviction. Thus, if a special cautionary instruction to the jury can be justified, it is clear that it should be given in cases involving substantially direct evidence, not substantially circumstantial evidence.

When the rules of evidence were first formulated, it might have been true that special rules were needed to protect the jury from drawing fallacious inferences and improperly estimating the probability of the existence of the facts in issue. Certainly most jurists of the day had a very low opinion of the jury’s abilities. Herbert Spencer referred to them as “twelve people of average ignorance.” The Common Law Commissioners of 1853 noted that the jury is “unaccustomed to severe intellectual exercise or protracted thought.” Lord Coleridge stated before the House of Lords that the argument that certain evidence should be admissible was based upon “the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgements and act upon, may be submitted to the jury.” However, by the middle

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46 Wright v. Tatham (1838), 5 Cl. & Fin. 670 at 690; 7 E.R. 559 at 566.
of the nineteenth century this view of the ability of jurors showed signs of changing. In 1861, Chief Justice Cockburn noted: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight."47

Certainly there can be little question that modern jurors are better educated and have a broader experience than jurors of the middle nineteenth century. Jurors at that time were largely illiterate and ignorant of any matters beyond their day to day existence. Nowadays, not only can virtually all jurors read, but most have a high school education and all of them will have been exposed through the mass media to an incredible range of information about the world in which they live. It would be both presumptuous and negligent for a law reform commission today to tolerate rules of evidence that were formulated to protect "rude and illiterate" jurors.48

As well as resting upon questionable assumptions about the jury's inference-drawing abilities, many rules of evidence rest upon dubious assumptions about human behaviour generally. The rule admitting past sexual conduct in rape cases assumes that there is a relationship between promiscuity and veracity; the res gestae exception to the hearsay rule assumes that a startling event stills the reflective thought process and heightens perception;49 the conditions

47 *Queen v. The Churchwardens of Birmingham* (1861), 1 B & S 763 at 767; 121 E.R. 897 at 899. In the United States, a judge expressed the same sentiments in even stronger language in 1853:

> And formerly in England, whole juries were composed of rude and illiterate men—a system of excluding testimony grew up, more technical and artificial than any to be found in the world.

> But as jurors have become more capable of exercising their function intelligently, the Judges both in England and in this country are struggling constantly to open the door wide as possible: aye, to take it off the hinges, to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion . . .

> Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however, remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict.


48 We doubt that modern juries, properly instructed, find special difficulty in evaluating the worth of hearsay evidence. In private and business life most important decisions are based, at least partly, on hearsay information. Juries are as well equipped by experience to assess hearsay evidence as they are to assess direct evidence given by oral testimony.


We disagree strongly with the argument that juries and lay magistrates will be over-pressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common-sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can.


49 The authors of a study of this hearsay exception suggested that these assumptions are so clearly wrong that, "On psychological grounds, the rule might very well read: Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation." R. M. Hutchins and D. Slesinger, *Some Observations On The Law of Evidence* (1928), 28 Colum. L. Rev. 432 at 439.
attaching to the admissibility of a hearsay statement against interest assumes a person is less likely to make a false statement which is against his proprietary interest than he is to make a false statement that ruins his reputation, or that might result in him being sentenced to death; the dying declaration exception to the hearsay rule assumes that a dying person is unlikely to lie (this assumption is only made in criminal trials in which the accused is charged with homicide; it is not made in a civil action in which, for example, a few hundred dollars might be at stake); finally, the rule requiring corroboration of the testimony of children who cannot be sworn assumes that children who understand the nature of the oath have a higher moral standard than those who do not. This last rule also assumes that the testimony of children is unreliable because children are likely to be insincere. In fact, their testimony is likely to be unreliable because of their underdeveloped perceptual ability, their inability to conceptualize and their susceptibility to suggestion.

Professor Cleary has observed, with respect to the empirical assumptions upon which the common law judges based the rules of evidence: "... the rules of evidence largely have been constructed out of anecdote and unsystematic observation, plus what hopefully passes for reason but could more honestly be labelled conjecture about human behavior." Another commentator noted ironically, "it is a curious paradox that these very rules are themselves based on no evidence which would be admissible in any court applying those rules." In the face of these unsubstantiated and inconsistent empirical assumptions about the jury's inference-drawing process, and about human behavior, one might be forgiven for questioning whether the rules of evidence are working well. It would indeed be surprising if rules premised upon such fantastical notions worked well in the real world.

It seems peculiar to have to appeal to authority to support the assertion that the rules of evidence are a disgrace to the common law. But, judging from the responses to the Commission's Report on Evidence, it would come as a surprise to many Canadian lawyers and judges to learn that in this century serious scholars of evidence law have been unanimous in condemning the rules and calling for their reform. This attitude towards the rules is admittedly in contrast to that held in the early part of the nineteenth century,

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50 W. Cleary, Evidence as a Problem in Communicating (1952), 5 Vand. L. Rev. 277 at 279. (footnote omitted)

51 D. S. Greer, Anything But the Truth? The Reliability of Testimony in Criminal Trials (1971), 11 British Journal of Criminology 131. Lee Loevinger perhaps made the point with respect to the naive assumptions about the jury's inference-drawing process best:

In terms of the rules of evidence themselves, the objection that the exclusionary rules are required because of the incapacity of juries to act reasonably in their absence is an assumption based on an opinion derived from a surmise, and altogether lacking in evidence, competent or incompetent, to support it.


52 Although it is not hard to find many expressions by lawyers and judges in panegyrical praise of the legal system and its operation, scholars who have studied the rules of evidence are nearly unanimous in finding them unsatisfactory and ill-suited to their function.

Loevinger, id. at 162.
when many jurists looked upon the rules of evidence "with almost religious sanctity."

In 1790, for example, Lord Kenyon C.J., is reported to have said, "... [The rules of evidence] have been matured by the wisdom of ages, and are now revered for their antiquity and the good sense in which they are founded." A few years later, in 1808, Lord Ellenborough cautioned that he "should be extremely sorry if anything fell from the court ... which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty and property...."5

At the beginning of the nineteenth century, the authors of the emerging treatises on evidence law were equally unrestrained and eloquent in their praise of the rules of evidence. In 1810, Swift, an American author, observed: "[The rules of evidence have been] reduced to a precision, and certainty, susceptible of little further improvement, and may now be considered as placed on a basis, that will endure as long as truth and justice shall be revered."5 The authors of the two finest nineteenth century treatises on evidence, both written around the middle of the century, also had a high regard for the state of evidence law. Best wrote: "The common law system of evidence ... must ever claim the highest respect and admiration as a whole, however particular portions of it may be justly or unjustly condemned."57 Simon Greenleaf, whose

63 During the nineteenth century ... [rules of evidence] were looked upon with almost religious sanctity without consideration being given to whether their source was historical accident, a social policy of the time of their origin, an outgrowth of a formalism then found in pleading and procedure generally, or was based upon a sound principle of logic and psychology. Discrimination was not made between principles fundamentally sound and those fantastic in their origin. Generally speaking, it was enough that the rule had been stated and being a rule of evidence its sins were white-washed and its virtue exhorted. In a large measure evidence rules were learned rather than thought through, and efforts were directed toward their classification rather than their criticism.

Mason Ladd, A Modern Code of Evidence (1942), 27 Iowa L. Rev. 213.

54 The full quote is:
All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity and the good sense upon which they are founded; they are not rules depending on technical refinements but upon good sense; and the preservation of them is the first duty of Judges.

R. v. The Inhabitants of Eriswell (1790), 3 Term Reports 707 at 721; 100 E.R. 815 at 823 (K.B.).


58 Z. Swift, A Digest of the Law of Evidence (Hartford: Oliver Cooke, 1810) at x.

An editor of the first treatise on evidence, written by Lord Chief Baron Gilbert, observed in his preface:
The more extensive our acquaintance with those fundamental maxims, which regulate the reception of testimony, in our courts of Judicature, the stronger will be our conviction of their utility, and the more zealous our veneration of that humane, discreet, and politic wisdom, by which they were established. They do not grow out of the petty exceptions of cavil and chicane, they are the conclusions of penetrative and enlightened minds, discerning with quickness, but deciding with caution.


1842 treatise was one of the first to thoroughly probe the principles upon which the rules rested, was unqualified in his praise of them. At the end of the first volume of his treatise he reflected: “The student will not fail to observe the symmetry and beauty of this branch of the law . . .; and will rise from the study of its principles, convinced, with Lord Erskine, that ‘they are founded on the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life.’”

The eighteenth and nineteenth century commentators, however, were not unanimous in their praise. Lord Mansfield protested as early as 1762 that “We don’t sit here to take our rules of evidence from Siderfin or Keble.”

In 1791, Edmund Burke, during the course of Warren Hasting’s trial, ridiculed the rules of evidence by noting “that a parrot he had known might get them by rote in half an hour and repeat them in five minutes.”

And, of course, the great reformer, Jeremy Bentham, in his Rationale of Judicial Evidence was vociferous in his criticism of the rules of evidence. The following passage is typical of the many critical comments interspersed throughout his treatise: “So far as evidence is concerned . . . the existing system of procedure has been framed, not in pursuit of the ends of justice, but in pursuit of private sinister ends—in direct hostility to their public ends.”

Since the end of the last century, however, it is difficult to find even one prominent commentator praising the rules. Fifty years after Greenleaf had

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The rules of evidence, however, which have been sanctioned by the wisest and best Judges, and ratified by the experience of ages, as the safest guides in the investigation of criminal accusations in British courts of justice, are not subtle refinements, barren technicalities, or arbitrary enactments; they are deductions drawn from a deep insight into human nature, and being founded on a close observation of the ordinary current of human action under the influence of the motives, passions, interests and affections which sway men in the diversified incidents of life, their object is, and they are calculated, to protect the innocent from unjust condemnation, and to prevent the escape of the guilty from merited punishment.

The Queen v. Downsey (1865-66), 6 N.S.R. 93 at 113.

59 Lowe v. Joliffe (1762), 1 Black W. 365 at 366; 96 E.R. 204 at 204.


62 There are, of course, exceptions. For example, Hamilton L.J. said:

I yield to authority on the laws of evidence without reluctance, because I am satisfied that in the main the English rules of evidence are just and I am satisfied also that there is no portion of English law which ought to be more rigidly upheld. My experience is that the public have in the result derived great benefit from their strict application.

Attorney-General v. Homer (No. 2), [1913] 2 Ch. 140 at 156.

While not necessarily referring to their rationality, John Chipman Gray is reputed to have referred to the “close and sustained reasoning” and the “quiet and prolonged study” necessary to master this branch of the law, of which none “lends itself more easily to philosophical inquiries or subtlety of distinctions.” Quoted in J. Maguire, Wigmore—Two Centuries (1963-64), 58 Nw. U.L. Rev. 456.
marvelled at their symmetry, Thayer, one of the first scholars to thoroughly explore the history of the rules, was much less confident about their symmetry, and more importantly, their utility. After quoting Greenleaf, he wrote: "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system..." In spite of this, however, when Thayer wrote his treatise in 1898, he felt that the rules were sufficiently flexible to provide a base for future juridical development. He thought that they only required treatment by jurists "... which, beginning with full historical examination of the subject, and continuing with a criticism of the cases, shall end with a restatement of the existing law and with suggestions for the course of its future development."64

Thayer’s most distinguished student, John Henry Wigmore, admirably carried out such an examination of the rules,65 but judges appeared incapable of, or unwilling to assume responsibility for fashioning the rules of evidence into a rational body of law for regulating judicial fact-finding. Gradually, as trials became more complex and knowledge about the principles and the assumptions of the rules of evidence increased, the rules began to look increasingly archaic. As a consequence, they came under bitter attack by those concerned about the quality of justice dispensed in the courtroom and the acceptability of its procedures. In 1904, in the preface to the first edition of his great treatise, Wigmore noted, "... the rules of Evidence, over and above others, have come to bear, even within the profession itself, the stigma of technical arbitrariness and obstructive unreason."66 Throughout his treatise, Wigmore was highly critical of the rules, and in particular of the manner in which judges and lawyers applied them.67

63 J. Thayer, Preliminary Treatise on the Law of Evidence (Boston: Little, Brown, and Co., 1898) at 509. Thayer also noted at 527-28:
The chief defects [of the laws of evidence]... are that motley and undiscriminated character of its contents...; the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury. These defects discourage and make difficult any thorough and scientific knowledge of this part of the law and its peculiarities.... In part our rules are a body of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used, without perceiving that ideas, pertinent and just in their proper places, are being misconstrued and misapplied.
64 Id. at 511.
66 Id. at vii-viii.
67 A series of comments on cases indexed under the heading “New Trial for Erroneous Rulings,” taken from his 1915 supplement, illustrate Wigmore’s attitude towards the bulk of evidence cases decided at that time:
Here is indeed the Trilogy of Technicalism...; typical case to show modern quibbling spirit of lawyers trying the case; this kind of ruling is itself a putrefac-
As the twentieth century wore on, the commentators became more strident in their criticism. In 1921, in an article entitled “The Progress of the Law,” Professor Chafee wrote: “The word ‘progress’ is somewhat ironical when applied to the enormous outpouring of American decisions on Evidence. The best proof of progress in this branch of the law would be its virtual disappearance from our appellate courts.”

Leon Green noted in 1930 that: “The rules of evidence which have come to govern the hearing of a witness’s story appear as if they were designed to enable his opponent to minimize its effect.”

Edmund Morgan, an incisive and analytical evidence scholar, and chief reporter of the Model Code of Evidence, was unrelentingly in his criticism of evidence law. He described the rules as “obstructions to intelligent investigation,” and in 1942 observed that “the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century . . . [and that] it is time . . . for radical reformation of the law of evidence.”

Morgan indeed assumed that the sad condition of the rules of evidence was self-evident. He asserted, “Any thoughtful lawyer who will merely thumb the pages of Wigmore will be convinced that the existing law of evidence is in hopeless confusion.”

In 1973, Professors Morgan and Maguire observed, “. . . there is scarcely a segment of the subject [evidence] which does not call for re-examination or revision.”

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69 L. Green, Judge and Jury (Kansas: Vernon Law Book Co., 1930) at 400.

70 Significant Developments in the Law during the War Years—Evidence (New York: Practising Law Institute, 1946) at 1.

71 E. Morgan, Foreword to the Model Code of Evidence (Philadelphia: American Law Institute, 1942) at 4. Morgan predicted the outcome should reform not be carried out, “. . . the hampering of investigation by the common law rules of procedure and evidence has become so irksome to litigants and legislators that greater and greater resort is being made to tribunals authorized to disregard them. . . .” at 50-51. Judge Wyzanki echoed similar concerns: “The original demand for administrative adjudication was traceable, in part at least, to the unwillingness of Courts to admit evidence which they allowed administrative agencies to receive and act upon”: U.S. v. United Shoe Machinery Corp., 89 F. Supp. 349 at 356 (D.Mass. 1950). J. Maguire noted as well: “Men who sound like good prophets warn us that if the judiciary continues to carry only an outmoded stock of procedural goods, it may find itself without customers.” Evidence: Common Sense and Common Law (Chicago: Foundation Press, 1947) at 164-65.


known passage, referred to the rules as “a study of calculated and supposedly helpful obstructionism.”

Perhaps the most significant and telling criticism of the rules of evidence was implied by the action of the American Law Institute in the 1930's. When that prestigious but conservative body came to the subject of evidence in its restatement of the law project, it decided that a mere restatement of the subject, such as the Institute had undertaken in the fields of contracts, agency and trusts, would be useless. While the Institute felt that it was possible and worthwhile to restate most other areas of the common law, such was not the case with evidence. The Council reasoned:

[T]he principal reason for . . . abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much the law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification.

By the late 1940's, the whole of the law of evidence was in such an unsatisfactory state that some courts were reluctant to attempt to rationalize even part of it by judicial law reform. Justice Jackson of the United States Supreme Court stated:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

Professor Cleary in 1952, described the atmosphere created by the rules: “Hellish dark, and smells of cheese.” McCormick lamented that the law of evidence “has not responded in recent decades to the need for simplification and rationalization as rapidly as other parts of procedural law.” Later in the fifties one of the greatest American judges, Justice Traynor, felt compelled to write:

. . . just as no one will tell the emperor that he has no clothes there are too few who will whisper that the law of evidence has too many. It is wound round in mummy casings from tip to buskined toe, but its venerable ancient history still

74 Maguire, supra, note 71 at 11.
75 W. D. Lewis, Introduction to the Model Code, supra, note 71 at viii-vi. See also (1939), 16 A.L.I. Proceedings 46.
77 E. Cleary, Evidence as a Problem in Communicating, supra, note 50. Professor Cleary went on to bemoan “the multiplicity of the rules and their unreality" and note that “possibly the unreality is what causes the multiplicity.”
moves men to respect, and they are loath to say that the years have made it a
museum piece. Medicine and business could not afford to be so naive.70

English and Canadian evidence law is virtually identical to the common
law of evidence in the United States, and all of these comments and concerns
are equally applicable to Canadian law. Thoughtful English and Canadian
commentators, however, have not been silent. In 1958, C.P. Harvey charac-
terized the law of evidence as:

Founded apparently upon the proposition that all witnesses are presumptively
liars and that all documents are presumptively forgeries, it has been added to,
subtracted from and tinkered with for two centuries, until it has become less of a
structure than a pile of builders' debris.80

Rupert Cross went so far as to say that, even if the present rules of evidence
produced no wrongful convictions, he favoured adoption of the Criminal Law
Revision Committee's recommendations on evidence because:

their adoption would spare the judge from talking gibberish to the jury, the
conscientious magistrate from directing himself in imbecile terms, and the writer
on the law of evidence from drawing distinctions absurd enough to bring a blush
to the most hardened academic face.81

Even the editor of the practitioner's bible, *Phipson on Evidence*, was moved
to write, "it is a matter for serious consideration whether ... the subject of
evidence ought not to be reconsidered with a view to ensuring that it shall
better conduce to the only object that justifies its existence, viz. the due as-
certainment of truth in the administration of justice."82

An ominous warning from Edmund Morgan summarizes the views of
most commentators:

The way of the would-be reformer in evidence is hard indeed; but not so hard as
will be that of the lawyer who believes in the Anglo-American system of trial by
judge or by judge and jury if drastic reform of the law of evidence is much longer
delayed.83

In view of these considered opinions, it was quite remarkable that when
the Commission suggested that the laws of evidence needed a major overhaul,
so many Canadian lawyers and judges responded by apotheosising the rules.
Indeed, many of their remarks made the authors and jurists of 150 years ago
seem restrained in their praise.

Forum 230 at 234.
at 333.
Sweet and Maxwell, 1942) at iv. For critical comments on the rules by Canadian
commentators see, C. Wright, Case Comment on *Palter Cap Co. v. Great West Life
*Evidence in Criminal Cases, supra*, note 7.
83E. Morgan, "Codification of Evidence," in Alison Reppy, ed., *David Dudley Field:
Centenary Essays Celebrating 100 Years of Legal Reform* (New York: New York Univ.
School of Law, 1949) at 176.
3. The Present Rules Only “Work” Because They Are Ignored

Critics of the Code often support their praise of the present rules of evidence by pointing to the fact that hundreds of cases are being tried in Canada daily. They conclude from this that the rules must be working well. Could it be that in spite of the nonsensical distinctions upon which the rules are based, the unrealistic empirical assumptions upon which they rest, and the utterly senseless word games in which they result in the courts of appeal, the application of the rules in trial courts assists the fair, expeditious and rational resolution of disputes? Obviously not. The fallacy of the argument is that irrationality and obstructiveness are only characteristics of the rules when they are applied. The system of criminal justice functions as well as it does only because the rules of evidence are largely ignored in trial courts. It is not uncommon to sit in Provincial Courts day after day and never hear an objection to the admissibility of evidence. When an eager counsel presses an objection, trial judges, perhaps embarrassed by the charade, perhaps ignorant of the complications of the rule, but more likely sensitive to their duty to resolve the case on its merits, usually admit the evidence.

I am not aware of a systematic study of the operation of the rules of evidence in trial courts, but the impressionistic evidence that they are not applied with rigour is overwhelming. Able and experienced judges will often candidly confide that they neither know the rules, nor make a pretence of applying them. If an objection is made, the common practice is to admit the evidence subject to objection. An American commentator, in 1954, spoke of “the wisdom of the practice adopted by many experienced trial judges in non-jury cases of provisionally admitting all evidence which is objected to if he thinks its admissibility is debatable, with the announcement that all questions of admissibility will be reserved until the evidence is all in . . . and at the end [he] will seek to find clearly admissible testimony on which to base his findings.”

Some well-known judges have confessed in print that they do not apply the rules. Perhaps the most candid statement is that made by Judge Learned Hand at the 1942 American Law Institute annual meeting when discussing the Proposed Final Draft of the Model Code of Evidence. In concurring with an assertion by Professor Morgan, the Reporter, that the trial judge must be given a discretion or the rules would have to be extremely detailed, Judge Learned Hand said:

I think the Reporter has been speaking absolute God’s truth this time. Do you suppose anybody in the last twenty-five years, except where the appellate court wanted to have a reversal because of something else in the case which made them doubt the general fairness of the verdict or judgment, observed all these complicated rules of evidence that we have had? I don’t believe anybody has known them. I tried cases for thirteen years and got along without all these technicalities.

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84 Supra, note 82 at 137-38.
85 (1942), 19 A.L.I. Proceedings 225. Charles Clark, former Chief Justice of the United States Court of Appeals for the Second Circuit, made the same point in explaining why there is not more agitation in the United States for reforming the laws of evidence:

... in my experience, the actual practice in the courts has tended to outstrip
Experienced counsel also often confess to not knowing or applying the rules. As early as the turn of the century Mr. Choate, the famous American trial counsel, is reported to have said to Professor Ezra Thayer: "Tell your father [Professor James Bradley Thayer] it is a good book [Professor Thayer's Treatise on Evidence], but it is a pity he did not publish while there was still such a thing in existence as the law of evidence." Knowledgeable commentators have recorded the lack of application of the rules in trial courts. McLearm, in 1938, noted: "There is even a growing reluctance to invoke in court the rules of exclusion, except where the testimony would be crucial, a reluctance prompted by motives both tactical and ethical." In 1950, Edward Cleary stated:

The law of evidence is sagging to the point of collapse under its own weight. It has cracked visibly in the administrative sphere, and what saves it in the courts is probably a rather general ignorance of what is actually between the covers of Wigmore, plus the fact that lawyers and judges often seem to be downright theoretical argumentation. While scholars and appellate courts have struggled with the weight of restrictive precedents from the past, trial courts in the main seem to have gone ahead with rather sensible reactions. I remember my dear and distinguished former colleague Augustus N. Hand saying with pride that in his years as a trial judge he always took pains to admit all evidence presented if at all useful or admissible and, in so doing, was never reversed by the appellate court.

C. Clark, Foreword to a Symposium on The Uniform Rules of Evidence (1956), 10 Rutgers L. Rev. 479 at 480.

Ezra Thayer, Observations on the Law of Evidence (1914-15), 13 Mich. L. Rev. 355 at 364. Professor James Bradley Thayer himself was aware that the rules were never applied with their full strictness. He observed:

The defects [in the laws of evidence] discourage and make difficult any thorough and scientific knowledge of our system and its peculiarities. Strange to say such a knowledge is very unusual, even among judges.

The actual administration of this system is, indeed, often marked by extraordinary sagacity and good sense, particularly in England. In that country it is uncommon to carry questions of evidence to the upper courts.


In a similar vein, Charles A. Wright commented: "... rules which were spawned, in whole or in part by the jury system, such as the hearsay rule, the "best evidence" rule, the rule against opinions, and the like have no logical place in a court trial. Thus while the rules retain a theoretical validity, in practice they are of little effect." A Primer of Practical Evidence (1956), 40 Minn. L. Rev. 635 at 667.

Legal scholars have long recognized that conceptual ossification in the field of evidence has created something of a monstrosity: a tissue of doctrine that seems to function best when it is most transparent—that is, when it is essentially ignored.


C. McCormick, Tomorrow's Law of Evidence (1938), 24 A.B.A.J. 507 at 581. Professor McCormick explained at 508:

... if one has occasion, as I have had, to compare the law of evidence in the books, with the rules of evidence as they seem actually to be applied in trial court rooms in several states, there is a strange disparity. The lush exuberance of doctrines which bloom in the digests and the six-volume treatises on evidence, and the sharp quiddities of the class room, though they were fairly well known to the advocate of a generation ago, are not familiar ground to the average successful trial lawyer of today .... For even the trial judges today, with notable exceptions, have only a discreet bowing acquaintance with the evidence rules.
ashamed to push the rules to their logical extremes. Evidence in action is, happily perhaps, somewhat different from evidence in books.\(^8\)

After a description of the rules of evidence summarized by the words “dreadful condition,” a discerning writer has observed: “Despite all this, federal evidence law has worked with remarkable smoothness. The reason is not that the complexity is mastered but that it has been ignored.”\(^9\)

These views were reiterated by many who communicated with the Commission. In fact, it would be surprising if the rules were applied with any regularity in practice. Time and time again at meetings organized by the Commission, none of the lawyers and judges present were sure what the present law was on a particular point. Or rather, while each was certain of his or her own statement of the law, each held differing views. Indeed, some of the most amusing comments on the evidence study papers were those in which the authors contended that a particular proposal would never work in practice, when in fact all the recommendation did was restate the present law.

Finally, it has been my experience, in reviewing countless transcripts of cases on appeal, that frequently no objection had been made at trial to the alleged evidentiary errors raised on appeal, although such errors often involved basic issues of evidence law. This experience would tend to confirm Wigmore’s assertion that the rules are only “game rules” for setting aside the verdict later on.\(^9\)

An unfortunate aspect of the present rules, however, is that they are not always ignored at trial. Indeed it might be fairly asserted that in many respects all the Proposed Evidence Code does is bring the law in theory into conformity with the law in practice in lower courts.\(^9\)

III. ANTECEDENTS OF THE CODE

In reforming evidence law, the Commission was able to draw and build upon an enormous body of critical literature, studies by various law reform bodies and prior codifications. It was the ability to draw upon this work which permitted the Commission to proceed with the Evidence Code relatively expeditiously and without a great commitment of resources. The research began by obtaining copies of evidence rules from virtually every common law

\(^8\) Supra, note 77.


\(^9\) Supra, note 60 at 260, para. 8c.

\(^9\) The English Law Reform Committee noted in their Report on hearsay evidence: Judges, believing themselves capable of weighing the probative value of different kinds of material which tend to show what in fact happened in the past . . . disparage technical objections to the admissibility of evidence in civil cases, and tactful advocates hesitate to persist. But it is unsatisfactory that the application of rules of evidence should depend upon the willingness of the individual judge to discourage the observance of what are still rules of evidence and the forcefulness with which he does so. Hearsay Evidence in Civil Proceedings, Thirteenth Report of the Law Reform Committee (Cmnd. 2964, 1966) at 6-7.
jurisdiction in the world. English translations of evidence rules existing in
European countries were also collected. An exhaustive search of the literature
was then undertaken. The indebtedness to the great evidence scholars of this
century must be apparent to anyone who reads the Code. The critical and
analytical writings of Thayer,93 Wigmore,94 Morgan,95 Ladd,96 Maguire97 and
McCormick98 were invaluable and relied upon extensively. With the exception
of those of Cross99 and Williams100 treatises of the great English evidence
scholars, such as Best, Taylor, Power, Roscoe, and Phipson, were of less value.101 These latter authors generally treated the rules uncritically. However,
the early editions of their works, before they were reworked by the case-
compilers who often completely destroyed their value, were useful in obtaining
a sense of the historical development of many rules. The only Canadian work
that was consulted regularly was the unpublished collection of materials on
evidence prepared by Professor Stanley Schiff of the University of Toronto
Law School.102 The notes in his materials contain a superb doctrinal analysis
of Canadian jurisprudence on evidence and the materials are developed so as
to highlight the purposes of the judicial trial, its institutional characteristics
and the procedural values that must be protected in an adjudicative process.

93 J. B. Thayer, A Preliminary Treatise on Evidence At The Common Law (New
York: Augustus M. Kelley, 1898).
94 J. H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials
at Common Law Including the Statutes and Judicial Decisions of all Jurisdictions of the
United States and Canada (Boston: Little, Brown, & Co., 1940). All of Wigmore's
thoughts on evidence are undoubtedly collected in his treatise. An unpublished bibliog-
raphy of his works, however, contains over 900 entries. W. Roalfe, John Henry Wigmore—
Scholar and Reformer (1962), 53 J. of Crim. L., Criminology & Police Sci. 277 at
97, n. 107.
95 A bibliography of Morgan's writings on evidence can be found in (1961), 14
Vand. L. Rev. 701. His books include Basic Problems of Evidence (4th ed. New York:
Practising Law Institute, 1963); Some Problems of Proof Under the Anglo-American
96 See Bibliography of Dean Ladd's Publications (1956-57), 51 Iowa L. Rev. 803;
Carlson).
97 See J. M. Maguire, Evidence—Common Sense and Common Law (Chicago:
The Foundation Press, 1947); Evidence: Cases and Materials (6th ed. Brooklyn: The
40 Texas L. Rev. 185; McCormick, Handbook on the Law of Evidence (St. Paul: West
100 Supra, note 44.
101 For a bibliography of early English treatises on evidence, see W. S. Holdsworth,
Jelf, Where to Find Your Law (London: H. Cox, 1907) at 415-26; G. D. Nokes,
Introduction to Evidence (London: Sweet & Maxwell, 1962) at 21-26; J. Wigmore,
supra, note 60, para. 8; J. L. Monroese, Basic Concepts of the Law of Evidence (1954),
70 L.Q. Rev. 527 at 527-33.
102 S. A. Schiff, Evidence in the Litigation Process: A Coursebook In Law (Draft
ed. Toronto: University of Toronto Faculty of Law, 1972).
Of more direct value were the many prior codifications of the rules of evidence, particularly the recent American codifications. These were used as a starting point in the examination of each area of evidence law. While the Commission's indebtedness to these Codes was acknowledged in both the Project working papers and in the Commission's Proposed Code, the antecedents of the Code were not reviewed in these publications in any detail. Therefore, to make clear the extent of this indebtedness, and the scholarship upon which the Proposed Code builds, I will review here the genealogy of the Code.

1. Bentham

Bentham is regarded as the modern precursor of the codification of the common law. He also remains the severest critic of the English rules of evidence. Yet he never proposed an evidence code. The explanation for this paradox is simple; he recommended the abolition of all exclusionary rules of evidence.103 He began his treatise on evidence as follows:

The Theorem [to be proved] is this: that, merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded.104

Bentham had such a significant impact on the development of evidence law, however, that any review of evidence reform and codification efforts must begin with his work.

Bentham wrote a monograph and a treatise on evidence law. His monograph is entitled An Introductory View of the Rationale of Evidence; for the Use of Non-Lawyers as Well as Lawyers. The manuscript was prepared for publication by James Mill in 1812. However, it was so critical of the rules of evidence that no bookseller would publish it for fear that it constituted a libel on the administration of justice. It was never published separately, but eventually appeared in Bowring's edition of The Works of Jeremy Bentham.105

Bentham worked on a treatise on evidence at various times between 1802 and 1812. When he took up the subject, he often did so without reference to his previous manuscripts.106 On three different occasions he attempted to complete his treatise on the subject.107 Finally, his unfinished manuscripts

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103 See Bentham, supra, note 61, vols. 6 and 7. The statement in the text is not quite accurate. Bentham did admit that evidence which might cause needless vexation, expense or delay should be excluded. (Id., vol. 6 at 213.) Also, he argued that communication made to a priest should be privileged. (Id., vol. 7 at 366-68.)

104 Id., vol. 6 at 203-4.


106 See Preface to Rationale, supra, note 61, vol. 6 at 201.

were given to Etienne Dumont who, over a period of years, extracted sections from them which he published in French in 1823.\textsuperscript{108} In 1825, Bentham recovered his papers from Dumont and gave them to John Stuart Mill, who edited and published them in 1827 under the title \textit{Rationale of Judicial Evidence, specially applied to English Practice from the manuscripts of Jeremy Bentham.}\textsuperscript{109} The \textit{Rationale of Judicial Evidence} was an exhaustive, but sarcastic and vituperative, review of English evidence law. Bentham set out to establish six propositions regarding the English jurisprudence on evidence, of which the first two were:

1. That the system, taken in the aggregate, is repugnant to the ends of justice: and that this is true of almost every rule that has ever been laid down.
2. That it is inconsistent even within itself; and in particular, that there is not a rule in it which is not violated by a multitude of exceptions or counter-rules . . .\textsuperscript{110}

The treatise was immediately attacked.\textsuperscript{111} Virtually all of the criticisms were of an \textit{ad hominem} nature. Bentham, it was alleged, was too academic, too far removed from practical life to appreciate the fallacies of what he proposed. Chief Justice Best referred to him in a judgment as “a learned writer, who has devoted too much of his time to the theory of jurisprudence, to know much of practical consequence of the doctrines he has published to the world.”\textsuperscript{112} Stephen was critical of Bentham’s work because “he had not the mastery of the law itself which is unattainable by mere theoretical study.”\textsuperscript{113} Bentham’s inclination to approve of the French method of interrogating prisoners was explained by “his lack of experience at the Bar.”\textsuperscript{114}

Nevertheless, through the work of Lord Denman and Brougham,\textsuperscript{115} Bentham’s writings had an enormous influence on evidence law. Virtually all of the legislative changes in English evidence law made in the mid-nineteenth century can be traced to Bentham’s scathing indictment of the common law

\textsuperscript{108} Étienne Dumont, \textit{Traité des Preuves Judiciaires}. For a brief account of Dumont’s contribution in translating various of Bentham’s manuscripts see Dillon, \textit{supra}, note 105 at 500, n. 1.

\textsuperscript{109} \textit{Supra}, note 61, vol. 6 at 190 ff.

\textsuperscript{110} \textit{id.} at 204.

\textsuperscript{111} See review in (1828), 48 Edinburgh Review 457. The reviewer was also extremely critical of Mill’s editorship, at 462-66. An earlier review of the French edition, edited by Dumont, was generally favourable: (1824), 40 Edinburgh Review 169. This latter reviewer did, however, take issue with a number of Bentham’s recommendations for reform, in particular, the abolition of the lawyer-client privilege. For a reply by Mill, see \textit{supra}, note 103, vol. 7 at 476.

\textsuperscript{112} \textit{Hovill v. Stephenson} (1829), 5 Bing 493; 130 E.R. 1152. Interestingly, this quote was removed from the edition of Greenleaf edited by Wigmore (16th ed. Boston: Little, Brown, and Co., 1899). In his treatise on evidence, Best accused Bentham of not understanding the characteristic feature of judicial evidence because he considered “every issue raised in a court of justice as a philosophical question, the actual truth of which is to be ascertained by the tribunal at any cost.” \textit{Supra}, note 57 at 37-38, para. 53.


\textsuperscript{114} Atkinson, \textit{supra}, note 105 at 228.

\textsuperscript{115} See Wigmore, \textit{supra}, note 94, vol. 1 at 239, para. 8.
rules. As well, at least a few of the treatises on evidence written about this
time drew heavily on Bentham's analysis. His Rationale of Judicial Ev-
dence has been called "of all Bentham's works . . . the most voluminous
and also without doubt the most important." John Stuart Mill observed,
"if Mr. Bentham had made no contributions to the science of jurisprudence
beyond the volumes which are now before us [The Rationale of Judicial
Evidence] . . . his name would deservedly be ranked among those of the
most eminent promoters of law reform."

Most of Bentham's criticisms of the rules of evidence have either resulted
in legislative change or have been assimilated in the arguments of modern
critics of the rules. Therefore, present day law reformers rarely rely upon
or make reference to Bentham's Rationale of Judicial Evidence. However, a
few modern reform efforts have been evaluated by commentators by refer-
ence to Bentham's proposals for reform.

2. Livingston's Code of Evidence

The first American codifier, Edward Livingston, clearly drew his inspira-
tion from Bentham. Indeed, he has been called "the American Bentham." In
the early 1820's he drafted the first modern code of evidence. Although

116 G. W. Keeton and O. R. Marshall, "Bentham's Influence On The Law of
Symposium (London: Stevens, 1948) at 79; Dillon, supra, note 105 at 509-11.

117 See Best, supra, note 57. Holdsworth summarized Bentham's contribu-
tions to the development of evidence law: "His influence is writ large on the
nineteenth-century statutes relating to evidence, and on the books of a new
type which then began to appear." Holdsworth, supra, note 101 at 121.

118 E. Halvey, The Growth of Philosphic Radicalism (London: Faber and Faber,
1928) at 383.

119 J. S. Mill, The Exclusion of Evidence, [1832] The Jurist 1. Mill also wrote of
the treatise, "It is the first and perhaps the greatest achievement of Bentham; the entire
discarding of all technical systems; and the example which he set of treating law as no
peculiar mystery, but a simple piece of practical business, wherein means were to be
adopted to ends, as in any of the other arts of life." As quoted in L. Radzinowicz, A

120 However, it was quoted twice in the Eleventh Report of the Criminal Law
Revision Committee, supra, note 48. See W. Twining, The Way of the Baffled Medic:

121 See Twining, id; H. L. A. Hart, Bentham and the Demystification of the Law,
[1973] Mod. L. Rev. 2; J. H. Chadbourn, Bentham And The Hearsay Rule—A
Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence (1961-62), 75
Harv. L. Rev. 932.

122 In a letter to Bentham, Livingston acknowledged, "The perusal of your works
first gave method to my ideas, and taught me to consider legislation as a science gov-
erned by certain principles, applicable to all its different branches, instead of an occa-
sional exercise of its power, called forth only on particular occasion without relation
to or connection with each other." He concluded: "Hereafter no one can in Criminal
jurisprudence make any wise improvement that your superior sagacity has not sug-
gested." Hunt, Life of Edward Livingston at 96, quoted in Dillon, supra, note 105 at
508, n. 1.


124 Code of Evidence, in 1 Complete Works of Edward Livingston on Criminal
of evidence were stated in the form of a code in England in 1825 by S. B. Harrison
in a booklet entitled "Evidence Forming a Title of the Code of Legal Proceedings
the Code was drafted for adoption in the state of Louisiana, a civil law jurisdiction, it was modelled on the common law. In his Evidence Code, as in his Penal Code, Livingston dealt with virtually every problem in the subject area, most of which are still with us today. Many of his arguments for abolishing certain evidentiary rules remain unequalled in terms of their painstakingly logical development. The Code was not adopted, however, in Louisiana, nor in any other jurisdiction, and appears to have had little impact on the development of subsequent evidence legislation or jurisprudence.

3. Stephen's Evidence Act of India

By 1860, the English common law of evidence was being applied generally in the Indian courts. In 1868, the Indian Law Commissioners prepared a draft evidence bill. However, the local authorities contended that it was too complicated and not suited to the needs of the country, and therefore it was never enacted. Two years later, James Fitzjames Stephen was asked to prepare an Evidence Code for India. The Code prepared by him was enacted in 1872. In large part, Stephen simply codified the English law of evidence. He claimed that the one hundred and sixty-seven sections of his Code covered all the English law of evidence contained within Taylor's two volume treatise on evidence. Stephen did, however, logically arrange the

according to the plan proposed by Crofton Uniacke, Esq." However, it was incomplete in many respects and had little impact. See Holdsworth, supra, note 101 at 467; see also, G. D. Nokes, *Codification of the Law of Evidence in Common Law Jurisdictions* (1956), 5 I.C.L.Q. 347 at 349-50.


128 See, for example, his argument for abolishing spousal incompetence. *Introductory Report to the Code of Evidence*, supra, note 124 at 452-459.

129 See G. W. Pugh, *Louisiana Evidence Law* (Indianapolis: Bobbs-Merrill, 1974) at 3. Livingston was commissioned by the Louisiana assembly to prepare a Code of Criminal Law, Evidence, and Procedure. He finished his work, but before it was enacted he was elected to Congress and practically ceased to reside in Louisiana. Dillon, supra, note 106 at 508-09, n. 1.


131 See *supra*, note 128 at 305. But see:

It has been asserted that the hundred and sixty-seven sections of the Evidence Act contain all that is applicable to India, in the two bulky volumes of Taylor. This appears to me to be a mere figure of speech. A great mass of principles and rules, which Taylor's work contains will have to be written back between the lines of the Code; the chief merit of which, unless I am wrong, consists in the perspicuity with which the line has been drawn and maintained between what is relevant and irrelevant; and in defining how that which is relevant is to be proved. The laborious assiduity with which Taylor has been boiled down into substantive propositions of law must be admitted. The defect of the Code, I think, is, that this process has been very arbitrarily applied, with too niggard a selection.

subject matter, develop a consistent terminology, remove some anomalies, and in other ways rationalize the rules of evidence. With only a few amendments, Stephen's Code remains the Evidence Act of India. It has been adopted in whole or in part in numerous countries, including Pakistan and Ceylon and, more recently, in such African countries as Kenya, Nigeria and Uganda.

In 1872, at the request of Lord Coleridge, the Attorney General of England, Stephen prepared a similar Code for adoption in England. However, Lord Coleridge was soon thereafter appointed Chief Justice, and his successor did not proceed with the enactment of the Code. While Stephen's Code was thus never adopted in England, it did form the basis of his text, Digest of the Law of Evidence, which was published in 1876. In this form it had an enormous impact on the common law of evidence. In the preface to his treatise, Wigmore noted that "... the domination of ... [Stephen's] thought in our law of Evidence during the past generation has been rivalled only by that of Professor Thayer."

4. Wigmore's Pocket Code

In 1910, John Wigmore wrote A Pocket Code of the Rules of Evidence in Trials at Law. This Code remains the most detailed ever published. The

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Some of his terminology has not met with general acceptance. For example, his insistence on referring to certain inadmissible evidence such as hearsay, as "irrelevant" evidence or evidence "deemed to be unrelevant," has been criticized. See R. Cross, supra, note 99 at 25; Montrose, supra, note 101 at 531.

See S. C. Sarkar, supra, note 131 at 5; M. P. Bhatnagai, Woodroffe and Ameer Ali's Criminal Evidence (Allahabad: Law Book Co., 1965). The Code appears to be working satisfactorily. Following a review of the Act as it applies in Pakistan, the Law Reform Commission of that country concluded:

No doubt the principles followed in the Act of 1872 are derived from the English law of evidence but these have been suitably amended to suit the peculiar circumstances prevailing in our country. The Evidence Act has worked satisfactorily in this country for about a century. The members of the legal profession, the Judges and the general public have sufficiently assimilated the principles of law laid down in the Act. It is no longer foreign to us. Thus, in our view, the rules contained in the Evidence Act neither cause delay in disposal of cases nor are unsuited to the genius of our people.

Supra, note 129 at 395.


Wigmore, supra, note 94, vol. 1 at xiv.

J. H. Wigmore, A Pocket Code of The Rules of Evidence in Trials at Law (Boston: Little, Brown & Co., 1910). Wigmore published new editions of the Pocket Code in 1935 and 1942 (in the 1935 edition the word Pocket was dropped from the title). Thus its revision followed new editions of his treatise. The first edition of his treatise was published in 1904, the second in 1923 and the third in 1940.
third edition published in 1942 is over 550 pages long, is divided into 3150 numbered paragraphs, and contains 242 rules, each of which in turn is subdivided into three to thirty articles (which in turn are further subdivided into paragraphs and sub-paragraphs.)¹³⁹ The Code is cross-referenced to Wigmore’s treatise and thus no specific problem of evidence is overlooked.

In the preface, Wigmore stated that the purpose of the Code was two-fold: “to provide the practitioner with a handy summary of the existing rules of evidence; and at the same time to state them in a scientific form capable of serving as a Code.” He expressly said, however, that the Pocket Code “is not offered as a proposal for legislation.” Indeed, he stated that he was not sure that a legislative Code was desirable at that time: “To Codification as a general enterprise, many objections may be raised—and a most deterrent one is that it tends to fossilize the law.”¹⁴⁰ However, while Wigmore disavowed the intention of preparing a Code for legislative adoption, the Code did serve as at least an inspiration for subsequent Codes. Indeed, in reviewing the first and second editions of the Code, respectively, both Roscoe Pound¹⁴¹ and Charles McCormick¹⁴² noted its usefulness to a legislator.

5. Commonwealth Fund Committee Proposals

In the United States, the organized movement to reform the laws of evidence began with the work of the Committee on Improvements in the Law of Evidence, which was appointed by the Commonwealth Fund in 1923.¹⁴³ The Committee was composed of leading evidence scholars, including John Wigmore and Edmund Morgan. It deliberated for five years. The members considered recommending that all rules of evidence be abolished, but rejected this approach.¹⁴⁴ Noting that Wigmore and other reformers had pointed out the “illogicalities and inconsistencies” in many of the rules of evidence, and concluding that little would be gained by repeating these arguments, they decided to send an elaborate questionnaire to practicing lawyers and judges in order to ascertain their views about priorities in evidence reform. On the

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¹³⁹ Article 4 of Rule 91 gives some sense of the meticulous detail which characterizes the code:

Art. 4. Radio-Broadcast Message. Where an utterance heard on a radio-receiving instrument purports to have been made by a particular person at a particular broadcasting station, it is sufficiently authenticated by testimony that the receiving instrument was adjusted to the wavelength of that particular station.

Par. (a) The sender’s identity may be evidenced
(1) By the speaker’s naming of the station, and his name of his principals, and
(b) By testimony of its wave-length as stated in any publication commonly used.

Id. (3d ed., 1942).

¹⁴⁰ Id. at ix.


¹⁴⁴ Id. at xi.
basis of the response they received, they recommended that five uniform statutes be drafted to implement the following recommendations: the rules of evidence should not be enforced if there is no *bona fide* dispute about the fact in question; the trial judge should be permitted to comment on the weight and credibility of the evidence; pecuniary or proprietary interest should never be a ground for excluding the testimony of a witness even where the other party to the transaction has died; declarations of deceased persons should generally be admissible; and business records should generally be admissible.146

Although few of the recommendations were enacted immediately, probably because of the inertia of the state legislatures,146 most of them eventually found their way into subsequent codifications. The Proposed Evidence Code is, however, one of the few Codes to follow the recommendation that declarations of deceased persons should generally be admissible. In this regard, it is interesting to note the response to the Committee's questionnaire. In Massachusetts, where such an exception had been recognized since 1898, the effect of the rule was thought beneficent by seventy-one percent of the lawyers and judges; only nineteen percent considered it harmful.147

6. Committee on Improvements in the Law of Evidence

In 1937, the Section of Judicial Administration of the American Bar Association, as part of its programme for reform in judicial administration, appointed a committee to study and make recommendations for the improvement of the law of evidence. Dean Wigmore headed the five man committee. The Committee did not consider the improvement of details throughout the law of evidence, but rather made fifteen specific recommendations for reform

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146 *Id.* at xix-xx.


147 *Supra*, note 156 at 41-42.

148 *Report of the Committee on Improvements in the Law of Evidence* (1938), 63 A.B.A. Rep. 570. Many of the recommendations of the Commonwealth Fund Committee were incorporated into the report. The changes sought by the Committee were summarized by Spencer Gard:

(1) disregarding of error in admission or rejection of evidence, if review discloses no miscarriage of justice or deprivation of substantial rights; (2) denial of new trial in nonjury case where inadmissible testimony given, if findings not based thereon and rest on substantial evidence; (3) elimination of necessity for exception provided timely disclosure made of ground for objection; (4) admission of survivor's testimony and declarations of decedent, if found to be made in good faith and within personal knowledge; (5) admission of declarations of deceased or insane persons prior to suit, subject to the same requirements as in (4); (6) curtailment of physician-patient privilege whenever court believes disclosure needed to secure justice, and refusal of privilege to accountants, social workers and journalists; (7) adoption of Uniform Business Records as Evidence Act; (8) abolition of opinion evidence rule for lay witnesses; (9) acceptance of principles of Model Expert Testimony Act; (10) authorization for certified copy of official record, in manner permitted by Rule 44 of the Federal Rules of Civil Procedure; (11) adoption of Uniform Judicial Notice of Foreign Law Act; (12) swearing of each witness separately, so as to make certain administration of oath
they considered simple, feasible, and necessary. In his foreword to the report, the President of the American Bar Association said that the report "presents to the American bench and bar the minimum requirements that are needed in a practical way to make our law of evidence workable in the twentieth century." In addition to a number of specific recommendations relating to rules of evidence and the administration of justice, the committee recommended that consideration be given to codifying various aspects of evidence law. Many of the Committee's recommendations were eventually adopted by the State and Federal Courts.

7. Model Code of Evidence

In 1939, the American Law Institute undertook to prepare a Code of Evidence. It appointed a Committee on Evidence, made up of America's most eminent legal scholars, to draft the code. Professor Morgan was appointed the Reporter and Professor Maguire the Assistant Reporter. The members included, among others, Learned Hand, Augustus Hand, Mason Ladd, William Hale, Charles McCormick and Charles Wyzanski, Jr. The Committee was aided by sixty-four consultants, headed by Dean John Wigmore. In 1942, the Institute approved a Model Code of Evidence. In outline, and largely in substance, it has formed the basis for all subsequent codifications of evidence, yet it remains the most radical and the most academically perfect Code of Evidence. It would have resulted in the virtual abolition of the rigid rules of admissibility.

The Code was immediately attacked by the bench and bar. Their attack derived impetus from a dissent to the Code written by John Wigmore. He concluded his dissent with this warning:

Reviewing this cumulation of shortcomings on the whole, might not a cold hearted critic describe this Draft Code somewhat as follows: "This is an academic composition, meritorious as a record of aspirations and highly significant as a symptom that Bench and Bar are ready for considerable progress; but not meriting legislative favor, first because its advanced proposals are far too radical at the present


148 See the Foreword to the Report, id., at 63 A.B.A. Rep. 517.


151 Model Code of Evidence, supra, note 71. For a description of the history and process of drafting of the Code, see William D. Lewis' Introduction to the Code at vii-xvi.

152 In terms of its drastic reform of the hearsay rule, the clear control it gives to the trial judge in conducting the trial and the broad principles in which it is drafted, the Law Reform Commission of Canada's proposed Code of Evidence is probably more similar to the Model Code than to any other. Many of the rules of the Proposed Code were inspired by provisions of the Model Code.
A number of states rejected the Code out of hand. However, at least three states (Missouri, Pennsylvania and California), while they eventually rejected the Code, undertook extensive studies of it. The objections raised by a committee of the California bar are representative of the comments made about the Code, and to anyone involved in the debate on the Proposed Evidence Code, have a familiar ring:

A study of the Code must convince anyone that it was designed, not to offer any improvement to existing statutes or existing codes of evidence, but to entirely revolutionize our present rules of evidence and to substitute for them the rules of evidence that are generally in force in continental Europe.

The members of the Committee concluded: "[We] earnestly recommend that the Bar should be on the alert to resist to its utmost at the coming or any succeeding session of the Legislature the enactment into law of the Code or any of the parts thereof." However, let it not be said that the Bar is against progress. The members of the Committee also noted, as did practically all the respondents to the Proposed Evidence Code, that, "... we would not want our report to be construed as indicating we believe that our present rules of evidence are perfect, but on the whole we believe ... that in this state they

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163 J. H. Wigmore, The American Law Institute Code of Evidence Rules; A Dissent (1942), 28 A.B.A.J. 23. One cannot help but feel that Wigmore was still smarting from the failure of the reporter of the Model Code, Edmund Morgan, to even consider drafting a Code of the detail of Wigmore's own Pocket Code of Evidence, supra, note 151. Wigmore prepared a statement at the request of the American Law Institute setting out the differences in approach between himself and the Reporter of the Model Code. These differences were expressed in the form of six postulates that should control the drafting of a practical code of evidence. Appendix of the First Tentative Draft of the Model Code, at 111-115. The next year these postulates found their way into the Preface to the Third Edition of Wigmore's Code of Evidence as postulates by which his Code was drafted. See supra, note 151 (3d ed., 1942).


168 Committee, id. at 262.

169 Id. at 383.
are well understood by Bench and Bar and are working reasonably well where intelligently construed and applied by Bench and Bar.\textsuperscript{160}

Although the Model Code was not adopted in legislative form in any jurisdiction, it was the subject of extended discussion in the legal periodical literature,\textsuperscript{161} and in this way had, and continues to have, an enormous impact. As the Director of the American Law Institute noted in 1954, referring to the Model Code, “courts have cited it and learned articles have cited it. Students have cited it. It has been a handbook for some administrative bodies. In other words, this Code, even without legislative adoption, has had a very considerable influence upon the law.”\textsuperscript{162}

In spite of the adverse reaction to the Model Code, the idea of using it as a basis for legislative change was never completely abandoned. In 1949, the Section of Judicial Administration of the American Bar Association took the position that the “natural starting point for consideration of reform of the law of evidence in any given state” was the Model Code, and that it was “preferable to work towards a complete revision, along the lines of the Model Code, rather than a piecemeal correction of the more outstanding faults.”\textsuperscript{163}

8. \textit{Uniform Rules of Evidence}

When it became apparent that the Model Code was unacceptable to the profession and was not going to be adopted by courts or legislatures, the American Law Institute suggested to the National Conference of Commissioners on Uniform State Laws that they draft a Uniform Code or Uniform Rules of Evidence, using the Model Code as a basis.\textsuperscript{164} In 1949, the project was approved and a committee was appointed. A trial judge, Spencer A. Gard of Kansas, was named Chairman. The committee included three practising attorneys and three professors, including Professors Mason Ladd and Charles McCormick. The American Law Institute appointed an advisory committee, chaired by Edmund Morgan, to assist in the work. The drafting took four years. In 1953, the Uniform Rules of Evidence were adopted by the National Conference of Commissioners on Uniform State Laws,\textsuperscript{165} approved by

\begin{itemize}
\item \textsuperscript{160} Id. at 282.
\item \textsuperscript{162} Director H. F. Goodrich, [1957] \textit{A.L.I. Annual Report} at 9-10, as quoted in Fryer, \textit{id.}, at 1161.
\item \textsuperscript{163} \textit{The Improvement of the Administration of Justice: A Handbook} (Washington: A.B.A. Section of Judicial Administration, 1949) at 57; see also Vanderbilt, \textit{supra}, note 150 at 325.
\item \textsuperscript{164} Prefatory Note, \textit{Uniform Rules of Evidence} (U.L.A.) 1953.
\item \textsuperscript{165} [1953] Handbook of the National Conference of Commissioners on Uniform State Laws 78.
\item \textsuperscript{166} (1953), 78 A.B.A. Annual Report 134; (1954), 79 A.B.A. Annual Report 535.
\end{itemize}
the American Bar Association,\textsuperscript{168} and, in 1954, endorsed by the American Law Institute.\textsuperscript{167}

Although the drafters of the Uniform Rules used the Model Code as a basis for their work, there are several important differences between the two Codes, largely because the drafters of the Uniform Rules wanted to make them acceptable to the profession and to have them form the basis for uniform rules in individual states.\textsuperscript{168} The Uniform Rules deal primarily with the admissibility of evidence. Therefore, many "procedural" rules, which are included in the Model Code, such as those dealing with the judge's control over the conduct of the trial, including his right to comment on the evidence, are omitted from the Uniform Rules. The drafters of the Uniform Rules used the language of the courts insofar as practicable.\textsuperscript{169} They also simplified the drafting by eliminating many of the cross-references used in the Model Code; in some instances, by combining several Model Code Rules into one Uniform Rule, and in others, by splitting a complex Model Code Rule into several Uniform Rules. The Uniform Code is comprised of only seventy-two rules. They were printed, with comments in a pamphlet of fifty-seven pages. The most significant substantive difference between the Codes is that the broad common law hearsay rule, which excludes the testimony of an unavailable witness, is essentially preserved in the Uniform Rules. The Model Code proposed to admit generally all declarations made by an unavailable witness. However, the Uniform Rules retain, with minor amendments, most of the other rationalizing and liberalizing changes recommended in the Model Code.

It was hoped that the Uniform Rules of Evidence would furnish the framework and momentum for the unification of evidence law throughout the United States, yet, although it was the subject of extensive comment in the legal periodicals,\textsuperscript{170} the American Bar Association approved them in 1953,
and the American Law Institute in 1954, by 1970 only two territories (Panama Canal Zone\textsuperscript{172} and the Virgin Islands\textsuperscript{172}) and three states (Kansas,\textsuperscript{178} New Jersey\textsuperscript{174} and California\textsuperscript{176}), had adopted modified versions of the Rules.\textsuperscript{176} In 1974, the Commissioners on Uniform State Laws, in the interests of uniformity, approved the Federal Rules of Evidence as the Uniform Rules of Evidence.\textsuperscript{177} Before turning to the Federal Rules, however, brief mention will be made of the reform efforts in those states that adopted the Uniform Rules.

Kansas was the first state to adopt the Uniform Rules, and did so with only slight modifications.\textsuperscript{178} This was undoubtedly because Spencer Gard, the Chairman of the Committee which prepared the Uniform Rules, was a District Judge in Iola, Kansas, and a member of the Judicial Council Advisory Committee that studied and recommended adoption of the Kansas Code of Civil Procedure.

One interesting difference between the Uniform Rules and the Kansas Rules of Evidence is that the Kansas legislature only adopted that part of Rule 45 of the Uniform Rules which gives the judge the discretion to exclude relevant evidence if it might unfairly surprise a party. Rule 45 of the Uniform Rules provides:

\begin{quote}
Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed
\end{quote}

\textsuperscript{172} Panama Canal Zone: C.Z. Code, tit. 5, see. 273-2996 (1963).

After 1970, even though most states were adopting or considering adopting the Federal Rules of Evidence, Utah adopted the 1953 Uniform Rules. Utah: Utah Code Ann., sec. 78. In 1953 a committee had been appointed in Utah to consider the advisability of adopting the Uniform Rules of Evidence in that state. The Committee reported to the Supreme Court of Utah in 1959. See J. F. Falknor, \textit{Vicarious Admissions and the Uniform Rules} (1961), 14 Vand. L. Rev. 855 at 857, n. 12. In 1970, another committee was appointed by the Utah Supreme Court, and its recommendations, which were based on the previous report, were adopted in 1971.

\textsuperscript{177} [1974] Handbook of the National Conference of Commissioners on Uniform State Laws 145.

by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.¹⁷⁰

This rule is the keystone of any rational system of judicial evidence and has been included with only slight drafting changes in every other code of evidence. But the Kansas legislature, afraid that it gave trial judges too much discretion, deleted it from their Code.¹⁸⁰ Judge Spencer Gard, commenting on the section, noted that the omission was not crucial because it was well recognized at common law that a trial judge had the discretion provided by Rule 45 of the Uniform Rules, and that his discretion should be continued to be recognized in Kansas.¹⁸¹

Another anomaly was created in the Kansas Code when the Supreme Court of the United States, in 1965, held that it was unconstitutional to comment on the accused's failure to testify.¹⁸² Kansas had adopted Rule 21 of the Uniform Rules, which provides that evidence of the accused's previous conviction is not admissible "for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."¹⁸³ In the Uniform Rules, however, that provision went hand in hand with a provision which permitted comment on a defendant's failure to testify.¹⁸⁴ So, in Kansas, the accused cannot normally be impeached with evidence of previous convictions, but his failure to take the stand cannot be made the subject of comment.¹⁸⁵

Commissioner La Forest and the author visited Kansas in 1974, and spoke at length with members of the Kansas bench and bar to determine how a Code, similar to the one which the Law Reform Commission contemplated recommending, has worked in practice. Everyone we met said that they were completely satisfied with the Code. No one expressed a desire to return to the pre-Code rules and practice of evidence.¹⁸⁶

In New Jersey the Uniform Rules were adopted with only minor amendment after a twelve-year period of study. The reform effort began with the appointment by the Supreme Court of New Jersey of a Committee to consider a revision of the rules of evidence. The Committee reported in 1955,

¹⁸⁰ Supra, note 173, sec. 60-445. The only ground for exclusion which was retained was that of surprise, a ground not generally recognized in modern Codes. See Rule 403 of the Federal Rules of Evidence, 28 U.S.C.A.
¹⁸¹ Id.
¹⁸⁴ See commentary on Rule 21, id.
¹⁸⁶ See Acknowledgements, Report on Evidence, supra, note 1 at ix.
and recommended adoption of the Uniform Rules. While the report received a generally favourable response among the members of the profession in New Jersey, no action was taken. In 1955, the New Jersey Legislature appointed a committee to study the Supreme Court Committee’s report and any other suggestions for improvement in the laws of evidence. This committee reported in 1956 and also recommended, with a few additional changes, adoption of the Uniform Rules. In 1960, the Legislature enacted the definition and privilege sections of the Uniform Rules; the relevant legislation also provided that the remaining rules of evidence could be adopted by the Supreme Court of New Jersey. In 1967, the Supreme Court, following a further Committee report, adopted the remaining Uniform Rules. Only minor amendments were made in the Uniform Rules.

The most extensive review of the Uniform Rules of Evidence was undertaken by the California Law Revision Commission, and the resulting California Evidence Code departs more drastically from the Uniform Rules than do the codes of Kansas and New Jersey. Evidence reform began in California in 1956. The Legislature in that year directed the California Law Reform Commission to make a study “to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence....” At the request of the Commission, Professor Chadbourn prepared studies of each Uniform Rule and the corresponding California law, together with his own recommendation for reform. Usually, he recommended that the relevant Uniform Rule be adopted, with minor amendments to conform to California practice. Based largely on these studies, the Commission drafted preliminary revisions of the Uniform Rules of Evidence. Chadbourn’s studies of each article of the Uniform Rules, along with the Commission’s tentative recommendations, were published in pamphlets between August, 1962 and June, 1964. Three months after the last pamphlet was published, the Commission published a

187 Report of the Committee on the Revision of the Law of Evidence To The Supreme Court of New Jersey (May 25, 1955). For a summary of recommended changes, see x-xii.


190 The Evidence Act, 1960 (L. 1960, c. 52).

191 For a brief description of Legislative history of the New Jersey Rules of Evidence, see Preface By The Commission and Preliminary Comments To The Rules, supra, note 174.


193 Id.

194 The titles of the pamphlets are: Article I. General Provisions; Article II. Judicial Notice; Burden of Producing Evidence, Burden of Proof, and Presumptions (Replacing Article III); Article IV. Witnesses; Article V. Privileges; Article VI. Extrinsic Policies Affecting Admissibility; Article VII. Expert and Other Opinion Testimony; Article VIII. Hearsay Evidence; Article IX. Authentication and Content of Writings. The pamphlets were all published in 6 California Law Revision Committee, Reports, Recommendations, and Studies (1964).
preliminary draft of a Proposed California Evidence Code. The Code was very different from both the Uniform Rules and the Commission's tentative recommendations with respect to the Uniform Rules. The Commission's stated reasons for rejecting the Uniform Rules were:

First, in certain important respects, the Uniform Rules would change the law of California to an extent the Commission considers undesirable. . . .

Second, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. . . .

Third, the draftsmanship of the Uniform Rules is in some respects defective by California standards.

The Commission's Final Recommendation on Evidence was published in January, 1965, and the Code was adopted a few months later. The most significant difference between the California Code and the Uniform Rules of Evidence is that the California Code generally leaves less discretion to the judge, is less liberal in admitting evidence, and is much more detailed. The detailed manner in which it deals with each specific rule is without doubt its most distinguishing characteristic. The California Code is over two and one half times as long as the Uniform Rules of Evidence.

California's approach to codifying evidence law has not been copied elsewhere. One suspects that the Law Revision Committee yielded at the last moment to pressure from the bar in not adopting the Uniform Rules, but rather adopting a Code containing a series of very detailed rules. Such a Code appears to provide more guidance to practitioners and to be a less drastic break from the past.

9. **Federal Rules of Evidence**

The most recent major American Code of Evidence, The Rules of Evidence for the United States Courts and Magistrates, has been called "the most

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195 Supra, note 192 at 4.
196 Id. at 33.
197 Id.
198 Supra, note 175.
199 J. M. Maguire et al., *Supplement of Evidence Rules to Accompany Cases and Materials On Evidence* (5th ed. Brooklyn: Foundation Press, 1973). An illustration from the rules demonstrates this difference. The Uniform Rules include four rules dealing with the definition and effect of presumptions, and prescribing the manner of resolving a clash between inconsistent presumptions (rules 13 to 16). The California Evidence Code, on the other hand, has eight sections dealing with presumptions generally, five sections dealing with conclusive presumptions, seventeen sections which list those presumptions which affect the burden of producing evidence, and ten sections which list those presumptions that affect the burden of proof. (ss. 600-669) Another illustration which demonstrates this difference deals with the disqualification of the Judge as a witness: The California Code in three detailed subsections sets out the circumstances and conditions and procedure of disqualification of the judge when he becomes a witness and then concludes with a subsection which states, "In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness." (s. 73) The Uniform Rules simply state, "Against the Objection of a party, the judge presiding at the trial may not testify in that trial as a witness." (rule 42)

200 Except to a certain extent in Ghana, see infra.
rational, practical, and expedient code of evidence in history." The fascinating judicial and congressional history of these rules has been re-told countless times.\textsuperscript{202} Briefly, however, suggestions that a set of rules for federal court trials be promulgated had been made for many years.\textsuperscript{203} In 1961, on the recommendation and authorization of the Judicial Conference of the United States, Chief Justice Warren appointed a Special Committee on Rules of Evidence to consider the advisability of developing uniform rules of evidence for the federal courts. In a report published in 1962, the Special Committee concluded that the rules of evidence in the federal courts should be improved.\textsuperscript{204}


\textsuperscript{204} Prior to the enactment of the Code, Rule 43(a) of the Federal Rules of Civil Procedure governed the admissibility of evidence in civil actions. It provided:

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 of equity, or under the rules 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.

(1 F.R.D. lxiii (1941)).

Thus, in determining whether evidence was admissible in civil actions resort had to be made to three different sources of law: (1) federal statutes, (2) rules of evidence previously used by federal courts in suits in equity, and (3) rules of evidence applied in the courts in the state in which the Federal Court was sitting. See generally, Note, The Admissibility of Evidence in Federal Courts Under Rule 43(a) (1946), 46 Colum. L. Rev. 267; Note, The Admissibility of Evidence Under Federal Rule 43a (1962), 48 Virg. L. Rev. 939; Note, Federal Rule 43a: The Scope of Admissibility of Evidence and The Implications of The Erie Doctrine (1962), 62 Colum. L. Rev. 1049.

In criminal matters, Rule 26 of the Federal Rules of Criminal Procedure provided generally that the admissibility of evidence, and the competency and privileges of witnesses, were governed by federal legislation, or, in the absence of legislation, "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26 of the former Federal Rules of Criminal Procedure, 5 F.R.D. 573 (1946), amended 1975. Thus, even in the criminal cases, there was considerable confusion over which rules to apply, and the rules tended to vary from one federal court circuit to the next. See, generally, L. B. Orfield, The Reform of Federal Criminal Evidence, 32 F.R.D. 121 (1963); T. F. Green, Drafting Uniform Federal Rules of Evidence (1967), 52 Cornell L.Q. 177 (1967); Wright and Miller, supra, note 202, Vol. 2 at paras. 401-19.
and that the enactment of uniform rules of evidence throughout the federal court system was both advisable and feasible.\textsuperscript{205}

The report was circulated to members of the bench and bar for comment. As a result of the favourable response, the Chief Justice of the United States Supreme Court appointed an Advisory Committee in 1965 to formulate uniform rules of evidence for federal courts. Professor Cleary acted as the Reporter for the Committee. The Committee was comprised of fifteen eminent practitioners, judges and law professors. It met every two or three months to discuss working papers and draft sections prepared by Professor Cleary. Four years later, in March, 1969, the Advisory Committee published a first draft of the Rules\textsuperscript{208} and invited submissions from the bench and bar. A revised draft appeared two years later.\textsuperscript{207} The Supreme Court approved a final version on November 20, 1972\textsuperscript{208} and two months later sent it to Congress to take effect on July 1, 1973, unless disapproved by Congress within ninety days. Congress, however, vetoed this judicial promulgation of the rules and undertook a study of the rules. This veto largely resulted from the jealous protection by Congress of its jurisdiction, and its concern over some of the privilege provisions, notably the abandonment of the physician-patient and spousal communication privileges, the liberalization of the executive privilege, and the general lack of recognition of state law in the area of privilege.\textsuperscript{209} After extensive congressional hearings and debates, the rules were signed into law by President Ford on January 2, 1975 to be effective July 1, 1975.\textsuperscript{210}

The rules were clearly drafted with the problems of the Model Code of Evidence in mind. Unnecessary and academic verbiage has been avoided and cross-references kept to a minimum. As much as possible each rule states an independent and self-contained rule. The substance of the rules might be summarized by noting that they display a bias in favour of admissibility, and that they continue the trend of investing the trial judge with greater discretion,


\textsuperscript{207} 51 F.R.D. 315 (1971).

\textsuperscript{208} 56 F.R.D. 183 (1972).


\textsuperscript{210} For reference to the congressional record, see Weinstein, \textit{supra}, note 202, Vol. 1.

President Ford, in requesting passage of the bill by Congress, urged:

\textit{Earlier this session, the House passed a bill to codify for the first time in our history, the 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.}

Quoted at xi.
particularly over the conduct of the trial.²¹¹ Finally, after three major efforts, it appears that American codifiers have arrived at a Code that will achieve uniformity.²¹² At least eight states have adopted the rules,²¹³ and they are being considered in many others.²¹⁴

The rules, however, have not passed without criticism. When they were approved and promulgated by the Supreme Court, Justice Douglas dissented.²¹⁵ As well, when the Rules were being considered by Congress numerous representations were made urging that the Rules not be adopted. Perhaps the most notable was made by Judge Henry Friendly. His concerns bear quoting because they are similar to the concerns expressed by many of the critics of the Proposed Canadian Evidence Code:

My first objection to the proposed rules is that there is no need for them. Someone once said that, in legal matters, when it is not necessary to do anything, it is necessary to do nothing. I find that a profoundly wise remark. We know we are now having almost no serious problems with respect to evidence; we cannot tell how many the Proposed Rules will bring.²¹⁶

He went on to say that: "... evidence is not the kind of subject that lends itself to codification. It is peculiarly a subject of the common law system of judicial development by examination of the actual facts in each case in an adversary setting."²¹⁷ Finally, he was concerned that "... the Rules will sti-


²¹⁵ 409 U.S. 1132 (Reporter's Note); 56 F.R.D. 184 at 185 (1972). One of his grounds for dissent was that the law of evidence is best left to case-by-case development or legislative enactment.
mulate appeals and increase reversals on evidentiary rulings.”

Judge Friendly’s concern impressed at least one member of the sub-committee. Representative Elizabeth Holtzman expressed her views separately from those of the Committee: “... the adoption of a rigid black letter evidentiary code might constitute a step backward ... [because of] the difficulty of dealing with evidentiary issues by black letter law and the disadvantage of cutting off the development of the law in many areas where such development on a case basis was presently desirable.” Other commentators were more sweeping in their criticisms. Professor Kenneth Graham wrote:

The general tenor of the proposed rules is so reactionary as to reject reforms that as conservative a body as the American Bar Association had embraced twenty years ago. They are totally inadequate as a basis for litigation in the Twenty-First Century. Furthermore, the form of the rules is so complex that it is difficult even for evidence scholars to decipher them. Finally, the overall approach of the rules seems so designed to favor certain classes of litigants and the interests of lawyers and judges rather than the public interest that they threaten to discredit the whole rulemaking process.

10. Scottish Law Commission, Draft Evidence Code

Two other recent codes of evidence studied by the Commission were drafted in Scotland and Ghana. The preparation of a Code of Evidence was one of the first projects undertaken by the Scottish Law Commission. In justifying this priority, the Commission noted that “the law of evidence was the branch not only most easily susceptible of codification, but was also that in which a Code would be of the highest practical value.” In 1968, the Commission published a Memorandum (No. 8) containing eight chapters of a proposed Code of Evidence. As well, the Memorandum included an introduction explaining the problems of codification, the form of the Code and the interpretative principles to be applied in construing the Code. The Code is an original contribution to the codification movement and contains a number of


217 Id. at 262.

218 Id.


220 Supra, note 216 at 195. For an equally sweeping condemnation of the rules, see Statement of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers, id. at 168.

221 Draft Evidence Code (First Part) Memorandum No. 8 (Edinburgh: Scottish Law Commission, undated) at 1.

222 Id. The date of publication is given in the Commission’s Fifth Annual Report 1969-70 (Edinburgh: H.M.S.O., 1970) at 6.
provisions pertaining to problems peculiar to Scottish law. However, the codifiers were clearly inspired by the American Model Code of Evidence, and many of the provisions reflect the liberalizing influence of that Code. For example, the hearsay rule is virtually abolished and the judge is given a broad discretion to control the conduct of the case.

The Draft Evidence Code was circulated to the bench and bar for comment. Comment must have been adverse because further work on the Code was delayed,223 and eventually the concept of codification was abandoned.224 The Scottish Law Commission is now preparing a paper recommending reform in various areas of evidence and the consolidation of existing statutory provisions.225


The codification of the rules of evidence was also one of the first projects undertaken by the Ghana Law Reform Commission. In 1971, the Commission published a report entitled, "Draft Rules of Evidence."226 The proposed Code drew upon American codifications, particularly the California and Model Codes; the Indian Evidence Act, as modified in Nigeria and East Africa; and recent statutory developments in England.227 For example, those sections of the Code dealing with presumptions, authentication, writings and privilege, are very detailed and similar in form to the California Code, while in its virtual abolition of the hearsay rule, the Ghana Code follows the Model Code. The Code was enacted in 1975,228 and the Commission subsequently published an extensive commentary on it.229

12. ..Eleventh Report of the Criminal Law Revision Committee

In 1964, the Home Secretary asked the English Criminal Law Revision Committee "to review the law of evidence in criminal cases..."230 Eight years later, in 1972, the Committee published its final report.231 The Committee did not recommend the adoption of a Code of Evidence because they felt that the far-reaching changes in the laws that they were recommending should be considered first.232 However, their Draft Bill deals with all significant areas of criminal evidence. The major recommendations of the Report include: the judge or jury should have the right to draw all reasonable infer-

230 Criminal Law Revision Committee, Eleventh Report: Evidence (General) (Cmnd. 4991; 1972) at 5.
231 Id.
232 Id. at 8.
ences from the fact that the accused remained silent in the face of police interrogation; the abolition of the caution by the police to the accused that he has a right to remain silent; the prosecution should have the right to comment on the accused’s failure to give evidence at trial; confessions should be excluded only if made under circumstances likely to make them unreliable; the accused’s disposition should be admissible to show his state of mind if he admits the actus reus of the crime; a burden of persuasion to disprove an element of the offence or to prove a defence should never be placed on the accused; the testimony of accomplices should not require corroboration; in cases of identification, the judge should have to warn the jury of the special need for caution; and, generally speaking, first-hand hearsay should be admissible, but second-hand hearsay (except for statements in other legal proceedings) should not.

The reaction to the Report was immediate, vicious and, in the end, overpowering. Newspaper and periodical headlines called it “Disappointing and Dangerous,” “Too High A Price for Conviction,” “A Full-Scale Assault On Traditional Standards of British Justice” and warned, “British Justice In Jeopardy.” The critics, however, did not stop at attacking the merits of the Commission’s recommendations: the secrecy of the Commission’s proceedings was condemned; the anecdotal nature of the support for the empirical assumptions of the Commission’s recommendations was ridiculed; the narrow frame of reference within which the Commission operated was questioned; and the composition of the Commission itself (all males with an average age of sixty-four and similar backgrounds, attitudes and experience) was criticized.233


Members of the Commission, in particular Glanville Williams and Rupert Cross, replied to their critics.234 Both authors contended that their critics had attacked statements in the Report which were inconsequential to the conclusions; that they attacked the lack of research without pointing to research the committee had ignored, or to facts that were needed and how they could be obtained; and that they often did not fully understand the present rules of evidence. Professor Cross noted that, irrespective of the correctness of the empirical assumptions upon which the recommendations rested, the recommendations could be supported on the simple ground that they were necessary in order to rationalize the rules of evidence by removing the illogicalities.235 He also described much of the criticism of the Report as being characterized by “ignorance, self-righteousness and unreason.”236

The Criminal Law Revision Committee’s Report on Evidence is one of the most closely reasoned documents published on criminal evidence, and many of its recommendations are long overdue. It is unfortunate that it is now apparently a dead issue in England. When the Report was published, meetings to review it were held at the Law Reform Commission of Canada. It was reassuring to find that much of the thinking underlying the Report paralleled that underlying the Commission’s Evidence Code.

14. Previous Canadian Codes of Evidence

A little-known Evidence Code has been in use in Canada for over seventeen years. In 1959, under authority of the National Defence Act,237 the Military Rules of Evidence, a code of evidence applicable in Canadian courts martial, was approved by the Governor-in-Council.238 These rules follow, to some extent, the Model and Uniform Rules. However, they are drafted in more detail than those Codes, and adhere more closely to the common law rules.239 The drafters attempted to draft a set of rules that would be acceptable to the Military and that could be understood by, and provide guidance for, people

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235 Cross, The Evidence Report, id.; see also Cross, An Attempt to Update, id.

236 Cross, The Evidence Report, id.


238 Order-in-Council 1959-1027, Aug. 13, 1959, amended by P.C. 1967-2255, Nov. 30, 1967 and P.C. 1971-31, Jan. 12, 1971, with additional explanatory notes approved by the Minister. The preparation of the Military Rules of Evidence began in 1952. The project was under the direction of Professor W. R. Lederman, then of Dalhousie University, Faculty of Law. He prepared draft sections, with explanatory notes and illustrations, and submitted them to members of the legal branch of the Armed Forces. He was assisted by Graham Murray and Dean Read, also of the Dalhousie University Faculty of Law. Dean Read supervised the final drafting of the rules.

239 The details and form of some of the rules was apparently inspired by English military law. The drafters of the rules acknowledged permission to use materials from United Kingdom Service Manuals. Queen's Regulations and Orders, Volume II, Appendix xvii at (iv).
who might not have a full legal training, or access to a legal library. In the Queen's Regulations and Orders, the rules are preceded by an explanatory note that describes the basic rules of evidence, their purposes and relationships. The Code has apparently "served the military well." 240

In drafting the Proposed Code of Evidence, reference was made from time to time to the Military Rules of Evidence. 241 Indeed a Military Law Project was initiated at the Law Reform Commission under the supervision of Colonel H.G. Oliver, who attended many of the meetings of the Evidence Project. The Canadian Armed Forces expressed an interest in adopting the Proposed Evidence Code when enacted so that there would be uniformity between military courts martial and public criminal trials. Furthermore, it is at present unclear whether the Court Martial Appeal Court is bound by the Military Rules of Evidence. 242

The Commissioners on Uniformity of Legislation drafted an Evidence Act in 1936, 243 which was revised in 1941, 244 and has since been amended from time to time. 245 The Act does not purport to be a code; however, it contains sixty-six sections which consolidate earlier statutory provisions and treat the various topics now covered in most provincial evidence acts. In 1959, the Commissioners undertook to study whether an Act containing Uniform Rules of Evidence should be recommended. 246 The question was referred to the Newfoundland Commissioners. 247 In 1963, these Commissioners expressed some doubt about the wisdom of attempting to codify the law of evidence but they suggested that the subject be referred to a more populous province where problems with the laws of evidence would be more likely to occur. The question was then referred to the Ontario Commissioners. 248 In 1965, the Ontario Commissioners concluded, after studying the Model Code and Uniform Rules of Evidence, that they did not have the resources to con-

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241 In a recent article, the Commission is criticized for failing "to acknowledge the existence of the Military Rules of Evidence" and failing to make "comments of any type about them." Id. at 280. In the preface to the proposed Code, reliance upon the American Codes is acknowledged because many of the sections of the Code were drawn from these sources. The Military Rules of Evidence were not followed in style or content and thus no mention was made of them. However, certainly like much of the published material the Commission consulted, the Military Rules of Evidence were useful in formulating positions. Perhaps the Commission should have published a bibliography of sources consulted.


244 [1941] id. 65.

245 The Uniform Act was amended [1942] id. 19; [1944] id. 60; [1945] id. 73. The Revised Uniform Act, [1945] id. 75, was amended [1951] id. 84; [1953] id. 82.

246 This initiative was apparently the result of an article on codification written by Professor Graham Murray, supra, note 82.


duct the research and study that was required in the field. The subject was thus withdrawn from the Agenda.240

This review of the antecedents of the Proposed Code of Evidence has two purposes. First, one purpose is to demonstrate that codification of the rules of evidence is not a new idea, or a notion foreign to common law countries. Codification has been successfully accomplished in many such jurisdictions. Indeed, in view of this long history of attempts at codification, it is curious that reform was such a long time coming and that codification was so bitterly resisted. Second, this review sets out the many models and the enormous body of scholarship upon which the Commission was able to draw. Professor Graham Murray has suggested that the American evidence codes were so good that “ridiculously little effort” would be needed to draft a code of evidence rules for use in Canada.250 Undoubtedly, the American codifications not only made the Commission’s work on evidence much easier, they made it possible. And because evidentiary problems admit of only a limited range of solutions, particular problems were often resolved in the same manner as they had been resolved in a previous codification. However, in preparing the Code, no previous resolution of an evidence problem was blindly followed. The discussion of each problem always began and ended with a discussion of basic principles.

IV. THE PROCEDURE OF REFORM

The decision on how to proceed with the study of evidence appeared to involve a choice among three alternatives. The possibility of establishing an advisory body of distinguished lawyers and judges from across the country was debated at length. A full-time staff member at the Commission would draft legislation and prepare comments on various aspects of evidence law. These documents would be discussed by the advisory group, which would meet four or five times a year. A complete Evidence Code would be prepared in four or five years. This is basically the procedure adopted by the English Criminal Law Revision Committee in reviewing the law of evidence in criminal cases.251 It is also the process followed in preparing the Rules of Evidence for the United District Courts and Magistrates.252

An alternative method would be to engage a number of lawyers and academics to prepare definitive working papers on various areas of the laws of evidence. At the end of two or three years, with these working papers in hand, the Commission would prepare a draft Evidence Code. The Ontario Law Reform Commission decided to proceed with their study of evidence law in this manner.253

250 R. G. Murray, supra, note 82.
252 Supra, note 206 at 1-9. See also statement of Albert Jenner, Hearings, supra, note 216 at 77.
A final suggestion was that a small group of full-time staff be employed at the Commission to prepare brief study papers on various aspects of evidence law. These papers would be circulated to the profession and the public at large. The study papers and all responses to them would be considered by the Commission in formulating its recommendations.

This third approach was adopted. The "advisory committee" approach was rejected, mainly on the grounds that it would not provide interested members of the profession and the public an opportunity for meaningful input in the early stages of the reform process. It was felt that the Commission should proceed as openly as possible. Normally the advisory committee approach presents the public with a fait accompli. Subsequent commentators are in some sense limited to accepting or rejecting the report of the committee. Furthermore, enormous difficulties in agreeing on the membership of the advisory committee were foreseen, because it would have to be representative of the many interests at stake in the reform process.

It was the unanimous view of members of the Commission that it would be pointless to prepare a series of academic tomes on the law of evidence. Perhaps more than in any other area of the law, all the necessary doctrinal analysis had been done in the law of evidence. It was hard to imagine that any improvement could be made on the work of such American scholars as Ladd, Morgan, Wigmore, Maguire, McCormick and Cleary, or of English scholars such as Cross and Williams. While such doctrinal analysis had not been done extensively in Canada, Professor Schiff's excellent materials provided a good basis for studying the Canadian jurisprudence. As well, the Ontario Law Reform Commission made available the background studies on evidence that were done for that Commission. While it was conceded that there might be some value in undertaking such research if it were done by people who could transform and enrich the data, there was a feeling that, given the paucity of good writing on evidence in Canada, most of the papers would simply collect, assemble and reorganize the information that was readily available. The need for additional compilations of cases was doubted. Finally, because the Commission was interested in developing an approach to evidence that reflected certain basic principles, it was essential that at least a small group of people be thoroughly familiar with all aspects of the subject and the proposed reforms.

At the outset, the law of evidence was broken down into a number of subject areas. The rules of evidence relating to the competency, questioning and impeachment of witnesses were the first chosen for study. It was felt that a study of this area would provide a microcosm of all the problems likely to

254 The fate of the English Criminal Law Revision Committee's Eleventh Report, supra, note 230, would appear to confirm the validity of this concern.

255 The Advisory Committee on the United States Federal Rules of Evidence was criticized on these grounds. In alleging that the Advisory Committee was unrepresentative, representatives of the Washington Council of Lawyers noted, "There are no lawyers concerned with problems of the poor; there are no environmental or consumer lawyers; there are no lawyers actively involved in the vindication of the rights of minority groups." Hearings, supra, note 216 at 178.

260 Supra, note 102.
be encountered in studying the rules. Following an exhaustive research of the relevant literature and legislation in other jurisdictions, study papers covering each topic were prepared. These study papers stated the problems and issues to be resolved in each area and the arguments relating to each. Rough draft legislation was also frequently proposed in the study papers.

Once a week, members of the Evidence Project met to discuss these study papers. In the first year the members included Martin Friedland, who was the Commissioner initially most involved in the Project, Edward Tollefson, who was on the research staff of the Department of Justice, Judge René Marin and the author. Both Mr. Justice Patrick Hartt and Mr. Justice Antonio Lamer, chairman and vice-chairman of the Commission, respectively, attended many of the meetings. In the second and third years, the Project was joined by Jean-Louis Baudouin, a professor of law at the University of Montreal, and Judge Ronald Delisle, who, then a professor on a leave of absence from Queen's University Faculty of Law, joined the Commission on a full-time basis for a year to work on the Project. While others were involved, two non-members of the Project, in particular, played important roles: a social psychologist, Professor Tony Doob, of the University of Toronto, and Professor Stan Schiff, of the University of Toronto Faculty of Law. Professor Schiff prepared detailed comments on each study paper, criticizing them from the point of view of traditional evidentiary theory. Indeed, he often prepared comments on the study papers that exceeded the study papers in length. The final product was undoubtedly improved by his tough, analytical and often unrelenting criticisms, although not as much as he would have liked. Professor Doob's specific role was to criticize the study papers from the point of view of the science of psychology. His ability to discern the empirical basis of the various recommendations, design research techniques to test their validity, and explain his conclusions in clear and understandable language, was of invaluable assistance.

After an area had been thoroughly explored at these weekly meetings, a draft study paper would be prepared for publication. The study papers contained proposed draft legislation and a commentary explaining the drafted sections. They were distributed to the public for comment. A number of people from whom comments were invited complained that the study papers were too brief and contained no footnote references. The papers were deliberately short in length, to encourage busy practitioners and judges to respond to them. They were not intended to serve as reference guides to the present law. Their sole purpose was to provoke comment on the merits of the suggested changes, based on the readers' experiences and on their views of the relative importance of the competing interests. Indeed, it was hoped that practitioners and judges would use the papers or make reference to them on a day-to-day basis as practical problems of evidence arose. In this way, problems that the recommendations would create or resolve could be discovered.

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287 'Study papers' is a somewhat pendantic title for what the Commission has released. 'Position papers with tentative recommendations' would be rather more accurate, for they contain no authorities, footnotes or references, and evince rather more provocative stances and rather less study than one would expect. A. W. Mewett, Editorial, Democratic Law Reform (1972), 15 Crim. L.Q. 1.
Over 5,000 copies of each study paper were distributed. They were distributed to, among others, Members of Parliament, Law Reform Commissions abroad and in Canada, Canadian libraries, the press, law teachers, law societies and other law associations, police associations, judges and magistrates, and any other interested groups or persons. Papers that affected particular groups were sent to representative organizations. The response to the papers was disappointing. An approximate total of only one hundred letters and thirty briefs was received. As well as receiving briefs and comments, members of the Project attended numerous meetings of judges and lawyers across the country to discuss the study papers. Many changes, mostly of a technical nature, were made in the proposed evidence legislation as a result of the comments received.

By the spring of 1974, all the study papers were completed and the Commission began preparing an Evidence Code. A group referred to as the Task Force on Evidence was formed. It included Mr. Justice Lamer and Dr. Gérard LaForest, both Commissioners, Jean-Louis Baudouin, Graham Murray, a professor of law from Dalhousie who was working with the Commission full-time in 1974, and the author. The Task Force met once a week throughout the fall of 1974 and early spring of 1975. It reviewed the Evidence Project's recommendations and the responses to them and sent its recommendations to the Commission in the summer of 1975.

The Commissioners met throughout the summer and fall of 1975 to agree on a Code. The author's role at these meetings was to answer specific questions and to provide background on the issues where that was necessary. While a number of drafts of the Evidence Code were prepared, Dr. Gérard La Forest assumed final responsibility for the drafting. In considering the final draft, the Commission occasionally met with outside groups. For example, in the fall of 1975, three meetings were arranged with leading practitioners from across the country, selected for this purpose by the Canadian Bar Association. Finally, in December of 1975, a Proposed Evidence Code was sent to Parliament.

Twelve study papers were eventually released, supra, note 3. All were of a similar format except Study Paper #5, Compellability of the Accused and the Admissibility of His Statements. This study paper contained a radical proposal for the interrogation of accused persons. The proposal involved the exclusion of all out-of-court statements made by the accused unless made before a judicial officer. Because of the radical nature of the proposal it was documented and contained no proposed legislation.

The letters and briefs were collected and correlated to the sections of the Proposed Evidence Code in a Commission document, Written Comments Received from the Public Relating to the Laws of Evidence, supra, note 4.

These recommendations were contained in a document which included: every particular evidentiary issue that had to be resolved; the Evidence Project's recommendations on each issue and the reasons for them; the comments that had been received from the public relating to each particular issue and a summary of the relevant comments that had been made at the various meetings that members of the Project had attended; the manner in which the question had been dealt with in other jurisdictions in recent codifications; the Task Force recommendations with reasons, to the extent that they departed from the recommendations of the Evidence Project; and, for some issues, general explanatory notes.

See supra, note 1. The Government referred the Code to the Justice Department for study. However on January 28, 1976, the Honourable Mr. Fairweather introduced...
In retrospect, I have at least three reservations about the reform process adopted by the Commission. First, I somewhat regret that there was not more co-operation between the Law Reform Commission of Canada and the various provincial law reform commissions in reforming this area of law.\textsuperscript{262} The needless duplication of effort, the need for uniformity, and the higher probability of the Code being adopted had it had the support of provincial law reform commissions, are compelling reasons for co-operation. Also, it is possible that a pooling of resources might have resulted in a better product.

At the outset of the Project, the Commission communicated with the provincial commissions and attorneys-general to explore the possibility of a joint programme. This concept was not pursued with vigour, however, and very little co-operation was ever achieved. The British Columbia Law Reform Commission was the most anxious to co-operate in a joint endeavour. They engaged John Spencer, a Vancouver lawyer, to prepare extensive comments on all the Evidence Project's papers, and members of that Commission met from time to time to discuss and vote upon the recommendations.\textsuperscript{263} Their comments were very useful in preparing the final version of the Code. However, the British Columbia Commission eventually decided to undertake their own study of various aspects of evidence law.\textsuperscript{264} The Manitoba Law Reform Commission also prepared comments on the first five Project study papers.\textsuperscript{265}

The lack of co-operation amongst the Commissions may have in some sense been a blessing, because it is apparent that each Commission had its own views on both the process and substance of evidence law reform.\textsuperscript{266} A

the Code as a private member's bill: An Act to Codify The Law of Evidence, Bill C-423. The only section he changed was the section dealing with the character of the rape victim. He would exclude such evidence in every case.

\textsuperscript{262} See Ryan, supra, note 16.


\textsuperscript{264} The B.C. Commission noted, "[W]e have continued to take an active interest in the work [of the federal] commission, but our participation was somewhat reduced this year because of constraints of time, availability of personnel and differing priorities." Annual Report, 1975 (Vancouver: Department of the Attorney General, 1975) at 6-7.

\textsuperscript{265} See supra, note 9.

\textsuperscript{266} See Law Reform Commission of British Columbia, Annual Report, 1976 (Vancouver: Department of the Attorney General, 1976) at 3-4. The B.C. Commission noted the expected impact upon B.C. evidence law of the federal rules and of any reforms by Ontario. Awaiting the reports of those commissions, they decided to pursue evidentiary problems of specific interest to British Columbia.

A second reservation about the reform process stems from the fact that the profession is apparently not prepared to take an active role in the law reform process when they are simply invited to respond to study papers. The Law Reform Commission went to great pains to ensure that every opportunity was afforded the profession to become involved in the process. Thousands of copies of the study papers were distributed, and each study paper appeared in The National, the newspaper of the Canadian Bar Association. Interested persons were invited, encouraged, indeed begged to respond. For whatever reasons, the profession's response was disappointing. Perhaps practitioners are too busy to commit their views to writing, do not think their written remarks will be taken seriously, or are simply not concerned at the preliminary stage of law reform because they do not feel that ultimate change is a serious possibility. In other areas the Commission has since adopted alternative means of bringing the expertise of practitioners to bear on the law reform process. Most commonly, they have established advisory committees comprised of lawyers and judges.

Finally, my strongest reservation about the process of reform is that the Evidence Project, and the Commission, did not organize their research in such a way that all their work could be published, or at least made available to the public in some form. I remain convinced that background papers in law review format would have been a waste of time, and that the published study papers performed a useful function. However, numerous other papers and documents were prepared which could have been made available to the public in some form. Such documents include: a number of background papers prepared by the Commission staff; the minutes of numerous meetings; a series of empirical studies done by Professor Doob; Professor Schiff's excellent analysis of the Project's study papers; a paper prepared by Bruce McDonald on authentication, identification and proof of documents; empirical research undertaken by Professor Ronald Cohen on the testimony of children; a series of delightful and perceptive papers written by Professor Murray on the general question of codification; and a major research project, involving the examination of police records, conducted with the assistance of Herbert Thurston, an advisor to the Ontario Police Commission. There was little justification for not making these and other studies readily available to interested persons, and particularly to critics of the Code.

Evidence was the first project undertaken by the Commission, and was

267 Ryan, supra, note 16, at 11.

268 This study attempted to answer questions relating to the importance of police questioning, the conditions under which confessions are usually given to the police, the kinds of arrested persons who are most likely to give confessions to the police, the effect of the presence of a lawyer on police questioning, the characteristics of police questioning, and the importance of statements given by the accused for use as evidence against him at trial.
well underway before the Commission was even fully organized. Therefore, it did not directly benefit from the introspective and self-conscious approach to the law reform process which began to be developed by the Commission during the second year of its operation. The Commission’s approach to law reform is probably unique among law reform bodies. Beginning with the premise that real law reform embodies changing social practices and that changing laws and changing values are inseparable, the Commission has set about exploring methods of law reform other than rule reform.\footnote{See Law Reform Commission of Canada, \textit{First Annual Report 1971-72} (Ottawa: Information Canada, 1972); \textit{Second Annual Report 1972-73} (Ottawa: Information Canada, 1973); \textit{Third Annual Report 1973-74} (Ottawa: Information Canada, 1974); \textit{Fourth Annual Report 1974-75} (Ottawa: Information Canada, 1975). See also, P. Hartt, \textit{The Limitations of Legislative Reform} (1974), 6 Man. L.J. 1; W. Ryan, \textit{supra}, note 16; J. Barnes, \textit{supra}, note 251; Lyon, \textit{Law Reform Needs Reform} (1974), 12 Osgoode Hall L.J. 421; H. Mohr, \textit{Comment} (1974), 12 Osgoode Hall L.J. 437; R. A. Samek, \textit{A Case For Social Law Reform} (1977), 55 Can. B. Rev. 409; E. Ryan and A. Lamer, \textit{The Path of Law Reform} (1977), 23 McGill L.J. 519.} Had the Evidence Project been able to benefit from this extended dialogue taking place at the Commission, its work might have taken a very different form.

V. PRINCIPLES UNDERLYING THE CODE

In this section, I will briefly indicate the critical focus adopted by the Commission in its review of the evidence rules, and outline and illustrate the major themes which emerged in the course of its work and which are reflected in the Evidence Code. Procedural rules can be evaluated on at least three different levels. First, they can be evaluated or criticized by reference to the prevailing jurisprudence. A rule can be viewed as being wrong or incorrect on the ground that it is inconsistent with, or cannot be derived from, the existing case law. Evidence reform was thought by many of the critics of the Evidence Code to involve simply the removal of anomalies or inconsistencies in the case law. Indeed, so ingrained is this notion of law reform, at least as it relates to evidence, that the Commission was often criticized solely because some of its recommendations departed from leading Supreme Court of Canada cases. From the beginning of its work on evidence, the Commission endeavoured to resist the temptation to confine its research to simple doctrinal analysis or to rely entirely upon appellate reports and commentaries on the existing case law.

At another level, the rules can be evaluated by reference to the empirical assumptions upon which they rest. Nearly every rule of evidence rests upon an assumption about human behaviour or about the jury's inference-drawing process.\footnote{Supra, Part II.} The assumptions underlying the common law rules of evidence were made by judges on the basis of introspection and their own experience. They were made prior to any scientific study of human behavior. Thus, if the rules are to be understood and meaningful reform undertaken, their presuppositions must be either verified or refuted by the findings of the modern science of human behavior. Accordingly, the Evidence Project undertook to determine the most efficacious manner of applying the knowledge of psychology to the premises on which the rules are based. A number of constraints,
experienced by all law reform bodies,271 are imposed upon interdisciplinary research of this kind: the task of finding a psychologist with an interest and some experience in the field; the costs, in terms of both time and money, of engaging in original research; the difficulty of determining the significance of research findings to policy formulation; and the difficulty of discerning and stating the empirical assumptions of the rules so that they could be verified or refuted. The Commission considered employing a psychologist on a full-time basis. Because of the difficulty in recruiting a suitable person, however, a social psychologist was hired on a part-time basis. He attended many of the Project’s meetings, prepared a number of research memoranda and undertook some original empirical research. The empirical assumption of each evidence rule was explored and subjected to examination and discussion by the Project, with the assistance of the psychologist. A search was made of the available literature for assistance in verifying each assumption. In addition, a major research project was undertaken on the testimony of children and the admissibility of confessions.

Thirdly, the rules can be evaluated in terms of the procedural and substantive goals they are intended to achieve. The premises of our procedural system and the interests which must be balanced in fashioning rules of evidence and procedure were carefully articulated by the Project. The discussion of each of the rules always began and ended with a clear reference to these values. I will not here attempt a definitive cataloguing of these interests, their inter-relationships and relative importance. It may be, however, that a brief illustration of how particular interests were balanced, with reference to particular rules of evidence, will reveal the general thrust of the Code.272

1. The Need to Admit All Relevant Evidence

Whatever one views as the ultimate purpose of the trial, it is clear that an important objective of the fact-finding process is to determine “what happened.” Thus, prima facie, all relevant evidence should be admissible. Professor Thayer is credited with having elevated this proposition to its rightful place in evidence theory. Thayer noted, “The two leading principles [of the rules of evidence] should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter required to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy of law excludes it.”273

Following Thayer’s admonition, the first general rule in the Code provides: “All relevant evidence is admissible except as provided in this Code or

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272 Frequently, of course, many interests are at stake in formulating a particular rule. For illustrative purposes, I will assume in the discussion that each rule entails the balancing of only two ‘interests.’
273 Thayer, The Present and Future of The Law of Evidence, supra, note 86 at 89. See Morgan and Maguire, supra, note 73 at 922-23: “Thayer was perhaps the first to describe these axioms and label them as the fundamental conceptions of the rules of evidence.” See also Wigmore, supra, note 60, Vol. 1, paras. 9, 10; J. L. Montrose, Basic Concepts of the Law of Evidence (1954), 70 L.Q. Rev. 527.
any other Act.” Thus, the slate is wiped clean of all prohibitions to admissibility. This bias in favour of admissibility is retained throughout the Code. Indeed, some members of the Project argued that this provision alone should constitute the rules (or non-rules) of evidence. The Commission was of the view, however, that in determining whether evidence should be admissible, interests other than the unrelenting search for truth, must be considered. More specifically, the Commission felt that interests such as finality, expedition, the need to protect the trial process from manufactured evidence and the need to preserve the moral acceptability of the court’s decision should be reflected in the rules of evidence. Furthermore, the institutional characteristics of the trial process, the adversary system and the jury, were perceived as imposing constraints on the methods used to further the goal of fact-finding. Finally, it was thought that certain values extrinsic to the litigation process itself might be jeopardized if there were no rules of evidence.

2. The Need for Finality

In most disciplines the pursuit of truth is an on-going process. However, if the judicial trial is to achieve its purpose of settling disputes, permitting re- pose among the parties to a civil dispute, and effectively sustaining the aims of substantive criminal law, a high degree of finality must attach to its outcome. While the importance of this interest is recognized in many rules of evidence, an instance in which the Commission gave it considerable weight is in the context of the question of whether the jury’s verdict should ever be subject to impeachment. My own view was that the desirable rule was that recognized in the majority of American jurisdictions, whereby the jury’s verdict can be impeached if misconduct in the juryroom can be proved without inquiring into the mental process by which the individual jurors reached their verdict.

The Commission was convinced, however, that greater value should be placed on the interest of finality in our criminal process than is currently the case in the United States. Accordingly, section 52(2) of the Code preserves the rigid common law rule that a member of the jury cannot give testimony impeaching the validity of the verdict of that jury.

In other contexts, however, the Commission was not persuaded that the principle of finality should take precedence over other values. For example, the Commission did not choose to require counsel at trial to make a timely and specific objection to offered evidence in order to preserve the right to appeal. Again, my own view differed from that of the Commission. I argued that, in the absence of a timely and specific objection at trial, any error should be waived for appeal and that this rule was necessary in order to ensure the efficient and orderly presentation of evidence. In this instance, then, the Commission was not convinced that the accused’s right to a fair trial should be sacrificed for the sake of the finality that such a rule would ascribe to the verdict at trial. A section was, therefore, drafted which essentially preserves the present law.

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274 Code, s. 4(1).
276 Code, s. 11.
3. The Need for Expedition

If the judicial trial is to be an effective forum for the resolution of disputes, its decision must not only be final, but must be reached relatively quickly and inexpensively. Thus, this value, the need for expedition, must occasionally predominate over others. Regardless of the importance of the issues at stake for the accused, an investigation on the scale of the Warren Commission cannot be mounted for every charge of murder. The Commission, however placed less emphasis on this value than did the common law judges who fashioned the existing rules of evidence. For example, the purpose of the collateral fact rule and the rule excluding, in the usual case, prior consistent statements, is to expedite trials. The Commission abolished both of these rigid rules. In their place, a discretion was conferred on the trial judge to exclude evidence if its probative value is outweighed by the danger that its proof and disproof would consume an inordinate amount of time. If the Code is adopted, this change should result in the admission of at least slightly more evidence than would be admitted under the present rules. To take a counter example, judicial notice is a doctrine that is designed in part to expedite proof-taking. Here, the Commission liberalized the present rules so that a broader range of matters will be subject to judicial notice. Presumably, this approach will result in the saving of time at trial. Critics of the Commission’s position would argue that this time-saving will be accomplished at the expense of accurate fact-finding and, accordingly, that the rules relating to judicial notice should not have been liberalized.

4. The Need to Protect the Trial Process from Manufactured Evidence

In most fact-finding forums, and certainly in the pursuit of knowledge in scientific laboratories or research libraries, the atmosphere is one of a sincere desire to seek the truth. Usually the persons involved have no motives for falsifying the evidence. Even if such motives do exist, the opportunities to fabricate evidence are slight. In a judicial trial, on the other hand, both motives and opportunities to manufacture evidence are present. Thus, the law of evidence has always shown great distrust for evidence that could be easily manufactured. In the nineteenth century, parties and witnesses with an interest in the lawsuit were prohibited from giving testimony for fear of perjury. Today, the hearsay rule, the best evidence rule and the rules relating to corroboration are, at least in part, premised on the need to protect the judicial trial from manufactured evidence. The Commission took the view that the rules of evidence were too blunt an instrument to be used for the purpose of attempting to protect the trial process from perjured evidence. Therefore, the hearsay and best evidence rules were greatly liberalized, and the rules requiring corroboration abolished. Thus, while ensuring the sincerity of testimony is at pre-

277 Id., s. 62.
278 Id., s. 5.
279 Id., ss. 82-85.
Law Reform Commission of Canada

sent a goal pursued by the rules of evidence, under the Code it is given little recognition.\textsuperscript{281}

5. \textit{The Need to Preserve the Moral Acceptability of the Court’s Decision}

If the judicial trial is to discharge its functions, parties must be willing to submit their disputes to the court for resolution and to accept the ultimate decision of the court as authoritative. To retain its legitimacy as a dispute-resolving forum, the court must apply substantive rules of law that are just. Equally important, the process of determining the facts and arriving at a decision must be acceptable to both present and future litigants and participants. This interest, which must be protected by the rules of evidence and procedure, was considered by the Commission in relation to many of the rules, including: the power the judge has to protect witnesses from harassment;\textsuperscript{282} the admissibility of evidence about the past conduct of the victims;\textsuperscript{283} impeaching the credibility of witnesses by introducing previous convictions;\textsuperscript{284} the accused’s right to confront his accusers; and, the role of the judge in questioning and calling witnesses.\textsuperscript{285} Generally, in drafting the Code, the interest of legitimacy was probably given more weight than the present rules of evidence ascribe to it.

6. \textit{The Need to Protect the Jury from Confusing, Misleading and Prejudicial Evidence}

Two characteristics of judicial trials have no counterpart in most other fact-finding tribunals: the adversary system and the jury. In another article, I have discussed the premises of the adversary system and alluded to the way in which the rules of evidence must be fashioned to ensure its proper functioning.\textsuperscript{286} As to the effect of the jury on the content of the rules of evidence, jurors are not, of course, experts in evaluating litigious evidence. Therefore,

\textsuperscript{281}Bentham warned of the difficulty of convincing lawyers that this interest ought not to be fostered by exclusionary rules of evidence:
Throughout the whole of this work, this practical conclusion is perpetually recurring. Do not exclude any evidence or testimony merely from the fear of being deceived.

Indisputable, however, as this principle is in itself, it is so new, and so contrary to the prejudices and habits of lawyers, that all I may have to say on the precautions to be employed will appear to them to be but a very weak remedy in comparison with the evil.

J. Bentham, \textit{Rationale of Judicial Evidence}, supra, note 61, Vol. 5 at 180. In the Model Code, the fear of perjury was expressly denied as a basis for rules of evidence:
Some of the deformities in that law [the law of evidence] are due to the obsession of early judges and of earlier and later legislators that perjury can be prevented by exclusionary rules . . . . If there ever was a time when exclusionary rules prevented perjury, that time has long since passed . . . . No rational procedure will sanction an exclusionary rule supported only by its supposed efficacy to hinder or prevent false testimony. This truth the Code recognizes.

Model Code of Evidence,\textit{ supra}, note 71 at 6.

\textsuperscript{282}Code, s. 58(2).
\textsuperscript{283}Id., s. 17(3).
\textsuperscript{284}Id., s. 64.
\textsuperscript{285}Id., s. 58.

the law has taken steps to further the rationality of the jury's estimations of the probabilities of propositions about the ultimate facts in issue, by excluding evidence from which they might draw fallacious inferences. Indeed, the majority of the rules of evidence were developed in order to protect the jury's inference-drawing process, and thus rest squarely on presumptions about the jury's fact-finding abilities. The rules might be broadly classified as rules designed to protect the jury from being confused, (such as the collateral fact rule), misled (the hearsay rule and the opinion evidence rule), or prejudiced against the accused (the character evidence rule).

The Commission was generally unimpressed by the need to protect the jury from certain kinds of evidence. Based largely upon their own extensive experience (as trial lawyers and judges, in the case of the chairman and vice-chairman), the general education and sophistication of modern jurors, and impressionistic evidence drawn from a number of studies, the Commissioners concluded that jurors are intelligent and diligent fact-finders. Thus the collateral fact rule, the hearsay rule and the opinion evidence rule were abolished or liberalized. One rule that was retained, and which is traditionally justified on the ground that the jury is not a completely rational fact-finder, is the character evidence rule. A character trait of the accused is sometimes evidence of probative value. It could be argued, therefore, that if the trier of fact were completely rational, there would be no need to exclude such evidence because of its prejudicial tendencies. However, at least one empirical study conducted by the Project suggested, not surprisingly, that people do place an emphasis on character evidence which exceeds its probative value. The Commission was convinced, as well, that the character evidence rule should be retained in order to ensure the legitimacy of the judicial trial. It is obviously of great importance that the trial be seen as a forum where people are tried on the basis of clearly defined acts, which they have been alleged to have committed, rather than on an assessment of their character.

7. The Protection of Values Extrinsic to the Fact-Finding Process

The rules of evidence discussed above are rules designed to further the ultimate objectives of the trial and to support the unique characteristics of the judicial trial, the adversary and jury systems. There are other rules of evidence, however, which are not designed to further the rationality of the judicial trial's search for truth, nor its function as a dispute-resolving forum. These rules exclude evidence on the theory that the value of the evidence to the court is outweighed by some other social value served by suppressing the evidence. The values regarded as being of sufficient importance to justify impeding the court in its search for truth may be divided into those of protecting certain relationships (solicitor and client, husband and wife); safeguarding

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government operations (executive privilege); controlling government power
(privilege against self-incrimination); protecting the innocent (standard of
proof beyond a reasonable doubt); and furthering the aims of the penal sys-
tem (the exclusion of unfairly obtained evidence). During the preparation of
the Code, there were hard fought battles over the efficacy of trying to protect
these interests by the rules of evidence, and over the manner in which such
objectives could best be achieved. The extent to which these values are pro-
tected by the rules in the Code will be obvious to anyone reading it. One
aspect of the last mentioned interest, namely, furthering the aims of the penal
system, deserves brief mention because it was the subject of perhaps the most
heated debate.

The Code provides that evidence shall be excluded, “if it was obtained
under such circumstances that its use in the proceedings would tend to bring
the administration of justice into disrepute.”\(^2\) The exclusion of unfairly
obtained evidence is often justified on the basis of the need to deter the police
from engaging in illegal or unfair methods of obtaining evidence. As is appar-
ent from the wording of the section, the Commission did not conclude that this
reasoning justified the exclusion of such evidence. The reasoning which the
Commission found persuasive was premised on the need to further the aims of
the penal system. One of the aims of the penal system is to educate people
about proper conduct in exercising power. The trial process itself can be used to
further that objective. The procedure followed by the state in deciding whether
to exercise its awesome power against an individual does, to some extent, edu-
cate people in the proper procedure for the use of power. As Thurman Arnold
observed, “Throughout history the appearance of justice and government moral-
ity has been symbolized by the use of the criminal trial.”\(^2\) If the judicial trial is
to fulfill this objective, it must demonstrate the importance of order, discipline,
and fairness as a basis for exercising power. A dramatic way to emphasize
humanitarian values and protect the integrity of the criminal trial as a teaching
device is to exclude evidence that is unfairly obtained. Whether the admission
of the evidence would “bring the administration of justice into disrepute” is
a surrogate question asked in achieving this end. However, it is a term with
which the courts are familiar and it conveys the sense of the section.

8.  The Need to Simplify the Rules

Finally, in striking a balance among the various interests, the rules them-
selves must be certain of application and as understandable as possible. In
view of the Commission’s commitment to simplification, this interest some-
times predominated over others. For example, the need for simplicity tri-
umphed over theoretical niceties with respect to the effect of presumptions.
Although this point often goes unnoticed, under present law, presumptions in
civil cases sometimes operate to shift the burden of going forward with the
evidence, and at other times to shift the burden of persuasion. In a perfectly
rational evidentiary system, those presumptions created simply for the purpose

\(^{290}\) *Code*, s. 15(1).

\(^{291}\) T. Arnold, *The Symbols of Government* (New Haven: Yale University Press,
1935) at 174.
of expediting proof-taking, (given certain basic facts, the presumed fact is so probable that it will save time to provisionally assume it) or for the purpose of achieving procedural fairness, (given certain basic facts, the presumed fact will be provisionally assumed because the adverse party has superior access to proof relating to it) should operate to shift only the burden of going forward with the evidence. Those presumptions created for important reasons of social policy, such as presumptions relating to the legitimacy of children, should operate to shift the burden of persuasion. Presumptions could be distinguished on the basis of their rationales, albeit not without difficulty. The dichotomy is not a crucial one, however, and in the Commission’s view, there was another important procedural value at stake here—simplicity. The Commission recommended a simple workable rule: that in civil cases all presumptions should have the effect of shifting the burden of persuasion.292

This brief survey of the interests to be balanced in formulating the rules reveals the delicacy of the task and perhaps explains why so many of the issues are ones on which reasonable people may differ. It also reveals, hopefully, the general value biases in the Code. Once the value choices were made, the distinct, but equally difficult question of translating them into statutory language had to be confronted.

VI. DRAFTING AND DISCRETION

The present rules of evidence suffer from rampant conceptualism.293 They are technical, detailed, rigid and often applied without reference either to their purpose or to the overall objectives of the system. It is truly an area where lawyers and judges have become bewitched and entrapped by their own jargon. The Commission, therefore, above all, wished to avoid producing a Code which would invite or even permit the development of conceptual jurisprudence. They wanted to discourage a decision-making process that is based, not on the merits of a particular problem, but on the selection of a solution from a number of pigeon-hole categories structured upon the ordinary usage of words and the facts and decisions of previous cases. Consequently, the rules are stated, so far as possible, in terms of the principles which underlie them rather than in terms of minute and detailed rules. In most cases, this will compel counsel to come to court prepared to argue why, in terms of

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292 Code, s. 14(2).
293 For anyone familiar with evidentiary doctrine, this assertion does not need documentation. However, a passage from Dean Wright’s review of Phipson, aptly articulates the problem well:

... Books like Phipson disclose that the past history of this part of the law has been to treat evidence in the same manner as the law of real property—to categorize and classify rigidly and to develop those categories sometimes, one would be tempted to say, merely for the sake of mediaeval logic. If common sense, used in this field to denote what a reasonable man would consider as something normally of probative value, rebelled against too rigid categories, there was always the normal legal method of making a new category in which one could classify anew what he could not force into another mold.

the purpose of the rule, certain evidence should be excluded. This should lead to open, frank, and principled decision-making by judges.

A few of the reforms embodied in the Code can be used to illustrate the change in the way evidence problems will have to be approached under the Code. Common law concepts such as competency, voluntariness and hostility are not used in the Code. Instead of determining whether a child can give evidence by reference to some vague definition of the concept of "competency," under the Code the judge will be asked to determine whether the child's evidence is of sufficient probative value to outweigh the dangers of misleading the jury or the undue consumption of time.\(^2\) In making this determination, the judge will have to consider the child's perceptual ability, memory and sincerity.

Under the present law, in determining whether a confession is admissible, the judge must make a finding as to whether the statement was made voluntarily. This concept has a different and ambiguous usage in virtually every branch of human knowledge, and certainly, on the basis of existing jurisprudence, has no settled usage in evidence law. The Code requires the judge to exclude confessions if made under circumstances likely to render them unreliable, or if their admission would bring the administration of justice into disrepute.\(^3\) These, of course, are the underlying rationales for excluding "involuntary" confessions.

Under the present law, before permitting a party who has called a witness to ask that witness leading questions, the judge must be satisfied that the witness is hostile. But why should the witness's disposition be the deciding factor in determining whether leading questions can be asked of that witness? In deciding whether a witness can be asked a leading question, surely the relevant question is whether the witness desires to give only those answers which are favourable to the party questioning him. If so, it is dangerous to permit counsel to suggest answers to the witness. The Code directs the judge's mind to this question in ruling on the permissibility of the form of a question.\(^4\)

The Code does not completely abandon common law evidentiary concepts and detailed rules. Both the hearsay rule and the character evidence rule, for example, have been retained. Section 27(1) provides that, "Hearsay evidence is inadmissible except as provided in this Code." "Hearsay" is then defined in conventional terms.\(^5\) While it might appear that this definition could lead to arguments over whether a statement is a "hearsay statement" rather than over the merits of admitting out-of-court declarations, the exceptions to the hearsay rule, particularly the exception for a person who is "unavailable as a witness," are drafted so broadly that the definition should not result in the exclusion of reliable and necessary testimony.\(^6\) It has been argued, however, that by defining hearsay to exclude statements which, when

\(^2\) Code, s. 5.
\(^3\) Id., s. 15, 16.
\(^4\) Id., s. 59.
\(^5\) Id., s. 27(2).
\(^6\) Id., s. 29.
made, were not intended as assertions of the truth of the facts which they are being admitted to prove, the Code will lead to the admission of evidence to which the "hearsay dangers" clearly attach. That is to say, the perception, memory, narration or sincerity of the maker of the statement may be in doubt, even though the statement was non-assertive, and no opportunity will be given to test these testimonial elements by cross-examination. The Commission considered drafting a definition of hearsay under which the judge, in determining whether a statement was to be excluded as hearsay, had to weigh the unreliability of the statement made by a declarant out of court against the necessity for the evidence in the particular case. However, it was eventually decided that the general discretionary section, which permits the judge to exclude evidence if its probative value is outweighed by the danger of misleading the jury, adequately covered this situation. The Commission did not want to destroy the vitality of this general clause by essentially repeating it in particular sections.

The Code also retains the common law rules which exclude evidence of the accused's character, but which admit similar fact evidence. The reason for these rules is that the probative value of the accused's disposition to commit the kind of offence with which he is charged, or crimes in general, is assumed to be outweighed by the prejudicial effect of such evidence on the jury. If, however, his disposition is relevant to a specific fact in issue, such as motive, opportunity or intent, the probative value of evidence of his disposition is assumed to outweigh its possible prejudicial effect. Obviously, the character evidence and similar fact rules implement only imperfectly the principles underlying them. In some cases, even though the accused's disposition might relate to a specific fact in issue, its probative value will be slight and its possible prejudicial effect great, and, therefore, it should be excluded. Under the present law, it is generally recognized that the judge has a discretion to exclude the evidence in such a case. Certainly under the Code this authority is recognized by the general provision permitting the judge to exclude evidence if its probative value is outweighed by the dangers of undue prejudice.

However, it is also true that, in some cases, the probative value of evidence of the accused's general disposition to commit the crime with which he is charged outweighs its prejudicial effect. This might be so in cases where the relevant character trait is an unusual one, as in cases involving certain sexual offences or child battery. The accused's disposition to commit the crime, proved, for example, by previous convictions for the same offence, might also be extremely probative in a case where there is independent evidence connect-

299 Id., s. 5.
800 Section 17(1) provides:

... evidence tendered by the prosecution of a trait of character of the accused that is relevant to the disposition of the accused to act or fail to act in a particular manner is inadmissible ... .

Section 18 provides:
Nothing in section 17 prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his disposition to commit such act, such as evidence to prove absence or mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.
801 Id., s. 5.
ing the accused with the crime. The rigid character evidence rule, however, would result in the evidence of character being excluded in both of these cases.\textsuperscript{802} It would have been consistent with the Commission's general philosophy to have no rule dealing with character evidence. The judge would simply have applied the principle in every case, weighing the probative value of the evidence against its prejudicial effect. Ultimately, however, the Commission was concerned that it should not appear to open the door of admissibility too widely in this area. The Commission felt strongly that the utmost care should be taken to ensure that accused people were not judged, or perceived to be judged, on their character rather than the act with which they were charged.

The drafting of the character evidence rule is exceptional. For the most part, the Code is drafted in terms of principles rather than detailed rules. This point can be further illustrated by comparing the Code with the comparable sections proposed in the Evidence Project Study Papers. In Study Paper #2, \textit{Manner of Questioning Witnesses}, the Evidence Project proposed a lengthy section dealing with those circumstances under which a party may ask leading questions of a witness called by him.\textsuperscript{803} In the Code this matter is dealt with in a relatively straightforward section:

\begin{quote}
A party calling a witness shall not ask him leading questions unless they relate to introductory or undisputed matters or are necessary to elicit the testimony of the witness, or unless it becomes apparent that the witness desires to give only such answers as he believes will be damaging to the party's case.\textsuperscript{804}
\end{quote}

\textsuperscript{802} Under the present law, judges sometimes avoid this result by reclassifying the evidence, for example, by construing evidence of general disposition as evidence relevant to identity, and thus admit it. See, for example, \textit{Thompson v. The King}, [1918] A.C. 221; 13 Cr. App. R. 61.

\textsuperscript{803} Section 2.

(1) Except as provided in subsection (2), the party calling a witness should not ask him a question that is so framed as to suggest the desired answer.

(2) Subsection (1) does not apply where, in the opinion of the judge or other person presiding at the proceeding,

(a) the question relates to an introductory or other undisputed matter;

(b) the examination of the witness would be unduly prolonged or protracted by any other form of questioning, because of his mental or physical condition, his difficulty is expressing himself in the language in which the proceedings are being conducted, his age or other like reason;

(c) the witness is deliberately suppressing evidence on matters that are known to him;

(d) the witness is reluctant to give evidence or is being evasive in his answers; or

(e) the question will tend to elicit fairly in the circumstances the honest belief of the witness.

Study Paper No. 2, \textit{supra}, note 3, s. 2.

\textsuperscript{804} Code, s. 59(1). It may be noted that the Code provision contains no cross-references or paragraphs. These common characteristics of Canadian legislation were kept to a minimum in the interests of simplicity. Definitions were also avoided where possible, both because they unnecessarily complicate the drafting and because they encourage judges to resolve cases by reference to the meaning of a word derived from its ordinary usage, instead of by reference to the purposes of the section. However, in this instance, it was felt that the words "leading question" had acquired a well-known and common usage that nearly paralleled the correct legal usage, and so the term was used in the subsection 59(1) and defined in subsection 59(3) of the Code.
The Project's draft of a rather lengthy open-ended listing of specific factual instances in which leading questions might be asked, is encompassed within a few simple statements of principle in the Code.\footnote{Although it was not drafted in terms of principles, the Project draft was open-ended. Paragraph 2(2)(e), \textit{supra}, note 303, provided the judge with a general discretion to permit leading questions. The commentary on that paragraph stated, "Under subsection 2(e) the trial judge is free to exercise his discretion in all the situations where he feels that leading questions will expedite the examination and will do no harm to the adversary." Study Paper No. 2, \textit{supra}, note 3 at 11. Having provided a number of specific factual instances where leading questions might be appropriate, the drafters wanted to provide a residual exception to virtually foreclose the possibility of appeal on the issue of whether leading questions should have been asked. While the rules relating to leading questions are sensible guidelines in conducting the trial, their application should not be argued at an appellate level. When the Project drafted a rule broadly to ensure that it was not under-inclusive, a list of specific exceptions was often followed by a residual exception. This kind of over-riding or super-eminent provision is common in civil codes. The purpose is to attempt to preserve some of the certainty of rules but, at the same time, to provide for hard cases.}

Another illustration of this basic drafting difference between the Evidence Project recommendations and the Evidence Code are the sections dealing with the use of previous convictions to impeach the credibility of a witness. This evidence is often of little or no probative value, yet it often causes great embarrassment to a witness and unfairly prejudices a party's case. To deal with this problem, the Project proposed that evidence that a witness has been previously convicted should be inadmissible unless the judge finds that the previous conviction involved a false statement or an element of dishonesty and is not too remote in time.\footnote{Section 4. (1) Subject to (2), evidence that a witness has been previously convicted of an offence is inadmissible for the purpose of attacking his credibility, except that the judge or other person presiding at the trial or other proceeding may, in his sole discretion, following an inquiry to be held in the absence of the jury, if there is a jury, decide that it ought to be received on the grounds that (a) the previous offence involved a false statement or an element of dishonesty, (b) the previous conviction was not too remote in time from the proceedings over which he is presiding, and (c) the party attacking the credibility of the witness can produce evidence of the record of the previous convictions. Study Paper #3 \textit{Credibility, supra}, note 3 at 2.}

The Commission again chose to deal with the problem in a much broader and principle-oriented manner. They first provided that a witness' credibility may be attacked or supported by relevant evidence.\footnote{Any party including the party calling him may examine a witness and introduce other relevant evidence for the purpose of attacking or supporting his credibility, except as otherwise provided in this Code. \textit{Code,} s. 62. This section is, of course, technically unnecessary. It adds nothing to the general section of the Code admitting relevant evidence. It was put in to make it clear that the rule that a party cannot impeach a witness called by him, the collateral fact rule, and the general rule prohibiting the admissibility of prior consistent and inconsistent statements made by a witness, were all abolished. It was also the Commission's hope that judges would begin applying a stricter test of relevancy in this area.} They then provided that evidence of a trait of a witness's character for truthfulness or untruthfulness is not admissible unless it is of substantial probative value. This section was designed to balance the embarrassment and unfair-
ness, often caused a witness when a previous conviction is introduced to impeach his or her credibility, against the probative value of such evidence. Somewhat incongruously, the Commission reverted to a strict rule in providing that a conviction incurred more than a certain number of years previously cannot be used to impeach the credibility of a witness. Vice-Chairman Lamer dissented to the imposition of this arbitrary rule of relevancy. The rule was included to provide witnesses with an assurance that their previous convictions would not be revealed if they testified as a witness, thus encouraging otherwise reluctant witnesses to come forward to testify. But in spite of the limitation imposed by this section, a comparison of the Project's draft with the Commission's illustrates a transition from relatively specific rules to more general rules.

This issue, whether laws should be drafted broadly in terms of principles or narrowly in terms of detailed rules, must be faced by all drafters. The draftsmen of the American Law Institute's Model Code of Evidence were forced to confront the issue directly because the leading members of that Project had divergent and extreme views on the matter. It is worth briefly recounting their debate because the issues there were so clearly defined. At the outset of their deliberations, three broad positions were identified. Wigmore argued for a detailed and specific Code, modelled after his own Code of Evidence. He put forward the following postulate for adoption by the A.L.I.:

Postulate IV. Details. This Code, aiming as it does to become a practical guide in trials, must not be content with abstractions, but must specifically deal with all the concrete rules exemplifying the application of an abstraction, that have been passed over in a majority of jurisdictions; the Code specifically either repudiating or affirming these rules.—If the objection be made that the law of Evidence should no longer remain a network of petty detailed rules, the answers are, first, that both Bench and Bar need their guidance in order that a normal routine be ordinarily followed for speedy dispatch at trials without discussion; secondly, that the Bar needs them in order to prepare evidence for trial along normal expected lines; and thirdly, that the really effective way to eliminate the present frequent over-emphasis on detailed concrete rules, is to provide that they shall be only guides, not chains,—directory, not mandatory,—and therefore to forbid the review of the Trial Court's Rulings, except in extreme instances.

The other extreme position was held by Charles E. Clark, Judge of the Second Circuit, at one time Dean of Yale Law School, and chief drafter of the Rules of Federal Procedure. He argued for a short, general, simple and flexible Code; a statement of a few general principles to be applied by the trial judge.

Edmund Morgan, the reporter, took an intermediate position. He argued that while the Code should be flexible and avoid unnecessary detail, it should also be sufficiently complete. Morgan's approach was adopted. It has

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308 Code, s. 64(1).
309 Id. at 96.
310 See (1939-40), 17 A.L.I. Proceedings 64.
311 Id. at 70, where Morgan quotes the Appendix to Evidence Code, Tentative Draft No. 1 at 111-12.
312 Id. at 80-84.
313 Foreword to Model Code, supra, note 71 at 12-13.
314 Supra, note 310 at 64-97.
also been adopted by most subsequent American codifications. While Morgan’s position was characterized as the middle position, it was clear that he was in favour of broadly drafted sections. At one point, asked to draft more specific rules, he stated:

If you gentlemen are not willing to give trial judges wide room for the exercise of discretion in the application of rules of evidence . . . [y]ou would have to get another reporter if you wanted a Code drafted with all those detailed rules because I think that would be the worst thing that could possibly happen to the law of evidence.

Drafting broadly in terms of principles means that the trial judge is given a wide discretion, as some people see it, in applying the law. In another article I have evaluated the costs and benefits of drafting in terms of principles and have explained why the drafters of the Code decided to draft in terms of principles in most instances. Without repeating the substance of those arguments, I would like to make a number of other points in answer to those who charge that the Code confides too much discretion in trial judges.

If discretion means the unaccountable freedom to decide one way or the other, one might argue that no body of principles could bestow on trial judges more discretion than the existing jurisprudence on the law of evidence. Over three hundred cases dealing with points of evidence law are reported in Canadian law reports alone each year, many of them raising several issues of evidence. A reading of any one year’s production should persuade a disinterested observer that the chances of predicting the outcome of individual cases are little better than random, regardless of the criteria followed. This unpredictability cannot be accounted for, as in other areas of law, on the basis that it is only the troublesome cases that reach the Court of Appeal. Many evidence judgments are not appellate court decisions. But more importantly, cases, particularly criminal cases, are not usually appealed because some evidentiary error was made at trial. The decision to appeal is most often made on the basis of the amount of money at stake (for both lawyer and client), the bargain made with the prosecutor, the seriousness of sentence, and a whole range of other such factors. Once the decision to appeal is made, the transcript is combed for evidentiary errors. Thus, in terms of the evidentiary issues, the cases that reach the appellate courts are probably almost randomly selected.

There are so many reported evidence cases (Wigmore cited over 85,000 in his treatise in 1940) and they are so often in conflict, that they tend to cancel each other out. On almost any contentious offer of proof, a respectable argument either for or against its admission can be made on the basis of the authorities. It is a disingenuous judge who, on a particular point of evidence, cannot decide a point either way and cite a body of authority in support of his

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816 (1943), 19 A.L.I. Proceedings 222.
decision. That, I would argue, is discretion: the ability to draw on one line of authority or another, and resolve the case either way, without having to render a principled judgment on the merits of the issue.\footnote{318}

It is sometimes argued that rigid rules of evidence are necessary to prevent a corrupt judge from abusing his discretion or to prevent a foolish judge from blundering. This argument was raised in the American Law Institute’s proceedings when discussing the adoption of the Model Code of Evidence, and a review of the highlights of that debate is instructive. Judge Van Voorhis maintained, “it would require a very unusual trial judge indeed to be able to apply many of the provisions of this Code where an arbitrary discretion is confided to the trial judge without any standards which he is to follow in the rendering of a decision.”\footnote{319} Morgan replied that, “If our tribunals are incompetent, gentlemen, there is no use making rules of evidence for them. If trial judges cannot be trusted to exercise fair judgment in cases of this kind, there is just no use of making rules of thumb for them.”\footnote{320} The specific rule being discussed at the time of the debate provided that the judge could exclude evidence if its probative worth was outweighed by, for example, the risk that its admission would necessitate an undue consumption of time.\footnote{321} After an extended discussion, Judge Augustus Hand, growing impatient with the debate, stated, “But has there ever been a time when a judge did not use his discretion in this very kind of a thing that is called for by this section? This kind of talk about this particular section is nonsense and a waste of time....”\footnote{322} Judge McElroy spoke in similar terms, but met squarely the argument that trial judges abuse their discretion:

... [We] had might as well candidly recognize that our having a fair trial depends to the highest degree upon the sense of fairness, the good faith, and the will-

\footnote{318}{One reason for the “elasticity” of the common law of evidence is that most evidentiary concepts are identified by words which have multiple reference. See J. Stone, \textit{Legal Systems and Lawyers’ Reasonings} (Stanford, Calif.: Stanford University Press, 1964).}

\footnote{319}{\textit{Supra}, note 316 at 220. After elaborating on this point, the judge concluded with a catch-22:

... saying these things I warn the Reporter not to be too severe with his criticism of my position in this regard because any administrative weakness upon my part will prove, as I think it should, that I am unfit to be trusted with arbitrary discretion upon so wide a scale.}

\textit{Id.} at 221.

\footnote{320}{\textit{Id.} at 224.}

\footnote{321}{Rule 303(1)

The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will

(e) necessitate undue consumption of time, or

(b) create substantial danger of undue prejudice or of confusing the issues, or of misleading the jury, or

(c) unfairly surprise a party who has not reasonable ground to anticipate that such evidence would be offered.}


\footnote{322}{\textit{Supra}, note 316 at 225.}
Thus, a consensus emerged among members of the Institute that, in the words of Edmund Morgan, "No legislation can create a procedure which a fool or a crook cannot pervert to his blundering or sinister purpose." The Model Code was, therefore, drafted on the assumption that it would be administered by a competent and honest judge.

Even if the formulation of detailed rules of evidence could minimize the possibility that the trial judge might misuse his discretion, the exercise, if undertaken for this reason, would be futile. The judge's decision-making process is replete with unreviewable discretion. In reaching his decision on the facts, he must evaluate and weigh the evidence and the credibility of witnesses. In undertaking this onerous task, he has complete discretion in the sense that he is unguided by rules or even standards. The judge also has an almost unfettered discretion in deciding whether to grant a discharge and in determining sentence. It is utterly incongruous to place such complete trust in the judge's ability to evaluate the proof and pass sentence, and yet to distrust his ability to make a principled decision about the admissibility of evidence.

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323 Id. at 226; see also J. R. McElroy, "Some Observations Concerning The Discretions Reposed In Trial Judges by The American Law Institute's Code of Evidence," in Model Code of Evidence, supra, note 71 at 356. Justice Charles Clark, arguing that a Code of Evidence should consist of only a few general principles, also addressed the issue of whether broad standards are dangerous in the hands of a weak judge:

"It is often said that you must have detailed rules, not for the good judge who does not need any rule, but the weak judge, but I think if you will follow the history of procedural development in this country you will see that that is decidedly not so."

There is no remedy that I know of for a weak or unintelligent judge. You have just got to take him as he is. But the worst possible remedy is to suggest detailed rules with the idea that you are going to compel him to be a better judge than he is because all that means is that you have given him a refuge behind which he can conceal somewhat or to some people his lack of intelligence.

Supra, note 316 at 82.

324 E. M. Morgan, Foreword to Model Code of Evidence, supra, note 71 at 8. See also McElroy, supra, note 323.

325 This, of course, was one of the premises of Jerome Frank's fact-skeptisms:

"When the oral testimony is in conflict as to a pivotal fact issue, the trial judge is at liberty to choose to believe one witness rather than another. In other words, in most cases the trial judges have an amazingly wide "discretion" in finding the fact, a discretion with which upper courts, on appeal, seldom interfere, so that, in most instances this "fact discretion" is almost boundless."


326 James Thayer made this same point over fifty years ago in arguing that rules of evidence should be regarded simply as rules of thumb. In meeting the objection that this would repose too large a discretion in judges, he said:

"Those who make it this objection, forget, for the moment, how much discretion is already reposed in our judges, and exercised by them at every hour of the day and in every part of their functions. In imposing criminal sentences, in punishing contempts, in passing upon motions, in making rules of court and regulating practice and procedure, in adopting rules of presumption, in determining the limits of judicial notice, in applying the rules of evidence, and in conducting trials generally,—in discharging these and other duties, a vast discretionary power is everywhere exercised. Men who can safely be entrusted with the discretion which
It seems to be the last vestige of the myth that, in applying the law, judges operate as slot-machines. Indeed, since rulings on the admissibility of evidence can be reviewed on appeal, a judge would have to both corrupt and ignorant to attempt to attain his sinister ends by misapplying the rules. Only a century ago, most of the rules of evidence were fashioned by judges on the assumption that witnesses were corrupt and jurors ignorant. We no longer feel that we can justify excluding evidence for these reasons. It would be incongruous, although poetic justice, to justify retaining the rules on the ground that it is the judges who are both corrupt and ignorant.

Even assuming that detailed rules might, to some extent at least, assist the foolish judge and dissuade the dishonest, this benefit must be weighed against the costs imposed by such rules. One such cost is that detailed rules will in many instances prevent good judges from giving a correct ruling on the merits of admitting certain evidence.327

Finally, it is perhaps worth noting that the history of all procedural reform represents a move from rigid and inflexible rules to liberality and flexibility.328 There is scarcely a procedural scholar who has not advocated the liberalizing of the rules of evidence. Thayer noted: "[T]he rules of evidence should be simplified; and should take on the general character of principles to guide the sound judgment of the judge, rather than, minute rules to bind them."329 Wigmore made the same point: "A formulated rule tends unwholesomely to be the judge's tyrannous master, not his ministrant tool. What the system of Evidence needs is, not so much another set of rules, or fewer rules,

the ordinary exercise of the judicial office imports, every day of the week, are fit to undertake the function that I am now suggesting.

Thayer, supra, note 273 at 94.

327 Our judiciary has not always been everything it should be .... However, courts like other social institutions, must depend for their ultimate success upon the integrity of the human beings who compose them; because a few judges have failed is no reason for tying the hands of all.

K. M. Johnson, Province of the Judge in Jury Trials (1929), 7 Tenn. L. Rev. 107 at 117.

328 The persistent habit of treating procedure as merely rules, and their enforcement, perhaps results from the failure to recognize the difference between rules of procedure, which are, so the adage goes, the handmaiden of justice and not its mistress, and substantive laws, which are intended to affect the vested interest of the parties:

An advance from the traditional treatment of the hearsay rule means, then, giving a very free hand to the trial judge. We ought to face this fact and fearlessly increase his powers .... We should keep clearly before our minds that this whole matter of evidence is mainly procedure, and that a claim of rights by the parties in such a field is to be accepted with caution. Many of the defects in our procedure can be traced to this error of treating supposed rights of parties concerning the rules of evidence on the analogy of property rights, .... simplicity and flexibility, important enough in any question of procedure become doubly important in a matter so delicate and varied as the guidance of a trial before an untrained tribunal. In such a proceeding everything that hampers the administrative freedom of the trial judge is to be regarded with suspicion.


as a judicial flexibility of rules.”

Not only evidence scholars, but also experienced judges have also argued for more discretion in applying evidentiary concepts. A remark by Chief Justice Phillips of the United States Tenth Circuit, is typical: “... [Based on] my experience of 13 years at the bar and 29 years on the bench ... [I think] ... a wide discretion should be accorded the trial judge in determining the admissibility of proffered proof.”

Most Law Re-

Another marked shortcoming is the Supreme Court's habit of treating the rules of Evidence as a rigid steelwork invariably applicable in precisely the same way.

But this is highly academic and unpractical—as impractical as the clambered abstractions of any professorial dryasdust. Every man of experience knows that the rules of evidence are based on generalities, on broad policies of experience, and are meant for typical situations—but for those only.

We all know that in the application of them, from case to case, the abstract situation for which they are supposed to be meant, does not necessarily exist; it is varied, in the case at hand. And therefore the rule should bend.

Wigmore, Evidence, supra, note 65 at 249.

The same point was made by Sir John Salmond:

No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the minutiae of the law of evidence. This is one of the last refuges of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abolition of all rules for the measurement of evidential value, but by their reduction from the position of rigid peremptory to that of flexible and conditional rules. Most of them have their sources in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it.


Phillips, Foreword to a Symposium on Evidence (1952), 5 Vand. L. Rev. 275.

A hundred and eighty years ago many judges deplored the quantity of discretion given to them. In 1790, Gros, J. dreaded “that the rules of evidence should ever depend upon the discretion of the judges . . . .” R. v. Inhabitants of Eriswell, supra, note 54 at 711 (T.R.); 818 (E.R.). Of course some contemporary judges still share this concern. An exchange between two Australian judges is fairly typical of the exchanges that the author overheard at meetings on the Evidence Code. In discussing a proposal to liberalize the hearsay rule in Australia, Mr. Justice Wells objected:

... let me interpolate here a strong dissent from the practice that is becoming more widespread amongst law-givers—that of identifying an issue and then leaving its resolution to the discretion of judges. Sometimes the word “discretion” is not actually used but its import is to be observed in legislation far too often. I deplore the tendency of throwing a sticky problem to the judges and demanding that they, under the cover of a discretion, sort the whole thing out. Unless it is unavoidable, parties and their legal advisers should not be made to feel that a case stands or falls according to the exercise of a wide judicial discretion with respect to admissibility.

Justice Reynolds replied:

I profoundly disagree, with respect, with Mr. Justice Wells' and others' distrust of judicial discretion. I do not believe that judges and other people realize how many discretions they exercise in the course of a few short hours in court. I believe these rules were made largely by the exercises of discretion; as I said before, they made the law of evidence for the needs of their time and nearly a hundred years ago, they stopped for some reason developing it. I think if the judges are given a firm, clear, legislative direction now that they can deal with this we can give the law reform in this field of adjudical law the greatest fillip since Lord Brougham's speech in 1828.

(1971) 45 Aust. L.J. 531 at 562 (Wells J.) and 568 (Reynolds J.).
form Commissions have been persuaded of the need for discretion in the law of evidence, and their recent reform efforts reflect this approach.\textsuperscript{332}

Common law lawyers are not accustomed to dealing with general principles and arguments by deduction. In order to make the Code more palatable to common law lawyers, the use of illustrations following each section was suggested. The illustrations would have shown how the principles in the section were formulated, as well as demonstrating their intended application, by clearly identifying the section for the common law lawyer, who is probably more familiar with the factual situations in which rules of evidence are invoked than the general principles behind them. It is interesting to speculate whether such a technique would have reduced the hostility of the bar to the Code. Edmund Morgan made liberal use of illustrations in explaining the operation of the Model Code.\textsuperscript{3} However, the only attempt to have illustrations form part of the legislative enactment was the Evidence Act Stephen proposed for adoption in England. Stephen explained in the preface to his Digest on Evidence, "The Bill [to be introduced into the English Parliament] contained a certain number of illustrations, and Lord Coleridge's personal opinion was in their favour, though he had doubts as to the possibility of making them acceptable to Parliament . . . I think that illustrations might be used with advantage in Acts of Parliament . . . as they bring into clear light the meaning of abstract generalities . . ."\textsuperscript{334} Stephen was severely criticized by a commentator for suggesting that illustrations might be useful in legislation.\textsuperscript{335} However, I remain convinced of their efficacy and regret that the idea was not pursued more vigorously by the Commission.

\textsuperscript{332} The Scottish Law Commission in the preface to the Code states the argument for discretion with eloquence:

\begin{quote}
It is not desirable to put the Courts in a straight-jacket from which they will inevitably seek to escape . . . .

A Code, therefore, should be drafted with the primary aim of enunciating clearly and simply the basic principles of the relevant branch of the law in a form in which they can be readily understood by legal practitioners and others who may wish to consult it. The application of these principles to particular problems, which is often a matter of concern in existing statutes, should be left as a rule to be determined. It is for the Courts to give effect to those principles against the background of a pattern of life which constantly alters. It is recognized that with the passage of time the interpretation of particular articles may change; this is a result to be sought rather than to be deplored.
\end{quote}

\textit{Supra,} note 221 at 4.

\textsuperscript{333} See, for example, the illustrations accompanying Rule 101, Model Code of Evidence, \textit{supra,} note 71 at 97-99.

\textsuperscript{334} Stephen, \textit{A Digest of The Law of Evidence,} \textit{supra,} note 113.

\textsuperscript{335} Lastly, so far as the question of legislation by illustrations is to be decided by the present work, it appears to be itself an illustration against the plan. The attempt thus to monopolize at once the functions of the legislator and the judge—to draw up a general rule, and then to hamper it with instances—is so wrong in principle that we cannot suppose it will ever be adopted.

. . . It is a cover and excuse for vagueness and inaccuracy in the legislator, and is a device by which the law can be made a nose of wax in the hands of the interpreter. On the one hand, assuming the illustration to be accurate, the rule may be narrowed by it; or, on the other hand, which is much more dangerous, if the illustration be inaccurate the rule may be extended to beyond its limits.

Editorial, \textit{An English Evidence Code} (1876), 20 Solicitor's J. 949 at 952.
VII. OPPOSITION TO THE CODE

Lawyers and judges were, with a few outstanding (and, given the rather heated atmosphere generated by the profession's response to the Code, one must add courageous) exceptions, almost unanimously opposed to the Code. This fact itself eventually became one of the most frequently voiced objections to the Code. That is to say, from the premise that lawyers oppose the Code, the conclusion was drawn that the Code must therefore be bad. As one judge put it, "Are all these judges and lawyers so conservative, so blind and so arrogant that they oppose the enactment of the Evidence Code without just cause?" The minor premise of this argument is that lawyers would only oppose the Code if it were bad. Thus, the argument can be refuted by suggesting other more probable explanations for the opposition of lawyers to the Code.

A search for alternative explanations might usefully begin by noting that as an historical phenomenon, lawyers as a group have always vehemently opposed procedural reform of any kind. Perhaps the best known example is the opposition of the organized bar to reform of the technical rules of pleading in the early nineteenth century. In retrospect, their arguments have been exposed as lacking in merit. Professor Sunderland has noted that, "Many of the arguments advanced to meet the broad grounds of public complaint were striking instances of the unintelligent rationalizing by which instinctive or inherited prejudices are given a formal justification." Contemporary commentators were even less kind in describing the bench and bar's defence of the procedural status quo:

This mischievous mess, which exists in defiance and mockery of reason; English lawyers inform us, is a strict, and pure, and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name.

It is interesting to note that many of the arguments made by lawyers in defence of the traditional rules of pleading are again being put forward in defence of the present rules of evidence. Duncan Kennedy's remark seems sin-

See supra, Part A. In the face of the criticism of the Code, some comfort was taken by those working on it from an observation by Ezra Thayer:

Remembering, then, how often prophecies of disaster to follow upon a new thing have failed, even when made by great men with reason behind them, patience and optimism are well nigh exhausted by the dogged resistance to any change in our system which reduced to its lowest terms means nothing but the ignorant clinging of instinct to familiar forms, backed by the advocate's gift of making any position more or less plausible.

E. R. Thayer, supra, note 86 at 356.

Roscoe Pound made a similar observation: "... not the least warning of legal history is one against confident prophecy of disaster when changes are made in the law." The Problems of the Law (1926), 12 A.B.A.J. 81 at 83.

Anderson, supra, note 5 at 167.


Id. at 735.

Mills, "Jurisprudence", in Encyclopedia Britannica, Supplement (1828), quoted id. at 733.
But why do lawyers oppose procedural reform? This question has been called "worth sociological study."\textsuperscript{342} I intend, here, however, to simply recount a few impressions, based for the most part upon the profession's response to the Evidence Code. The consistency of the profession's stance on questions of procedural reform over the years suggests that the reasons underlying it are deep-seated and, perhaps, structural in nature, deriving from the institutional role performed by the legal profession. Further, the highly emotional and unreasoned nature of many of the responses to the Commission's work suggests that many members of the profession feel instinctively that change in this area of law is anathema. Lawyers frequently conduct reasoned debate on the major issues of the day. What accounts for this profound distrust of procedural reform? One possible explanation would emphasize the fact that lawyers are so familiar with the present rules that they have become part of their habits of thought.\textsuperscript{343} They simply cannot conceive of an alternative system or alterna-

\textsuperscript{341} D. Kennedy, \textit{Form and Substance in Private Law Adjudication} (1975-76), 89 Harv. L. Rev. 1685 at 1687.

\textsuperscript{342} K. W. Graham, \textit{supra}, note 201 at 288.

That the dead hand of evidentiary tradition should grip us with a hold so stubborn is a rather intriguing mystery. The mystery is intensified if we seek to find, in this hodgepodge of constitution, statute, court rule and decision that goes by the name of "law of evidence", some unique characteristic which makes its shackles difficult to loosen.


Nowhere else in English law has there been such an obstinate resistance to change and reform as in the law relating to Evidence . . . .


\textsuperscript{343} This explanation has been alluded to by a number of commentators:

This assumption (that the jury-trial system of Evidence is the only safe system) permeates the judicial opinions. It is attributable to the narrow experience of the trial lawyers who have become judges. The inveterate habit of mind cannot easily be altered when the judicial function comes to be exercised. It eulogizes reverently the mint, anise, and cummin of every detail of the system. It enshrines with sanctity each exception to an exception of a rule. It scans the findings to detect a slip in the practice, and when found it fervently dwells on the particular virtues of the violated rule. In short, it acts upon the assumption that no truth ever has been or ever can be discovered, in human controversy, except by the rigid employment of the jury-trial rules.


Breadth of vision in rule enforcement is inhibited by this effort to obey or compel obedience to rules. The repetition of the act of obedience or of the act of compelling obedience thoroughly moulds the ideation of bench and bar, until procedure for them becomes only rules and enforcement of rules; the reason for the rules and the ultimate objective of the system disappear. Repeated situations for interpretation serve to focus a renewed emphasis upon the rule with each interpretation foreshortening the perspective. Judges lay down interpretations. By stare decisis they become part of the rules. Later judges and lawyers respond to comparable stimuli in comparable fact situations to interpret the interpretations. The incentive to obey causes these interpretations to be repeated, and repetition makes them automatic; automaticity encourages a blind response to stimuli; the blind response gives harsh rigidity.
The need for consistency between our behaviour and attitudes is well recognized in psychological theory. A trial lawyer who makes daily use of the rules of evidence would experience unpleasant cognitive dissonance if he or she did not firmly believe in the efficacy of the rules. Even if a lawyer were initially sceptical of the utility of the rules, he or she would eventually resolve this dissonance by persuading himself or herself that the rules were efficacious. Indeed, the longer the lawyer is in practice, and the more experienced in conducting trials, the greater the need to rationalize the existence of the rules. Not many people, with even a modicum of self-esteem, would be prepared to admit that they have been engaged throughout their lives in quackery. Jerome Frank, in the polemical style which often obscured or made unpalatable his great insights, made the same point in illustrating the phenomenon he described as the lawyer's frequent resort to "verbal legal magic" (in this context, the verbal magic surrounding the invocation of the rules of evidence) in order to transform the desire to have judicial trials conducted rationally and fairly into the belief that they actually are.

A less kind, but perhaps more probable, explanation for the profession's opposition to procedural reform, however, might be premised on some perceived self-interest which lawyers consider to be threatened by procedural reform. Lawyers are notorious for strongly resisting change which threatens their narrow self-interest. Indeed, the strength of their opposition is a reliable indicium of the imminence of the threat and of the importance of the interest being protected. On what basis could one argue that narrow self-interest has clouded the profession's response to reform of the rules of evidence?

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344 See Sunderland, supra, note 338 at 726: "... the lack of experience with any other technique makes it difficult for the bar to see defects in the current system, or to appreciate their seriousness if pointed out."

346 Moreover, the self-interest of lawyers is almost invariably at odds with the public interest. Indeed, while it might sound perverse, for this reason I found the response to the Code encouraging. Such an overwhelming hostile response from the bench and bar led me to believe that the Code was on the right track.
First, it is clear that lawyers have little personal interest in improving the evidence rules. As one commentator rhetorically asked, “How interested will a lawyer be, who is paid per trial day, in promoting efficiency and in exploring questions like the added time required to try cases because of the exclusionary rules?”\textsuperscript{347} Further, it may be that a lawyer who successfully invokes a particular rule of evidence to have certain evidence excluded, and subsequently wins the case, views the victory as confirmation that the rules are working well, or at least, that the retention of that rule is in his best interests. Often lawyers communicating with the Commission argued in favour of retaining a particular rule by recounting the facts of a trial experience in which it had worked to his or her advantage.\textsuperscript{348} Lawyers appeared to believe that a rule that had worked to their advantage in a particular case must be “good law.” There is sure to be a reasonable psychological explanation for the fact that such correspondents always recalled trials they had won because of an exclusionary rule, rather than trials they had lost because of the same rule.

What guild interests could lawyers be said to be defending in opposing the Evidence Code? Perhaps the most likely explanation for the profession’s opposition is that the profession thought that the Code threatened their economic self-interest, which is inherent in the preservation of the status quo. A remark attributed to Goldwin Smith makes the point colourfully: “to expect the lawyer to reform legal procedure would be to expect the tiger to abolish the jungle.”\textsuperscript{349} The defence of requirements for legal practice, and the enforcement of prohibitions on the unauthorized practice of law before the courts, are much enhanced if there is, in fact, some special reason why only legally trained persons should appear before them. To suggest that the Code would simplify the law of evidence to the point where lawyers would be unnecessary is, of course, pure hyperbole. However, there is little doubt that the Code does set forth a law of evidence which is more accessible and understandable than the present law. Further, it is clear that lawyers have a vested interest in maintaining the complexity of the law.\textsuperscript{350} In modern jargon, the

\textsuperscript{347} Graham, \textit{supra}, note 201 at 289.

Individual success in practice suffers no apparent loss from the use of a defective system, because the handicap operates equally upon all competitors. Accordingly, immediate self-interest offers no convincing reason for leaving the familiar paths and undertaking a struggle with new problems.

From Sunderland, \textit{supra}, note 338 at 726.

\textsuperscript{348} Lawyers may have real difficulty in examining \ldots [questions relating to the reform of evidence law] objectively. It is much easier simply to favor the use of those evidence rules which apparently help to win verdicts and/or judgments. Thus a practicing lawyer may remember fondly a case that he had last month in which loose interpretation of the rules of evidence aided the court in giving a judgment—in his favor. Another lawyer may recall another case in which stricter application of the rules of evidence was a real help—to his client.


\textsuperscript{350} A commentator, as early as 1826, recognized the interest lawyers have in ensuring the complexity of the law. Referring to the technicalities of pleading, he noted: Not a formality is there which serves not as a pretext for charges; and scarcely
complexity and consequent mystification of law results in its privatization, to
the undeniable benefit of the profession. For this reason, it is unlikely that the
impetus for simplification will come from lawyers, and it is realistic to predict
that common law lawyers will remain hostile to all forms of codification.851
Richard Posner, the doyen of the modern economics and law movement, has
argued:

Since . . . statutory and judge-made rules are substitutes, an exogenous decrease
in the former will lead to an increase in the demand for the latter. This helps
explain the traditional hostility of the legal profession to the displacement of
judge-made ("common law") rules by statutory codes: as noted earlier, the
demand for legal services is apt to be greater, the greater the reliance of the legal
system on precedent rather than statute.352

The self-interest protected by lawyers need not be material. A more specu-
lative reason as to why lawyers oppose reforms in the law of evidence finds
its genesis in the theory of games that people play. In his seminal book, Games
People Play,353 Dr. Eric Berne argued that people tend to live their lives by
playing our certain "games" in their interpersonal relationships. These
"games" are played to avoid confronting reality, to deal with helplessness, to
rationalize activities, or to avoid participation in the "real" world. Is it too
far-fetched to suggest that there is some element of gamesmanship in this
sense in our current procedural system?

The trial has, of course, been analogized to the theatre354 or to a morality
play355 by many commentators, and to a "battle," "fight" or "duel" by

a moment of delay which is not contrived to minister either to the ease or the
profit of lawyers, if not to both . . . Every inconsistency, every groundless dis-
tinction leads to uncertainty, and every uncertainty to law suits, accompanied
with harvests of fees for lawyers: in short there is, perhaps, not a single imperfec-
tion in the law by the existence of which lawyers are not in some way or other
benefited. (1826) 6 Westminster Rev. 40, as quoted in Sunderland, supra, note 338, at 731.

351 Bentham, in explaining why members of the legal profession have such a high
regard for judge-made law, stated:

. . . wherever it exists, lawyers will be its defenders, and perhaps innocently, its
admirers. They love the source of their power, of their reputation, of their for-
tune: they love unwritten law for the same reason that the Egyptian priest loved
hieroglyphics, for the same reason that the priests of all religions have loved their
peculiar dogmas and mysteries. The Works of Jeremy Bentham, supra, note 61, Vol. 3 at 206, as quoted in Alfange,

Indeed, in support of this same point—the legal profession's perceived threat to
their vocational interest in simplifying the law—it has been noted that, "James Carter,
the man who was most active in the campaign to defeat the civil code of David Dudley
Field, was commissioned to do so by the Association of the Bar of the City of New
York." P. A. Rabkin, The Origins of Law Reform: The Social Significance of the Ninte-
thenth-Century Codification Movement and Its Contributions to the Passage of the Early

352 L. Ehrlich and R. A. Posner, An Economic Analysis of Legal Rulemaking
(1974), 3 J. Legal Studies 257 at 274.


354 See M. S. Ball, The Play's The Thing: An Unscientific Reflection on Courts
Under the Rubric of Theater (1975), 28 Stanford L. Rev. 81.

The rules of evidence give form to the theatre or set limits, if not some of the weapons, for the battle. To be sure, some of the rules serve a useful function in this regard by assisting in the resolution of the conflict and by educating people about right conduct and fair play. One suspects, however, that many of the rules are uncritically supported by lawyers, not because they contribute to the socialization function of the trial, but because they ensure that the lawyer—as he solemnly rises to make a spectacular objection or debate, in dramatic oratory, esoteric and, to a layman, incomprehensible points of evidence—remains the leading actor in the drama. The present collection of contradictory decisions, referred to compendiously as the rules of evidence, provides lawyers with an immense arsenal from which to either defend or advance any position. As Morgan and Maguire have observed, the rules of evidence are “clearly such fun that the initiate will not easily tolerate [their] abolition.” In striving to protect their role in the drama, lawyers are not unusual. They only confirm Nietzsche’s famous observation that hidden in every man is a child who wants to play, or as the popular saying goes: “People don’t really grow up, they just play with bigger toys.” Unfortunately, the courts have an important social function to perform, and society can ill-afford to permit them to be used as entertainment for lawyers.

Trial lawyers, to retain their status as members of a learned profession, must claim to be masters of some specialized skill premised on an underlying theory. Their trade must require intensive and systematic schooling in theory as well as applied techniques. The rules of evidence might thus be seen as legitimizing the trial lawyer by making an otherwise fairly ordinary task, the presentation of proof at trial, appear to be a highly intellectual endeavour. Without the rules of evidence, the skill required of a trial lawyer would not be much different, and certainly not any more difficult, than the skill required of any good police detective.

The rules of evidence undoubtedly appear, to a layman and to many lawyers, to be a highly intellectual subject of study. Indeed, John Chipman Gray referred lovingly to the “sustained reasoning” and the “quiet and prolonged study” necessary to master this branch of the law, of which no other “lends itself more easily to philosophical inquiries or subtlety of distinctions.” Erskine discovered the source of the rules of evidence “in the charities of religion—in the philosophy of nature—in the truths of history, and in

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368 See Frank, supra, note 325.
369 Jerome Frank explained the trial lawyer’s support for the jury system by similar reasoning:

In part, trial lawyers’ public praise of the jury system stems from their vested interest in its existence. In part, too, they have come to enjoy the opportunity it affords them to engage in histrionics. Many a trial lawyer has much of the “ham” in him. Trial by jury is melodramatic. As Dean Green says, it is designed to make a stage for the trial lawyer, its chief actor. It is the trial lawyer’s “artistic handiwork. The courthouse is his playhouse.”

Id. at 138.
369 As quoted in Maguire, supra, note 62 at 456.
the experience of common life." Certainly any self-respecting members of a profession would have an interest in retaining the vitality of such knowledge.

A number of other reasons might be put forward to explain the profession's hostility to the Code: many of the sections of the Code would compel them to argue value choices directly, and thus force them, in effect, to admit that the law is not autonomous; a codification of the law of evidence would to some extent lessen the control over law-making presently exerted by lawyers and judges; and finally, the common law lawyer's deep-seated, although misguided and uninformed, hostility to anything that smacks of the civil law. Although this is not the forum in which to thoroughly develop these arguments, it is clear that the opposition of the bench and bar to the Code can be explained on grounds that do not go to the merits of the Code. In contexts such as the present, in which allegations of professional bias motivated by narrow self-interest are easily—and often—made, it seems especially important that the profession steer a course of reasoned debate and analysis in its assessment of proposals for change. From this perspective, the nature and quality of the debate that was provoked by the Evidence Code could not fail to disappoint many observers.

VIII. CONCLUSION

For a lawyer the judicial trial of an issue of fact has two distinct aspects. First, the lawyer must be concerned with proving those propositions of fact upon which his or her cause of action rests and with persuading the trier of fact to the requisite degree of belief in their existence. This aspect of the judicial trial is in essence no different than any other inquiry into historical fact. It involves collecting and evaluating relevant information and making judgments about the probable occurrence of past events. The second aspect of the judicial trial, which distinguishes it from proof in general, is the legal aspect: the rules of evidence. Traditionally, it is this second aspect of the judicial trial that has consumed the attention of lawyers. Indeed, this has been true to such an extent that the systematic study of the principles of proof has been virtually ignored by lawyers. This emphasis is surely wrong. Unless we assume that the rules of substantive law are perverse, "proof" is what the trial should be all about.

Reforming the rules of evidence by stating them in terms of their policy foundations, and by recognizing a discretion in the trial judge to admit evidence if its probative value outweighs the dangers of undue prejudice, the undue consumption of time, and the possibility of misleading the jury, will

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560 See Greenleaf, supra, note 58 at 584.
561 L. Loevinger, supra, note 51: "... the problem of legal proof is nothing more than a particular aspect of the universal problem of drawing valid inferences from data."
hasten the day when judicial trials will become rational fact-finding inquiries. Lawyers will have to prepare for trial by studying logic and psychology rather than the musings of nineteenth century judges. However, a strong case can be made for simply abolishing the rules of evidence. The idea that the rules of evidence should be abolished is not new. Bentham proposed just that over one hundred and fifty years ago. Since then, many commentators have taken up the cause. Some commentators have proposed a set of simple principles to take the place of the rules. Lee Loevinger has suggested that the following three principles are sufficient:

A) All evidence is to be received and considered that would influence a fair-minded man in deciding the issue before the tribunal; B) The tribunal may and should require the production of evidence and witnesses that are or may be appropriate and useful in the investigation of the issue before the tribunal and are within the power of the party to produce; and C) Inquiry should be forbidden into such topics, and only such topics, as have been recognized as privileged for reasons of social policy by the legislature or by explicit judicial decision.

He concluded that “Such a body of principles will serve every legitimate interest now served by the rules of evidence, will avoid many of the defects of the present rules, and will permit and assist in making litigation a genuine search for at least some measure of truth.”

Nor is the notion that the study of the principles of proof should displace

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363 Operating these rules [the rules of evidence] has kept judges and lawyers and law professors so fully occupied that they have not yet satisfactorily explored the important questions of evidential cogency. They have been too busy deciding what should be kept out to make, much less teach, systematic appraisal of what they let in. So the law school work on evidence has to do with exclusion rather than evaluation.


364 Eventually, perhaps, Anglo-American court procedure may find itself gradually but increasingly freed from emphasis on jury trial with its contentious theory of proof. With responsibility for the ascertainment of facts vested in professional judges, the stress will be shifted from the crude technique of admitting or rejecting evidence to the more realistic problem of appraising its credibility. Psychologists meantime will have built upon their knowledge of the statistical reliability of witnesses in groups a technique of testing the veracity of individual witnesses and assessing the reliability of particular items of testimony. Judges and advocates will then become students and practitioners of an applied science of judicial proof.


365 See supra, Part C.

366 A well-known lawyer is reputed to have said to Sir James Stephen when he was drafting his Evidence Code: “My Evidence Bill would be a very short one; it would consist of one rule, to this effect: All rules of Evidence are hereby abolished.” Quoted in Wigmore, supra, note 60, Vol. 1 at XIV. For a discussion which attempts to meet some of the practical concerns that Wigmore expressed with respect to the total abolition of the rules, see Ferrari, Political Crime and Criminal Evidence (1919), 3 Minn. L. Rev. 365.

367 Loevinger, supra, note 51 at 174; for a slightly longer statement of principles to guide the admission of evidence in jury trials, see Thayer, Present and Future of The Law of Evidence, supra, note 86 at 94.

368 Loevinger, id.
the study of the minutiae of the rules of evidence a radical idea. Bentham was again the harbinger. Indeed, the purpose of his treatise, the *Rationale of Judicial Evidence*, was, in his words, "[t]o give instructions serving to assist the mind of the judge in forming its estimate of the probability of truth, in the instance of the evidence presented to it; in a word, in judging the weight of evidence."\footnote{Bentham, *supra*, note 61, Vol. 3 at 204.} This aspect of Bentham’s treatise was all but ignored. Over one hundred year later, Wigmore was compelled to plead: "... [t]he process of Proof represents the objective in every judicial investigation. The procedural rules for admissibility are merely a preliminary aid to the main activity, viz. the persuasion of the tribunal’s mind to a correct conclusion by safe materials... the judicial rules of admissibility are destined to lessen in relative importance during the next period of development. Proof will assume the important place; and we must, therefore, prepare ourselves for this shifting of emphasis."\footnote{Wigmore, *supra*, note 362 at 4. McCormick also perceived the trend in evidence law from strict rules to the discretionary application of principles and, eventually, to the abandonment of the system of exclusion and concentration on the scientific evaluation of proof. McCormick, *supra*, note 362. Many contemporary evidence scholars argue that more emphasis should be placed on the rational processes of weighing evidence and less on arbitrary exclusion. See A. L. Goodhard, *A Changing Approach to the Law of Evidence* (1965), 51 Virg. L. Rev. 759.}

Thus, my fondest hope for the Code of Evidence is not necessarily that it will be enacted, but that it will have some influence in changing the way in which Canadian lawyers think about evidence problems and in which students are taught them. The Code is, in large measure, a product of the long and vibrant tradition of Anglo-American evidence scholarship, which, if it is ultimately to achieve its objectives, will dramatically simplify the rules of evidence and hasten the day on which the profession will take up the important task of rationalizing judicial fact-finding.\footnote{For a bibliography of materials on judicial proof see N. Brooks, "Psychology and The Litigation Process: Rapprochement," in L.S.U.C. *Psychology and the Litigation Process*, *supra*, note 41 at 26.}