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## SYSTEMIC CHANGE AND LOCAL REFORM: TWO VIEWS OF THE FUTURE OF CANADIAN EVIDENCE LAW

By SIMON CHESTER\*

### I

Jeremy Bentham would have had the measure of this symposium. As we speak of change and the alternative modalities of change in the law of evidence, we join in a long standing debate, inaugurated by Bentham a hundred and fifty years ago. The central themes of this symposium were clear in Bentham's work. When we bewail arid over-conceptualism and propose demystification of the law, we follow Bentham's analysis: "to keep the whole subject involved for ever in confusion, the very thickest confusion that can be manufactured, has been the line of policy so diligently and successfully pursued by the fraternity of lawyers throughout the whole field of law."<sup>1</sup> When we seek to substitute a rational system of proof by reducing outdated exclusionary rules, admitting all evidence and then assessing its probative value, for inquiries into out-moded psychology and dubious probabilities, Bentham's thinking precedes us.<sup>2</sup>

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<sup>1</sup> Jeremy Bentham, "An Introductory View of the Rationale of Evidence," in *The Works of Jeremy Bentham*, ed. J. Bowring (Edinburgh: William Tait, 1843). Vol. VI at 144; H.L.A. Hart, *Bentham and the Demystification of the Law* (1973), 36 M.L.R.2.

<sup>2</sup> Bentham, "Rationale of Judicial Evidence," *id.*, Vol. VII at 72.

Bentham, in many ways the most radical of reformers, was the great advocate of codification and a proclaimed skeptic towards the traditional merits of the common law.<sup>3</sup> He insisted on placing even the most revered tenets of the law under critical scrutiny.<sup>4</sup> His intelligent analysis of the future development of the law's substance, method, procedure, and logic, and his definition of the appropriate place of conscious law reform efforts in this development, reminds us that the following articles, whether dealing with subjects such as the desirability of codification or alternative approaches to hearsay, take implicit positions on the central problem facing reformers: the rationality of the law and its capacity to adapt and develop.

I want to stress that when discussing the merits, or imperfections, of the *Report on Evidence*<sup>5</sup> of the Law Reform Commission of Canada or the Ontario Law Reform Commission's *Report on the Law of Evidence*,<sup>6</sup> we are also addressing much broader issues. While those who evaluate the approach of each Commission to various topics may have preferences between the two, rarely can one come to any conclusive judgments, given the fact that the two reports are characterized by such different intentions and informing philosophies. They are fundamentally not comparable. The two reports are directed at effecting practical change, rather than demonstrating, through purely abstract illustrations, the theoretical dilemmas of law reform. Yet the choices made between reform measures turn on preferences and attitudes that derive from moral and political values as much as they spring from experience of the technical intricacies of the trial. They also exhibit very different responses to questions that are emerging in a much wider debate concerning the future development of law in Canada and the appropriate function of a law reform agency in that process.

Indeed the only proposition that commands general acceptance in this symposium is that many features of our law of evidence stand urgently in need of reform. The unsatisfactory character of this part of the law is taken as axiomatic by virtually all who study and write upon the topic.<sup>7</sup> Anomalies, irrationalities and archaisms abound in a subject that has received scant attention from reformers, legislators or academic writers. Lamenting the paucity of principles among the plethora of precedents, most analyses conclude with tortured apologies for irrationalities and pleas for systematic re-

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<sup>3</sup> Bentham, "General View of a Complete Code of Laws," *id.*, Vol. III at 200-10.

<sup>4</sup> Bentham never failed to preach the necessity of scrutinizing everything. "I think, therefore I exist", was the argument of Descartes; 'I exist, therefore I have no need to think or be thought about' is the argument of jurisprudence." As quoted in J. H. Wigmore, *Evidence in Trials at Common Law*, Vol. 1 (Boston: Little, Brown, 1940) at 241.

<sup>5</sup> Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975) (hereinafter Canada Report).

<sup>6</sup> Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976). (hereinafter Ontario Report).

<sup>7</sup> Much of the law of evidence 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": *Michelson v. U.S.*, 335 U.S. 469 at 486 *per* Jackson J. (1948).

form. The case for reform is usually based upon a number of orthodox points: evidence rules are cumbersome, over-complex, often difficult to find and apply, archaic and outmoded, and, on occasion, they may obstruct the court in finding truth and doing justice.<sup>8</sup>

Although evidence law as such is one of the unique features of the English common law,<sup>9</sup> as a separate system of rules it is comparatively recent. Its growth, over the last three centuries, has been shaped by the adversary system of argument and by the pivotal place of the jury in the criminal trial. Evidence law modified the full rigour of the adversary system, which, unmitigated, might tend to conceal or overstress certain evidence, by providing a complex set of rules to heighten the truth finding capacity of the trial. Potentially suspect evidence was screened out by exclusionary rules, since jurors were assumed to lack the judgment or discernment to assess its true worth.

However, over time, evidence law accumulated excrescences and dubious distinctions and was overlaid with a vast number of cases muddying and distorting the rules. The process of reform, through remedial legislation or innovative decisions, did not purge evidence law of its defects. Faced with a Byzantine complexity that took the singular genius of the subject, Wigmore, eleven thick volumes to analyse,<sup>10</sup> all who approach the subject can see the necessity for change. Yet despite the apparent consensus in favour of the need for reform, few topics in law reform have been as fraught with controversy as evidence law. The controversy surrounding the recent *Report on Evidence* of the Law Reform Commission of Canada is simply the most recent illustration of this continuing truth.

The arguments of the reformers are often contentious; the reaction of a number of their critics even more so. A legal profession that can adapt to fundamental reform of land law, commercial law, or family law, nevertheless bridles at evidence reform. When reform distorts the careful balance of the trial by removing procedural safeguards that guarantee liberty, the opposition is well taken. Yet it cannot be assumed that every antique rule of evidence that blocks a court's access to truth necessarily advances and protects other values. Too frequently we tend so to venerate the rules of evidence and similarly concepts such as trial by jury, the adversary process, or the doctrine of precedent, that they become beyond criticism, analysis, or modification. Only when individual rules cause damage to a lawyer's case is any criticism, gen-

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<sup>8</sup> But see *contra*, *Greenleaf on Evidence*, ed. J. H. Wigmore (16th ed. Boston: Little, Brown, 1899) at 584:

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 in the charities of religion in the philosophy of nature — in the truths of history, — and in the experience of common life.

<sup>9</sup> Thayer, *A Preliminary Treatise on Evidence at the Common Law* (London: Sweet and Maxwell, 1898) at 1-2, as quoted in Murray, *Evidence: A Fresh Approach* (1959), 37 *Can. B. Rev.* 576 at 577.

<sup>10</sup> Though *Wigmore on Evidence* represents the fruits of an impressive lifetime of scholarship, the work itself eloquently demonstrates, by its very bulk, how tendencies to over-classification and ratiocination can lead to opacity, casuistry and unreason.

erally local and specific in nature, voiced. One might also add that concern to make evidence rules comprehensible to the general public<sup>11</sup> has not been a major factor militating in favour of a greater lucidity in the law. The focus of study in evidence law has been narrow. The history of statutory reform of the law of evidence in Canada parallels the case law by dealing almost exclusively with minor points of adjustment and rarely with major points of principle. The fundamental questions asked by the Canada Commission, starting with the basic "why evidence law?", have generally been considered meaningless.

## II

Controversy shapes change — the end result has been that the development of evidence reform has been long, compromised, erratic and partial. Law reform commissions must cope not merely with the conceptual constraints of the existing law of evidence, but also with the less tangible bonds of the history of prior reforms. As often happens in questions of law reform, the argument of law reformers may be traced back to Jeremy Bentham. Peculiarly committed to the use of legislation as the basic vehicle of socio-legal change, he proposed a radical reform of the law of evidence.

[M]erely with a view to rectitude of decisions, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded: for that although in certain cases it may be right that this or that lot of evidence, though tendered should not be admitted, yet in these cases the reason for the exclusion rests on other grounds; viz., avoidance of vexation, expense and delay.<sup>12</sup>

Bentham argued for the abolition of exclusionary rules so that all evidence, even hearsay, would initially be admitted<sup>13</sup> and then a judge would assess the probative weight to be attached to it. Bentham rejected rules restricting the competence of witnesses to testify and favoured removing claims of professional privilege.<sup>14</sup> His proposals were uniquely cogent, following closely the logic of utility; for the first time a sustained attempt was made to identify the principles that should underly the law of evidence. From this perspective, he made a bitter and sustained attack on the present law. Although Bentham's attacks have generally been considered as the inspiration of the English statutory reforms of 1843, 1851 and 1898, his more sweeping recommendations went unheeded. This may be the first example of a general principle that where reformers propose both systemic change and local

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<sup>11</sup> "Certainly no one save a lawyer can understand the law of evidence, and in the opinion of this writer no lawyer, even though he may admit to understanding that law, could [ever] explain it": Wright, *The Law of Evidence: Present and Future* (1942), 20 Can. B. Rev. 714.

<sup>12</sup> Bentham, *supra*, note 1, Vol. VI at 203-04.

<sup>13</sup> "Avoid putting an exclusion upon evidence on every occasion on which exclusion of evidence is improper; — as it will be shown to be in every case, except those in which it is called for by a due regard to the collateral ends of judicature.": Bentham, *id.* at 12.

<sup>14</sup> This included doing away with lawyer-client privilege, though Bentham would not admit evidence given to a Catholic priest under the seal of the confessional: Bentham, *id.* at 98; Vol. VII at 366-68.

reform, their arguments toward the broader objectives are seldom as successful as their specific proposals.<sup>15</sup>

From Bentham's example spring Stephen's Indian Evidence Act (1872), Wigmore's Code of Rules of Evidence (1910), the Model Code of Evidence (1942), the Uniform Rules of Evidence (1953), the California Evidence Code (1965), the New Jersey Rules of Evidence (1967), and the Federal Rules of Evidence (1975).<sup>16</sup> Yet the progress of reform measured in terms of the achievement of actual change has been gradual and halting. Of the American reforms, the most controversial and the most stimulating was the Model Code of Evidence. The Model Code was vigorously attacked by the American Bar, which found its simplifications, restatements and innovations unpalatable. Although the Code subsequently was not adopted anywhere, it has nevertheless continued to be a vitally important influence on subsequent reform proposals in the field of evidence.<sup>17</sup> Even the more cautious Uniform Rules of Evidence, which generated little critical reaction, had substantially less ultimate impact than its authors had hoped: they were expressly adopted only in the Virgin Islands, the Panama Canal Zone, and Kansas, and generously drawn from in New Jersey, Utah, and California. The new Federal Rules of Evidence took some thirteen years to gain acceptance, accompanied by fierce debate about the reform of the hearsay rule and the law of privileges. The Uniform Rules of Evidence proposed in 1974, which for the most part mirror the Federal Rules, have been adopted in eight states.<sup>18</sup> The slow impact of American evidence reform becomes all the more apparent when compared with the virtually total acceptance, by both scholars and legislators, of the more radical Uniform Commercial Code, which was intended to effect an even greater transformation of a body of legal doctrine and to have a more immediate impact on the society outside the courtroom doors.<sup>19</sup> In 1961, Professor Edmund Morgan, the moving force behind the Model Code, summed up the situation:

This glacier-like rate of progress makes comparison heartening in terms of geologic periods, but it can hardly be a source of gratification in measuring the

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<sup>15</sup> This characterization may be too harshly drawn since it can be argued that the usual pattern of legal change is for small changes to cumulate into major developments. See L. M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) at 291 and M. M. Shapiro, *Stability and Change in Judicial Decision-making: Incrementalism or Stare Decisis* (1965), 2 *Law in Trans. Q.* 134.

<sup>16</sup> Nokes, *Codification of the Law of Evidence in Common Law Jurisdictions* (1956), 5 *I.C.L.Q.* 347.

<sup>17</sup> Paradoxically, it was also suggested that the Model Code had a harmful effect since it caused restrictive rules to be revived that might otherwise have been left forgotten in the recesses of obscure case law: see remarks of Learned Hand J., quoted in E. M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Columbia University Press, 1956) at 194.

<sup>18</sup> Adopted in Arkansas, Florida, Maine, Minnesota, Montana, North Dakota and Oklahoma, and with slight modifications in Nebraska: see *1977-78 Reference Book* (Chicago: National Conference of Commissioners on Uniform State Laws, 1977) at 64-69.

<sup>19</sup> But see Friedman, *supra*, note 15, at 270.

improvement in the administration of justice by courts in a time of rapidly changing physical and social conditions.<sup>20</sup>

### III

The recent Canadian reports can thus be considered as two of a long series of attempted reforms, which, while of varying scope and success, have all served to bring into the open the implicit premises of the law of evidence. Since Professor Brooks has described the genesis of the Report of the Law Reform Commission of Canada, it may be useful to note some of the background of the Ontario Report, in terms of both the historical background and the Commission's underlying approach to reform.

Although Ontario has had an Evidence Act since 1877, when pre- and post-Confederation legislation was consolidated, statute law still represents only a part of the totality of legal rules concerning evidence, an overlay on the manifold rules of the common law. This mixture of statute law and common law has been preserved for the last hundred years, and its continuation is endorsed by the Ontario Law Reform Commission Report. The Report is predominantly a re-examination and revision of *The Evidence Act*,<sup>21</sup> proposing specific and local amendments to both common law and statute law.

Historically, there have been two earlier attempts to update and rationalize Ontario's evidence law. The first, by the Statute Law Commissioners, chaired by Mr. Justice W. R. Riddell, led to the enactment of *The Evidence Act, 1910*,<sup>22</sup> a work of redrafting and reorganization which, for the most part, is still in force today.<sup>23</sup> Essentially a housekeeping and consolidation exercise, it made minor changes, but accepted the entire conceptual framework of the present law.

The second venture looked to be a much more ambitious attempt. In January 1942, the Honourable Gordon Conant, Q.C., Provincial Attorney General in the last days of the Hepburn Ministry, announced the formation of an Ontario Law Revision Committee<sup>24</sup> to study the advisability of revising the laws of evidence,<sup>25</sup> the administration of estates, and limitation of actions. Professor Cecil Wright, J. J. Robinette, and Leslie Frost, later Premier, were appointed members of the Committee which was chaired by Mr. Justice C. P.

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<sup>20</sup> Edmund M. Morgan, *Practical Difficulties Impeding Reform in the Laws of Evidence* (1961), 14 Vand. L.R. 725.

<sup>21</sup> R.S.O. 1970, c. 151.

<sup>22</sup> S.O. 1910, c. 43.

<sup>23</sup> Cf. Ontario Provincial Archives, R.G. 4.

<sup>24</sup> The establishment of such a body had been recommended by F. H. Barlow in *Interim and Final Reports on a Survey of the Administration of Justice in Ontario* (Toronto: Department of the Attorney General, 1939) at B75, and by the Select Committee of the Legislature Appointed to Enquire into the Administration of Justice in *Journals of the Legislative Assembly of the Province of Ontario*, Vol. LXXV, Session 1941, Part 2, Appendix 2 at 805.

<sup>25</sup> The letter of reference noted that attention was to be focused on the admissibility of written statements (business records, experts' reports) in the light of the *English Evidence Act, 1938*, and in general on clarifying, simplifying and otherwise improving procedure in the courts.

McTague.<sup>26</sup> Dr. D. A. MacRae, author of one of the few Canadian evidence texts, was proposed as a consultant. The year 1942 seemed an appropriate one to embark on evidence reform for a number of reasons. The American Law Institute's ill-fated Model Code of Evidence was receiving a final editorial polishing. Also, the Conference of Commissioners on Uniformity of Legislation in Canada had passed a Uniform Evidence Act at its meeting in Toronto the previous September which, in January, 1942, was recommended for enactment. Canadian legal journals of that year speculated as to the future development of the law of evidence<sup>27</sup> and were explicit in their praise of the approach taken by the American Law Institute in its work towards the Model Code of Evidence.<sup>28</sup> Cecil Wright, in a classic polemic,<sup>29</sup> used the example of the Model Code to censure *Phipson on Evidence*<sup>30</sup> and the common law of evidence which it represented. The year 1942 was an auspicious year, but not a happy one. The Ontario Law Revision Committee "held only one meeting, which was a dinner meeting, and nothing further was ever done."<sup>31</sup> Despite his enthusiasm for the Model Code, Cecil Wright's energies were directed elsewhere and even the attempt was forgotten.

Reform of Ontario's evidence law was to be delayed until the mid-sixties. In 1963, the Attorney General, the Honourable Frederick Cass, Q.C., appointed the recently retired Chief Justice of the High Court, the Honourable James C. McRuer, and the Deputy Attorney General, W. B. Common, Q.C., as a special committee to look into medical evidence in courts of law. This committee reported in February, 1965, and its proposals were implemented in *The Evidence Amendment Act, 1968*.<sup>32</sup> One of its recommendations was that *The Evidence Act*<sup>33</sup> of Ontario should be amended to provide for the admission in evidence of all records made in the ordinary course of business. When in January 1966, the Attorney General asked the Ontario Law Reform Commission to look into the admissibility of business records,<sup>34</sup> the Commission began a process of study that was to last ten years. The Commission's Report

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<sup>26</sup> For the record, the other members were Mr. Justice J. G. Gillanders, Mr. Justice J. A. Hope, Mr. Justice W. D. Roach, D. B. Coleman, Co. Ct. J., J. A. S. Plouffe, Dist. Ct. J., C. L. Snyder, K.C., Deputy Attorney General, I. T. Strachan, K.C., M.P.P., F. H. Barlow, K.C., K. F. Mackenzie, K.C., Professor F. C. Auld, Alan B. Harvey, G. W. Mason and John L. Wilson, K.C.: *Globe and Mail*, February 2, 1942; *The Law Revision Committee in Ontario* (1942), 11 Fort. L.J. 246.

<sup>27</sup> D. A. MacRae, *Wigmore on Evidence* (1941-42), 4 U. of T. L.J. 151.

<sup>28</sup> Cecil A. Wright, note to Morgan, *Comments on the Proposed Code of Evidence of the American Law Institute* (1942), 20 Can. B. Rev. 271.

<sup>29</sup> Cecil A. Wright, *The Law of Evidence: Present and Future* (1942), 20 Can. B. Rev. 714.

<sup>30</sup> *Phipson on Evidence*, ed. R. Burrows (8th ed. London: Sweet & Maxwell, 1942).

<sup>31</sup> Information drawn from the *Globe and Mail*, February 2, 1942 at 4, col. 1; Note, *The Ontario Law Revision Committee* (1942), 4 U. of T. L.J. 399; (1941), 10 Fort. L.J. 289; (1942), 12 Fort. L.J. 98; and from two documents in the Ontario Provincial Archives, R.G. 4: "Law Revision Committee."

<sup>32</sup> S.O. 1968, c. 36.

<sup>33</sup> R.S.O. 1960, c. 125.

<sup>34</sup> Ontario Law Reform Commission, *Annual Report* (Toronto: Department of the Attorney General, 1967) at 10.



on this particular aspect of evidence law was published in February 1966, and was implemented by section 1 of *The Evidence Amendment Act, 1966*.<sup>35</sup> Following this work, the Ontario Commission itself decided to embark on a broad study of the provincial rules of evidence.<sup>36</sup> Dr. Alan W. Mewett, a prolific author on the subject of evidence and editor of the *Criminal Law Quarterly*, was appointed as Director of the Evidence Project. He subsequently assembled a research team of experts from law faculties: B. C. McDonald, R. G. Murray,<sup>37</sup> J. D. Morton, S. Borins,<sup>38</sup> R. J. Delisle,<sup>39</sup> and S. I. Bushnell.<sup>40</sup> These individuals prepared research papers on individual topics in need of reform, analysing the present law and suggesting modifications. These were discussed in great detail by the entire Commission which maintains close control over policy-making processes. In some cases the papers were also discussed with a consultative committee consisting of representatives of the judiciary and leading counsel.<sup>41</sup> The research papers were ultimately circulated on a confidential basis to other law reform agencies, such as the Law Reform Commission of Canada, but were not made available to the general public.<sup>42</sup> Initially, the Commission had hoped to produce a codification, and the California Code was viewed sympathetically.<sup>43</sup> This codification hope was not realized, but at a fairly early stage a commitment was made to frame reform proposals in draft statutory language<sup>44</sup> as a means of focusing discussion, with the result that the drafting of the Draft Act virtually preceded the writing of the supporting text contained in the body of the Report.

One important factor affecting the Ontario project was the protraction of the work during the early years of this decade when the pressures of other work affected the priority given to evidence. The Ontario Commission is fortunate in being able to initiate its own work programme, but it is also bound by *The Ontario Law Reform Commission Act*<sup>45</sup> to receive subjects referred to it by the Attorney General. The Commission has tended to give such references a higher working priority than other projects, and in the

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<sup>35</sup> S.O. 1966, c. 51.

<sup>36</sup> *Supra*, note 34 at 22-23.

<sup>37</sup> *Id.*, at 23, para. 88.

<sup>38</sup> Ontario Law Reform Commission, *Third Annual Report 1969* (Toronto: Ministry of the Attorney General, 1970) at 13, para. 47.

<sup>39</sup> Ontario Law Reform Commission, *Fourth Annual Report 1970* (Toronto: Ministry of the Attorney General, 1971) at 12, para. 42.

<sup>40</sup> Ontario Report, *supra*, note 6 at 251.

<sup>41</sup> The consultative committee consisted of the Honourable G. A. Gale, Chief Justice of Ontario, the Honourable Campbell Grant, the Honourable John W. Brooke, the Honourable E. Patrick Hartt, His Honour Judge F. C. Hayes, His Honour Judge J. A. Clare, F. W. Callaghan, Q.C., Assistant Deputy Attorney General, P. DeC. Cory, Q.C., Ross G. Gray, Q.C., B. J. MacKinnon, Q.C., P. B. C. Pepper, Q.C., Julian H. Porter, J. T. Weir, Q.C., and Clay M. Powell: *supra*, notes 38 and 39.

<sup>42</sup> See statement by Hon. Dalton A. Bales, Q.C., in *Ont. Leg. Debs.*, Supply Committee. June 26, 1972 at S-1578.

<sup>43</sup> *Supra*, note 34 at 23, para. 89.

<sup>44</sup> Ontario Law Reform Commission, *Fifth Annual Report 1971* (Toronto: Ministry of the Attorney General, 1971) at 15, para. 58.

<sup>45</sup> S.O. 1964, c. 78.

early seventies, three references, on Sunday observance legislation, on the administration of Ontario courts, and on consumer warranties and guarantees, largely monopolised the Commission's time. The Commission's important work on family law also tended to pre-empt any discussion of evidence reform.<sup>46</sup> It is impossible to assess the influence of this loss of momentum on the Report ultimately produced, but it may have tended to fragment the basic principles of reform and to make individual chapters stand as discrete topics. The practical need to limit the scope of the inquiry, coupled with the provincial focus of the project, meant that research concentrated on particular aspects of evidence law rather than reviewing the entire system of proof, the structure of the trial, and the merits of the adversary system. Such an ambitious project could only be conducted as a major national inquiry involving close federal and provincial co-operation and the assistance of the practising bar. While there were hopes that such a shared project would be feasible,<sup>47</sup> this ultimately proved impossible. Five years of research had taken place in Ontario when in March 1972, the first research programme of the Law Reform Commission of Canada was approved and their evidence project began its work in earnest.

The drafting of the Ontario Report was undertaken by the project Director, Dr. Alan Mewett, who was also responsible for a large proportion of original research, and for advising the Commission at every stage of the project. Dr. Mewett's draft Report drew together the research contained in the papers prepared by the research team. This draft Report was discussed at length by the Commission and was prepared for publication by an internal Commission editorial team, working under the general direction of the Vice-Chairman, the Honourable James C. McRuer.

Although the Ontario Report does not dwell at length on the theoretical foundations of the undertaking, it does reveal a complex set of attitudes and opinions. It essentially accepts the traditional structure and procedures of the trial, occasionally suggesting alternatives to present practices. A separate Commission study dealt with the administration of Ontario courts, and the revision of the rules of civil practice is currently being undertaken by a committee chaired by Walter B. Williston, Q.C.<sup>48</sup> This contrasts with the evidence project of the federal Law Reform Commission which has been carried on at the same time as a project focusing on pre-trial procedures in criminal cases. Although Ontario's work encompasses many areas of provincial evidence law, it does not purport to provide a comprehensive theoretical analysis of every rule of evidence. Rather it is intended to take a more pragmatic functional approach, concentrating on problem areas which require reform. As a result, the Report contains a number of major reform proposals together with a number of chapters that conclude that since, in many areas,

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<sup>46</sup> See Ontario Law Reform Commission, *Seventh Annual Report 1973* (Toronto: Ministry of the Attorney General, 1973) at 13, and Ontario Law Reform Commission, *Eighth Annual Report 1974* (Toronto: Ministry of the Attorney General, 1974) at 14.

<sup>47</sup> *Supra*, note 34 at 22, para. 86; see also statement by Hon. Arthur Wishart, Q.C., in *Ont. Leg. Debs.*, October 20, 1969 at 7260.

<sup>48</sup> See W. B. Williston, *Revising the Ontario Rules of Practice — The Work of the Civil Procedure Revision Committee* (1977), 1 *Advocates' Quarterly* 18.

the present law appears to be functioning satisfactorily, reform would be undesirable. Change for its own sake is not an objective.

When the Ontario Report speaks of "preserv[ing] the sound and established principles" yet "adapt[ing the] law . . . to . . . the changing conditions of modern society,"<sup>49</sup> it defines a specific and limited role for itself. While it admits that "some of the rules of evidence . . . are obscure" and that "others [are] obsolete," it concludes that "in most areas, the basic principles underlying the present law are sound," that ". . . the common law approach to evidence is basically sound, and that it would be unwise to reform the law in radically new directions."<sup>50</sup> Ontario rejects codification by an argument which links codification with linguistic difficulties in interpreting new provisions, which, it is argued, "could seriously disrupt the administration of justice."<sup>51</sup>

The alternative chosen by the Commission is to make specific necessary reforms, relying on "the organic growth of the common law"<sup>52</sup> to cope with further change. The courts have, in the past, illustrated their ability to fill in any gaps in the law. Codification is thought "to inhibit the growth and development of the common law,"<sup>53</sup> although it is also admitted that the "process of judicial reform . . . is . . . slow and uncertain."<sup>54</sup> The Ontario Commission seems to contemplate that the law of evidence must receive an on-going review, with periodic legislative amendments and alterations where necessary. The common law is accorded a special respect<sup>55</sup> and other law reform bodies are criticized for departing too widely from common law principles<sup>56</sup> or for giving too much discretion to the judiciary.<sup>57</sup> Only in a few carefully delimited areas is the Ontario Report prepared to expand judicial discretion or power of choice.<sup>58</sup> Although the Ontario Report contains copious footnote references to the reforms adopted in other jurisdictions, in only a few instances is it prepared to adopt these outright,<sup>59</sup> generally developing new, and occasionally unprecedented, proposals of its own. The Report demonstrates a desire to clarify uncertain areas of the law and avoid confusion.<sup>60</sup>

Despite the fact that the Ontario Report does not contain any explicit

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<sup>49</sup> Ontario Report, *supra*, note 6 at ix.

<sup>50</sup> *Id.* at xi.

<sup>51</sup> *Id.*

<sup>52</sup> One would hope that the organic growth described will be undertaken in the spirit of *Ares v. Venner*, [1970] S.C.R. 608 rather than *Myers v. D.P.P.*, [1965] A.C. 1001.

<sup>53</sup> Ontario Report, *supra*, note 6 at 14.

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.*, at 108, 145, 152.

<sup>56</sup> *Id.*, at 15.

<sup>57</sup> *Id.*, at 14-15.

<sup>58</sup> See, for example, *id.* at 70-71 (evidence obtained by illegal means) and 221 *ff.* (executive privilege).

<sup>59</sup> *Id.* at 164 (court experts proposal taken from Federal Rules of Evidence); at 274 (judicial notice section adopted from Federal Rules of Evidence); at 218 (various admissions proposals derived from Model Code of Evidence).

<sup>60</sup> *Id.*, at 28, 121.

declaration of its support for relevance as the basis of admissibility, the motif is strongly felt throughout.<sup>61</sup> A consistent theme of the Report is that since exclusionary rules prevent the court from having all possible evidence before it, the loss of evidence must be counter-balanced by other gains or by the preservation of overriding values.<sup>62</sup> For this reason, private privilege is treated very differently than in the federal Report: a general professional privilege is rejected, marital privilege is abolished, and the lawyer-client privilege is not expanded. In considering the law of executive privilege, the Commission broadened the grounds of claim but also added tighter procedural controls.<sup>63</sup> A number of other chapters show that the Commission is more concerned with the expeditious conduct of the trial and the fair administration of justice than it is to use legal norms to safeguard values external to the legal process.<sup>64</sup>

The Ontario Report is its own justification, and since it must be assessed on its own merits, it is not necessary here to offer any further arguments in support of its proposals. The Ontario Commission's objectives are modest and understandable, given its overriding attachment to the existing common law. Moreover, one suspects that the Ontario Commission sensed no strong pressures for reform that might have compelled a more radical posture. Among the different groups potentially affected — the general public, the practising bar and judiciary, and the academic community — there is not the pressing interest in reform so clearly seen, for example, in the area of family law. It is perhaps not surprising that comparatively little public interest has been shown in this aspect of law reform. The technicalities of evidence law are the unique province of the legal profession, despite the fascination the public may have with the drama of the trial.<sup>65</sup> Whether one views reform as a response to a compelling public interest, or as the resolution of a major clash of mores or social values, the conclusion unhappily seems to be that evidence is not a locus of concern on either view. If systemic change is truly desired, the constituency for such reform is not revealed by the comments of the public.

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<sup>61</sup> See Thayer, *supra*, note 9 at 264; Federal Rules of Evidence, Rule 402; California Evidence Code, Rules 350, 351; Uniform Rules of Evidence, Rule 7(f); Kansas Evidence Code, Rule 60 – 407(f).

<sup>62</sup> See, for example, the Ontario Report, *supra*, note 6 at 21, 133.

<sup>63</sup> Burger C.J. in *U.S. v. Nixon*, 418 U.S. 683 (1973) at 710:

Whatever their [the privileges'] origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

<sup>64</sup> Compare the explicit identification of interests in the statement of R. Delisle and N. Brooks in *The Evidence Project* (1973), 4 Can. Bar J. (N.S.) 28 at 28:

In formulating a rule of evidence the following interests must also be considered: the conservation of resources, the efficiency of the entire legal system, the moral acceptability of the courts' ultimate decisions, the manifest fairness of the proceedings, the need for simplification and finality, the preservation of the dramatic unity of the trial, the protection of the integrity of the participants, and the support of independent social policies such as protecting certain relations and controlling the governmental process.

<sup>65</sup> Canada Report, *supra*, note 5 at 1; M. S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre* (1976), 28 Stan. L.R. 81.

Nor do the opinions of the practising bar indicate any clear direction for reform. The profession jealously protects the legal values enshrined in the trial process and the adversary system.<sup>66</sup> In the year since the two Canadian evidence reports were published, the profession has not as a body displayed great zeal to implement either report. It has shown concern about the practical implications of the federal Code<sup>67</sup> and appears to be skeptical of the merits of codification.<sup>68</sup> Nor do reported Canadian cases on the law of evidence reveal any marked judicial dissatisfaction with the rules joined with enthusiasm for wholesale reform. The two evidence projects have been largely staffed by those teaching the law of evidence in Canadian law schools who have a unique interest in the rationalization and systemization of this aspect of the law.<sup>69</sup> However this group is not sufficiently large, organized or politically powerful to be able to generate compelling pressure for reform.

The lack of a sizeable constituency for reform has had a number of significant results, and will probably shape future decisions about implementation. For example, the actual goals of reform tend to be indeterminately expressed. Law reform will bring, we are assured, a more reasonable balance between the flexibility that would result from making the individual judge the sole arbiter of admissibility, and the specificity that would result from an attempt to make a set of rules so detailed and so meticulous as to cover virtually every conceivable situation.<sup>70</sup> However it could as easily be argued that such a balance is currently displayed in the common law.

#### IV

It must also be remembered that the tradition of the common law rests heavily on the rules of evidence. Built up slowly and haphazardly through the accretion of case law, the rules of evidence have been seldom and recently modified through legislation; growth has been gradual, organic, spasmodic, responding to the stimulus of individual case-situations as they reveal defects. The common law tradition, however, represents more than a historical de-

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<sup>66</sup> In this sense it may well be true that the Ontario Report has captured the profession's sense of the type, though not necessarily the particular detail, of reforms needed. See F. E. Dowrick, *Lawyers' Values for Law Reform* (1963) 79 L.Q.R. 556; M. Weber, *On Law in Economy and Society*, trans. Shils and Rheinstein (Cambridge: Harvard University Press, 1954) at 201-03, 316.

<sup>67</sup> Thayer characterized evidence as a whole as resulting from practical understanding rather than overarching theory:

A system of evidence like this, thus worked out at the forge of daily experience in the trial of causes, not created, or greatly changed, until lately, by legislation, not the fault of any man's systematic reflections or forecast, is sure to exhibit at every step the mark of its origin. It is not concerned with nice definitions, or the exact academic operations of the logical faculty. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound, practical understanding. *Supra*, note 9 at 3-4.

<sup>68</sup> R. P. Anderson, *A Criticism of the Evidence Code: Some Practical Considerations* (1977), 11 U.B.C. L. Rev. 163; critical comments were also made by the then Chief Justice of Ontario, the Hon. W. Z. Estey at his swearing-in, and by the Criminal Lawyers Association: *Toronto Star*, February 8, 1977 at A2, *Toronto Star*, February 9, 1977 at A3, *Globe and Mail*, February 10, 1977 at 1.

<sup>69</sup> Weber, *supra*, note 66 at 198, 205.

scription; it also comprehends a potent ideological ideal, the commitment of the legal culture to the values of legalism:<sup>71</sup> that justice is best guaranteed by procedural safeguards and by consistent rule-following. Legalism is also embodied in the Langdellian pedagogy of North American legal education and closely connected with the process values of formally rational law, judicial subordination and the denial of any extensive judicial contribution to policy-making, and the preference for certainty and linguistic stability. The commitment to these values is widespread within the legal profession, although it tends to be an impulsive one since no one has yet succeeded in fashioning an accurate and coherent theory of the legal rationality of the common law.

Those who would depart from the slow growth of the common law argue that the pressures and complexity of contemporary society highlight both the unsatisfactory element of evidence law and the necessity for thorough reform. The suggestion is clear that the common law lacks sufficient dynamic potential to effect the necessary fundamental changes. We may have become so habituated to the common law of evidence that we fail to recognize the basic uncertainty of the legal rules, the massive amount of discretion that still remains to the trial judge and the necessity for change. Simply to reformulate the common law norms will not change the system, because the characteristic form of reasoning within our legal system would remain. This reasoning focuses narrowly on specific rules, and the interpretation of set forms of words, and neglects the importance of underlying purposes and principles and the social role of law.

Codification is often seen as a threat to the traditional commitments of the legal profession, and on the question of codification the Ontario and Canada evidence reports are in sharp contrast. The Ontario Report further consolidates the evidence rules, extending the pattern of *The Evidence Act*<sup>72</sup> of 1877 and making no attempt at comprehensiveness. By accepting the traditional approach and values of the legal system, the Ontario Report sidesteps the serious jurisprudential issues posed by other reform proposals. It sees the future of Canadian evidence law as an outgrowth from present norms and practices, revised to take account of modern conditions and practical difficulties. The federal Code, however, marks a bold departure from traditional concepts of statute law in its extent, form, and drafting.<sup>73</sup> It also poses a direct challenge to the myth of the rationality of the common law and questions the specific nature of legal argumentation within that system.

At a minimum, a code attempts to restate clearly all the rules of law in

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<sup>70</sup> *Model Code of Evidence* (Philadelphia: American Law Institute, 1942) at xii.

<sup>71</sup> See J. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964).

<sup>72</sup> R.S.O. 1877, c. 62.

<sup>73</sup> Earlier advocates of codification of the law of evidence included Lord Wright, *Legal Essays and Addresses* (Cambridge: University Press, 1939) at 338-39; the Evershed Committee — *Final Report of the Committee on Supreme Court Practice and Procedure*, (1953; Cmd., 8878) at 95, 106 and 325; J. H. Wigmore, *Code of the Rules of Evidence* (3rd ed. Boston: Little, Brown, 1942); and Bentham, *supra*, note 1. Such is the ambiguity of the term "codification" that these authors all essentially proposed quite different exercises.

a particular area, together with the basic underlying principles.<sup>74</sup> Codifications demand basic changes of attitude and reasoning. Common law paradigms of legal reasoning, the reconciliation of case law and the interpretation of statutes, are strained by a code which repudiates the primacy of precedent and which requires explicitly teleological interpretation of generic norms. Codification implies a particular view of language since it demands that special emphasis be placed on the wording of the code. It focuses attention on the purposes revealed or implied beyond the surface rules.

Codification as proposed by the Law Reform Commission of Canada would have a profound impact on our theory of common law argumentation and judicial decision. By generalizing norms and by aspiring to comprehensiveness, a code must perforce result in an expansion of judicial creativity and discretion. The results of the federal Proposed Code will be hard to predict and measure, but we may assume that they will be both complex and substantial.

Indeed, the difficult issues are only revealed when one determines the fundamental goals of a codification, and whether the federal Code achieves its proclaimed purpose. Thus it becomes critically important to examine the relationship of the Proposed Code to the present law and the implicit challenges it poses for conventional legal argumentation in those situations where the result of the application of the rules is not readily predictable.<sup>75</sup> As suggested earlier, law reform often poses difficulties for long-standing notions of the basic autonomy of legal thought, and the Proposed Code postulates a novel conception of the common law, the judicial role, and the logical basis of argument and decision.

Unhappily, at the crucial point of the Proposed Code's relationship to the common law, the Commission's thinking is hedged, almost fuzzy. At times it appears that the Code merely imposes a gloss on the common law; at others that it is intended to abolish the common law; or that it is to be supplemented by common law stripped of its present precedential force.

The Proposed Code contains sweeping general sections, such as section 3: "[m]atters of evidence not provided for by the Code shall be determined in the light of reason and experience so as to secure the purpose of this Code." The purpose of the Code, as shown by section 1, is: "to establish rules of evidence to help secure the just determination of proceedings, and to that end to assist in the ascertainment of the facts in issue, in the elimination of unjustifiable expense and delay, and in the protection of other important social interests."

Section 2 seems to imply that the common law is abrogated: "[t]his Code shall be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed."<sup>76</sup>

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<sup>74</sup> See Law Reform Commission of Canada, *Criminal Law: Towards a Codification* (Study Paper, 1977) at 2, 16.

<sup>75</sup> See, generally, R. M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 80-130.

<sup>76</sup> Cf. *California Evidence Code*, s. 2; *Ghana Evidence Decree 1975*, N.R.C.D. 323, ss. 178(3), (4).

This interpretation seems to be borne out by section 4(1) which states that "[a]ll relevant evidence is admissible except as provided in this Code or any other Act."<sup>77</sup> The Commission speaks of replacing the common law<sup>78</sup> and a number of commentators have seized on this to characterize the Code as abolishing the common law.<sup>79</sup> Yet in the other official language the Commission describes the impact of codification in less absolute terms: "il remplace le common law comme source *supplétive* du droit de la preuve."<sup>80</sup> Case law seems to re-appear, "while past cases can be examined for the light they can shed, under the Code they should not constitute an impediment to informed and experienced judgment."<sup>81</sup> This last point is expanded within the Report when the Commission comments on section 3 by noting that "[p]recedent is . . . a major source of experience and may be looked to, but it will not have binding force."<sup>82</sup> The cautious practitioner will conclude from all this that despite all the talk of abolition of the common law, it may nevertheless be prudent not to discard the ostensibly superseded wisdom of the standard texts by Wigmore, Cross, Sopinka and Lederman, or Glasbeck.

Edmund Morgan in his foreword to the Model Code of Evidence explicitly identifies an over-rigid system of *stare decisis* as the vitiating flaw of evidence.

The rules of evidence have been developed in myriads of cases, wherein the later judges have felt themselves bound by the doctrine of *stare decisis* to adhere to the pronouncements of their predecessors but bound also to avoid the absurdities which the simple application of these pronouncements would produce. In attempting to escape this dilemma they have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in haphazard fashion, one rule seeming to have no relation in reason to another.<sup>83</sup>

Although the federal Report signals a break with the traditional theory of *stare decisis*, it does not provide an unequivocal alternative theory of argument and decision.

The Model Code of Evidence hinted at a new judicial role, in which sufficient discretion would be vested in the judge at trial so that he or she would not feel constrained to twist the decision or the reasoning of the judgment to conform to a set of dubiously reconcilable precedents.<sup>84</sup> The icono-

<sup>77</sup> See also ss. 32 and 54.

<sup>78</sup> Canada Report, *supra*, note 5 at 6.

<sup>79</sup> Mr. Justice D. C. McDonald in *Canadian Bar Association National*, October, 1976, at 11. Paul Rothstein, *An Evidence Code: The American Experience* (1977), 36 C.R.N.S. 274 at 284.

<sup>80</sup> Canada Report, *supra*, note 5 at 7: French text (*italics added*).

<sup>81</sup> Law Reform Commission of Canada, press release headed "Evidence Code Proposed for Canada," Ottawa: December 28, 1975 at 3.

<sup>82</sup> Canada Report, *supra*, note 5 at 51.

<sup>83</sup> E. M. Morgan, *Foreword to Model Code of Evidence*, *supra*, note 70 at 3-4.

<sup>84</sup> Wigmore supports the need for more flexibility in his *Code of Evidence*:

What the system of Evidence needs is, not so much another set of rules, or fewer rules, as a judiciary flexibility in their application. The rules should be guides, not chains. This great curative feature can be obtained, and by a few simple though powerful principles.

*Supra*, note 73, at xiii.



clastic challenge to traditional attitudes becomes explicit in the federal Report. However, to make new uses of precedent and construct a novel theory of legal argumentation which is explicitly purposive and value-oriented is likely to produce great difficulties, particularly in preparation for trial<sup>85</sup> (for example, who can predict when a claim of privilege will be successful?), and in taking appeals (appellate tribunals will have to stifle any inclination to substitute their discretion for that of the judge at first instance).<sup>86</sup> Any increase in the freedom of action of individual judges is likely to be counterpoised by a lack of uniformity in the legal system as a whole, given the necessary limitations on the power of appellate judges to supervise and bring consistency into disparate decisions.

The American movement for codification of the law of evidence has been well documented. Codification efforts were built upon a polemic critique of the illogicalities of the common law of evidence, arguing that codification provided the best method of simultaneously clearing deformities from the law, simplifying the law where possible and achieving a system of rules readily comprehensible by both bench and bar. The amount of hard thinking devoted to the various codes is impressive, and the codes contain many innovative and excellent features. Yet the codification movement achieved only sporadic acceptance.

In a sense, the Model Code is typical because it has been regarded as prototypical. The drafters of the Code lobbied vigorously for the implementation of the Code in legislation. This objective was in distinct contrast to the other work of the American Law Institute, the various Restatements of the law, whose purpose was explicitly didactic, and whose impact can only be traced inferentially in the reasoning of law teaching and appellate opinions.<sup>87</sup> Yet the legal profession as a whole could not be convinced of the wisdom of the Model Code. Wigmore expressed doubts about codification along the lines of the Model Code and produced a new edition of his own Code of Evidence in reply.

Nor have the recent American codes been universally or uncritically welcomed. The Federal Rules of Evidence occasioned critical comment from a number of judges<sup>88</sup> and legislators<sup>89</sup> who rejected the very idea that the law of evidence was amenable to detailed codification. Case by case development was still thought to be the soundest route to reform. Academic writers have analysed the shortcomings of individual provisions of the Federal Rules,

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<sup>85</sup> J. M. Maguire, *The Hearsay System: Around and Through the Thicket* (1961), 14 Vand. L.R. 741 at 775: "It is uncomfortable to go to trial without knowing whether important evidence will be let in or excluded."

<sup>86</sup> Section 11 of the Draft Evidence Code is intended to curb this tendency. Cf. *Model Code of Evidence, supra*, note 70, Rules 6 and 7.

<sup>87</sup> See, for example, the remarks of Laskin J.A. in *R. v. Strand Electric Ltd.*, [1969] 1 O.R. 190 at 200, as quoted in the Ontario Report, *supra*, note 6 at 217.

<sup>88</sup> See remarks of Goldberg J. and Friendly C.J., quoted in House Report No. 93-650 as set out in Title 28 U.S.C.A. at 824.

<sup>89</sup> See remarks of Rep. Elizabeth Holtzman, set out *id.* at 844. See also Spiegelberg, *Rules of Evidence: Hearings Before the Committee on the Judiciary* (U.S. Senate, 93rd Congress, 2nd Session, 1974) at 96.

which were produced by a highly talented group over many years with extensive commentary,<sup>90</sup> and thus thought to be the best effort at reform.

## V

However, it would be both inaccurate and unfair to tie the historic opposition of the legal profession to codification to prejudice, misunderstanding, conservatism, or narrow chauvinism. More is at stake in a move towards a codified system of law than simply sweeping away myth and myopia. In a subtle, though profound way, codification affects the basic intellectual and institutional foundation of the common law system. Critics often react emotionally and directly to a challenge that is sensed rather than comprehended in its totality. They sense tendencies within law reform, perhaps inevitable tendencies, that seek to transform the nature of law and the scope of the legal system.<sup>91</sup> Such law reform activity is explicitly concerned with the understanding of the place of legal change in social change, and necessarily challenges the assumed rationality of the law.

Similar tendencies were shown in the nineteenth-century European codification movement, when evidence laws comparable to the common law rules<sup>92</sup> were swept away by a system of rational evaluation of evidence.<sup>93</sup> Weber's *Law in Economy and Society* describes the process in terms that may also be aptly applied to the federal Code: "modern . . . legal developments have contained tendencies favourable to the dilution of legal formalism. At a first glance, the displacement of the formally bound law of evidence by the "free evaluation of proof" appears to be of a merely technical character . . . . [The] new system clearly appears as a product of substantive rationalization . . . . It is clear that, through the system of free evaluation of proof, a very considerable domain which was once subject to formal juristic thought is being increasingly withdrawn therefrom."<sup>94</sup>

Codification by its deliberate espousal of open-ended standards and purposive reasoning may tend to undermine the autonomy of legal decision-making and to deprive law of its specialist character.<sup>95</sup> The principles of argument to which appeal must be made, such as "reason and experience,"<sup>96</sup>

<sup>90</sup> L. H. Tribe, *Triangulating Hearsay* (1974), 87 Harv. L. Rev. 957 at 972, n. 52.

<sup>91</sup> Hinted at in two recent articles: R. A. Samek, *A Case for Social Law Reform* (1977), 55 Can. B. Rev. 409; J. N. Lyon, *Law Reform Needs Reform* (1974), 12 Osgoode Hall L.J. 421.

<sup>92</sup> Weber, *supra*, note 66 at 227.

<sup>93</sup> Ontario Report, *supra*, note 6 at 3-6.

<sup>94</sup> Weber, *supra*, note 66 at 227; Max Rheinstein's footnote to this passage, written in 1953, is revealing:

The entire system of formal proof was swept away by the procedural reforms of the nineteenth century and replaced by the system of free or rational proof, which did away with most of the exclusionary rules, released the judge from his arithmetical shackles, and authorized him to evaluate the evidence in the light of *experience and reason*. (Emphasis added.)

<sup>95</sup> Weber, *id.* at 279; R. M. Unger, *Law in Modern Society* (New York: Free Press, 1976) at 195; R. M. Unger, *Knowledge and Politics* (New York: Free Press, 1975) at 95.

<sup>96</sup> Draft Code, *supra*, note 5, section 3.

“prejudice, confusion, waste of time,”<sup>97</sup> “human dignity and social values,”<sup>98</sup> “considerations of policy and logic,”<sup>99</sup> “public interest in privacy,”<sup>100</sup> “harshness,”<sup>101</sup> “interests in maintaining secrecy,”<sup>102</sup> represent not fixed legal concepts in the form of legal rules or standards, but norms derived from the general principles of ethic, utility, expedience or an ideology.<sup>103</sup> While no one today would deny that the judicial process must on occasion have recourse to considerations of substantive rationality, the federal Proposed Code goes far beyond this recognition to demand that a trial judge engage in the balancing of competing values to determine the basic question of the admissibility of particular evidence. By their very nature, values may guide a judge, but they do not dictate a decision one way or another or control discretion.<sup>104</sup>

Although one can only applaud the federal Commission’s willingness to explore new directions, I have grave doubts about the implications of some of its work. When the federal Commission expresses its distaste for traditionally limited legal argument and speaks of principles, basic philosophy, purposes and values, it allies itself with some of the most persuasive recent jurisprudential writing. In this respect one of the most important general features of the Draft Code is that it encourages the judge to frame decisions and to refashion argument in terms of values and purposes. The movement to discredit black-letter legal positivism has been supported by other intellectual theories which undermine the views of knowledge, language and decision on which conventional conceptions of judicial decision-making rest. As a partial reaction to the failure of these older theories, increasing stress has been placed on purposive interpretation as the best guide to the just and reasonable application of legal norms. The meaning of a rule, and thus its scope and impact, is said to be linked to a decision about how best to achieve the purposes ascribed to a rule. Despite the obvious attractions of such a theory, purposive interpretation is likely, for a number of reasons, to be *ad hoc*, uncertain, shifting and subjective. Purposes are likely to be highly complex, expressed in the most general and abstract way, and constantly changing. Thus the most effective method of achieving a desired end is likely to change over time and over different situations.

In a large number of areas, ranging from commercial law to family law and criminal law, law reform proposals have suggested making greater use of open-ended standards, further delegation of discretionary powers, a more

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<sup>97</sup> *Id.*, ss. 1, 5, 59(2).

<sup>98</sup> *Id.*, s. 15(2).

<sup>99</sup> *Id.*, s. 14(4).

<sup>100</sup> *Id.*, s. 40.

<sup>101</sup> *Id.*, s. 57.

<sup>102</sup> *Id.*, s. 44(1).

<sup>103</sup> See Weber, *supra*, note 66 at 63.

<sup>104</sup> “The purposive theory of adjudication requires not only a criterion for the definition of controlling policies, but also a method for balancing them off against one another. In the absence of a procedure for policy decision, the judge will inescapably impose his own subjective preferences, or someone else’s, on the litigants”: Unger, *Knowledge and Politics*, *supra*, note 95 at 95. See Weber, *id.* at 75.

active role for judges,<sup>105</sup> and have argued for a broadening of the bases of legal argument. However, by doing so, we have simply substituted a new set of problems for the old. Discredited formalism has yielded to a chimera.

I suspect that the federal Commission has consistently overestimated the usefulness of explicit reference to values as guides to both reform and decision. Value-analysis has very distinct limitations as a heuristic or conceptual technique. Values simply do not go far enough, are too vague, indistinct, or incoherent to serve as useful pointers toward either explanation or change of a society, or to guide a judge towards a just decision.

North American legal thought has, in recent years, moved towards an explicitly policy-oriented model of legal discourse, designed to compel both decision-makers and decision-analysts to make explicit choices between competing values. One may therefore expect to see, in the next few years, the emergence of a jurisprudence of values focusing on this pivotal notion within social psychology.

The very notion of value reveals many difficulties. Values are deep, complex, often irrationally held, linked to emotional preferences; they lie at the core of an individual's life. They are the bedrock on which beliefs, attitudes and opinions are grounded and constructed as an individual encounters the world. Values tend to be shadowy, focused by symbols; they are difficult to locate, identify, analyse, or change. Extrapolating the shared values of mass society from these hidden individual values is a perilous task, that all too easily serves to conceal the imposition of a particular ideological viewpoint. The concept of value presents serious theoretical problems for those who would use it as the key notion to understanding the place of law reform within social change.

Oliver Wendell Holmes emphasized that general principles do not decide concrete cases. The insight remains salutary in law reform. The values of liberty, physical integrity, security of property and social order, the whole range of values expressed and protected in the Canadian *Bill of Rights*, are important and indeed essential, but they do not provide or dictate a solution to any problem expressed at other than the most general level. Virtually every legal problem, whether approached as a law case, or law reform topic, will yield, if analysed, a multiplicity of values, values that often conflict and which require weighing and balancing. In traditional jurisprudence, when social values and interests come into conflict, the function of law is to reconcile, to resolve, to mediate, to do justice, responsibilities which cannot be abdicated in the name of either a consensus or dissensus of values within society. Too much of the thinking of the federal Commission assumes a consensus model of society in which values are uniform, stable and shared. If the Canadian mosaic, which may also be a mosaic of contrasting and conflicting values, fails to provide a consensus on which to base reform, where is the law reformer to turn? Is he or she simply expected to take a conservative stance of accepting whatever injustices may be sanctioned by majority opinion or values? Can one ignore the fact that, all too often, so-called shared values are the prejudices and interests of dominant social and professional

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<sup>105</sup> Meyer, *Evidence in the Future* (1973), Can. B. Rev. 107 at 111.

groups rather than common perceptions of the good? For law reformers, as much as for judges, it is generally impossible to appeal to any stable, authoritative, coherent and universally accepted set of values to guide interpretation and to dictate a decision. Decision-makers must choose which of competing sets of beliefs in society should be given priority; diversity is the truth of human experience.

However limited the role of value analysis may be, it does have its place. In unsettled or rapidly changing areas of the law it often becomes necessary to make explicit use of open-ended standards, or to entrust to judges policy decisions which may turn on value choices. The shared understandings to which we refer as values impinge on the legal decision-maker in a number of ways. Not only do they guide behaviour in contexts unregulated by legal norms, they provide the substantive content of open standards like due care, unconscionability and reasonableness that are used in areas where the variety of circumstances and the competition of opposing policies is such that no set of specific rules would be satisfactory or workable. However, one can reasonably doubt whether every area of the law exhibits such conflicts between either policies or moral theories so as to justify subordinating the possibility of a set of specific rules to generally expressed open standards.

By their very nature, law reform studies often focus on areas where established legal rules are under strain from a conflict of policies generated by the pressures of social change. Indeed it often seems attractive to propose the introduction of open standards as reforms, leaving their precise impact and scope to time and future circumstance in the continuing adjudication of disputes. There is then a deliberate trade-off between the modicum of certainty necessary for citizens to orient their conduct by reference to legal norms, or for lawyers to give advice or prepare for litigation, and the need to expand judicial consideration of values and policies in individual cases.<sup>100</sup> However, there has been no convincing argument presented to show that the law of evidence is under the contemporary stress of such unmanageable conflict between policies that tradition and experience must be discounted or discarded.

## VI

The critical articles contained in this symposium assess the detailed recommendations proposed by the two Commissions. Beyond these questions of substance and the questions of underlying philosophy addressed earlier, the two Reports differ markedly in style and tone. While the Ontario Report, being essentially problem-oriented, at times seems unfocused, it is copiously footnoted and readers who do not find the proposed reforms convincing, will yet be able to assess the alternative approaches of different jurisdictions set forth in the Report. The Report does not centre on a particular unifying theme or purpose, but adopts an essentially pragmatic approach. From its tone the Report is written primarily for the interested legal practitioner or student rather than the general public.

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<sup>100</sup> Weber, *supra*, note 66 at 309; Unger, *Law in Modern Society*, *supra*, note 95 at 197.

This contrasts with the introduction to the Canada Report<sup>107</sup> which attempts to set out the Commission's philosophy of reform and to justify the purposive analysis that it seeks to apply to all rules of evidence. Though the philosophy underlying the Report appears to draw disparate recommendations into a coherent unified whole, at times the Report is unpinned and under-argued. While one recognizes that the desirability of reaching a broad public through untechnical and simplified discussion is a cardinal objective of the Commission,<sup>108</sup> evidence law is nevertheless primarily of interest to the legal profession. It may be that in the conscious attempt to reach a broader public, the Commission was less successful in convincing a legal profession whose support was important if implementation was to be ensured.

For example, at a discussion of evidence reform held by the Criminal Justice Section at the August, 1976, Annual Meeting of the Canadian Bar Association in Winnipeg, the fear was expressed that provisions, such as section 14(4) of the Code, which states that where two presumptions conflict the presumption "founded on the weightier considerations of policy and logic" shall apply, would lead to uncertainty and disparity in the application of the law.<sup>109</sup> There is a lot to be said for and against this principle, yet the Report contains only three lines of commentary on the section, which neither explain nor justify it:

Occasionally two presumptions conflict. Subsection (4) provides a method for resolving such conflict. The one founded on the weightier considerations prevails.<sup>110</sup>

No one could guess from this brief passage that the subject could be treated differently and that the merits of the Canada Commission's position had been persuasively put elsewhere.<sup>111</sup> Section 14(4) is in fact a slightly rewritten version of Rule 15 of the Uniform Rules of Evidence, which also contained a coherent defence of the rule, together with an argument for rejecting the traditional Thayer theory that conflicting presumptions simply cancel each other out. Thayer's view had been adopted in Rule 704(2) of the Model

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<sup>107</sup> Unsparingly criticized by A. W. Mewett, *Law Reform Commission of Canada Report on Evidence* (1976), 18 Crim. L.Q. 155.

<sup>108</sup> W. F. Ryan, *The Law Reform Commission of Canada* (1976), 25 U.N.B.L.J. 3 at 12.

<sup>109</sup> In his article cited *supra*, note 68 at 186, Mr. Justice Anderson deals with the section as follows:

If the Rule in *Hodge's Case* is too confusing, as submitted by the proponents of the Evidence Code, what is to be said of such a 'simple and accessible rule, readily understood by laymen' as is contained in section 14(4) of the Evidence Code, which reads as follows:

(4) Where two presumptions conflict the presumption founded on the weightier considerations of policy and logic shall apply, and if there is no such preponderance both presumptions shall be disregarded.

Need any more be said!

<sup>110</sup> Canada Report, *supra*, note 5 at 61.

<sup>111</sup> See generally, E. C. Mengel, Jr., *Conflicting Presumptions* (1965), 10 Villanova L.R. 324 and McCormick's *Handbook of the Law of Evidence*, ed. E. W. Cleary et al. (2nd ed. St. Paul: West Publishing Co., 1972). § 345 at p. 832.

Code of Evidence, against the advice of both Morgan and Maguire.<sup>112</sup> The issue is a minor but a contentious one and is lucidly joined in both the Uniform Rules and Model Code. Section 14(4) can be seen, by the examples there given, to be both sensible and workable. Yet the interested Canadian practitioner is confronted with an unargued statement in the Canada Report that simply states: take it — or leave it. It is hardly surprising that section 14(4) was attacked since it is an unfamiliar approach, that stands without authorities, without supporting arguments, without an analysis of the problem or of the alternatives. Yet when explained it is, in the words of the comment to the Uniform Rules, "the best and simplest solution, and that most consistent with good sense."

Unpinned by either sufficient argument or authority, cocksure logic cannot convince. If logic was sufficient proof of the wisdom of reform we would even now be in the promised land of Bentham's hopes.<sup>113</sup> But reformers must overcome long-standing tradition, ingrained attitudes and ideological commitments,<sup>114</sup> and that requires a thorough marshalling of arguments to explain proposals and overcome objections. The two reports have been described as falling short of the best work of either Commission, in cogency and clarity, when compared with the evidence reforms of American, English or Australian agencies.

## VII

Today there is a great measure of uniformity in Canadian evidence law. When contrasted with the United States, we have few major difficulties in ensuring the uniform application of evidence rules, since both federal and provincial legislation share, to a very great extent, the same informing principles of the common law. Not only does the common law remain in effect in some areas, but the legislative reforms which have taken place have preserved a considerable measure of similarity between the various provincial Evidence Acts, and the *Canada Evidence Act*.<sup>115</sup>

While it has sometimes been suggested that it might be desirable to have a separate statute dealing with evidence in civil cases,<sup>116</sup> and another purely concerned with criminal cases, this would be difficult to achieve given the present division of legislative responsibility for effecting such a change. The constitutional problem is difficult, and complicated by a number of statutory provisions. For example, while the *Canada Evidence Act* is stated to apply to criminal proceedings and to those civil proceedings over which Parliament has jurisdiction, section 37 of the Act provides that, subject to the *Canada Evidence Act* and other federal statutes, the provincial laws in force will also

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<sup>112</sup> Morgan sets out all the issues clearly, together with examples, in his *Introduction to the Model Code of Evidence*, *supra*, note 70 at 54-64, and in the *Commentary*, *id.* at 314-18.

<sup>113</sup> Bentham, *supra*, note 1, Vol. I at 194.

<sup>114</sup> Weber, *supra*, note 66 at 316.

<sup>115</sup> R.S.C. 1970, c. E-10.

<sup>116</sup> J. Sopinka and S. Lederman, *Evidence in Civil Cases* (Toronto: Butterworths, 1974) at ix.

be applicable. While the precise ambit of section 37 has never been determined,<sup>117</sup> it seems intended to operate to promote the dovetailing of federal and provincial law. Secondly, the Federal Court of Canada has a discretion when hearing matters to admit otherwise inadmissible evidence, if that evidence would be admitted under provincial evidence law in a similar proceeding in a superior court within a province. Lastly, by virtue of section 20 of the *Divorce Act*,<sup>118</sup> divorce proceedings are to be conducted under provincial evidence law, unless the *Divorce Act* or other federal legislation provides otherwise.

The two reports preserve this general division in the scope of their application. The Ontario Draft Act, while generally aimed at civil cases, would also apply to administrative tribunals and to prosecutions for provincial offences. While the federal Code would be used predominantly for criminal trials, it would also apply to civil cases in the Federal Court, and partially to federal hearings and inquiries. However, since the federal Code seeks to be pre-emptive, it does not mar its logic by incorporating provincial law by such an expedient as section 37 of the *Canada Evidence Act*.

So different are the two reports that implementation would create new and unnecessary distinctions between cases tried under federal or provincial law. The legal profession was understandably concerned about the possibility of having two different systems of evidence law, and the attendant confusion that this would cause for judges and lawyers. While any legislative reform requires a period of readjustment and relearning, no coherent case was made out for such a potentially confusing fragmentation of the law.<sup>119</sup>

In many respects it is important that there be a high degree of operating compatibility between federal and provincial law. In addition to the divorce and Federal Court situations mentioned earlier, criminal law is an important example. The same fact situation may constitute an offence under either the *Criminal Code* or under a provincial statute. The practice of criminal law would be immeasurably complicated if different rules of evidence applied between *Criminal Code* offences and provincial offences. The demands of formal equality in the administration of justice, and the practical concern for efficiency would not be served by such a divergence. These concerns were evident in the reactions to the federal Code that followed its publication.

The Minister of Justice, the Honourable Ron Basford, committed the federal government shortly after publication to a programme of consultation on evidence reform with the judiciary, the bar, crown attorneys and senior government officials.<sup>120</sup> A large number of meetings and seminars were organized and chaired by Kenneth Chasse, formerly a Crown prosecutor,

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<sup>117</sup> See Ontario Report, *supra*, note 6, Chapter 17, which canvasses the jurisprudence. See also W. F. Bowker, *The Law of Evidence, 1923-47* (1948), 26 Can. B. Rev. 246 at 247.

<sup>118</sup> R.S.O. 1970, c. D-8.

<sup>119</sup> For an argument along these lines, see J. R. Adams, *Twin Codes of Evidence: Just What the System Ordered* (1975), 20 S. Dak. L.R. 228.

<sup>120</sup> Can. H. of C. Standing Committee on Justice and Legal Affairs, *Proceedings*, No. 54 (May 25, 1976) at 6, 37-38.



who acted as the Justice Department's opinion gatherer on evidence reform. Reactions to the federal Code, interestingly enough, varied greatly from province to province and between professional groups. The results of the opinions garnered at these meetings could be summarized generally in three propositions: that existing law was unsatisfactory; that any reform should clarify and simplify the present law; and that codification in the sense proposed by the Law Reform Commission of Canada was distrusted as a concept. Although seminar groups welcomed a number of the specific reforms in the federal Report, they generally rejected the Draft Code.

The Ontario Report did not provoke the same degree of comment, though particular recommendations such as those on marital privilege, professional privilege and the oath were the subject of critical newspaper editorials. The Ontario government was guarded in any public statements about possible implementation.<sup>121</sup>

Shortly after the publication of the Ontario Report, a number of interested individuals began to express concern about the divergence of the Ontario and Canada Reports, not merely from a disinterested academic curiosity, but from a real anxiety that this divergence might be carried forward into legislation to produce fragmented systems of evidence law. A new initiative was required.

In early 1977, Dr. Richard Gosse, Q.C., the newly appointed Deputy Attorney General for Saskatchewan, started to promote the idea of a special project to draft uniform federal and provincial evidence legislation. Dr. Gosse was uniquely qualified to act as a catalyst in this exercise. His career had included two and a half years as Counsel to the Ontario Commission and a period as a Consultant on Family Law Reform to the federal Commission; latterly he had taught evidence to law students at the University of British Columbia. Dr. Gosse produced a brief discussion paper for the federal-provincial Attorneys General meeting held in Ottawa in June, 1977. At that meeting, it was decided to refer the entire subject to the Uniform Law Conference of Canada, an organization ideally suited, by function and history, to promote a uniform federal-provincial Evidence Act.

At a Special Plenary Session of the Fifty-Ninth Annual Meeting of the Uniform Law Conference held in the Casino of the Algonquin Hotel in St. Andrews, New Brunswick, on August 25, 1977, decisive steps were finally taken to plan the future development of Canadian evidence law. The St. Andrews Resolution established an Evidence Task Force, reporting to the Uniform Law Conference, and invited provincial jurisdictions to join Ontario and Canada as participating members.<sup>122</sup> At the time of writing, British Columbia, Nova Scotia, Alberta and Quebec have agreed to join the Task Force. The Task Force will meet for two days a month under the chairmanship of

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<sup>121</sup> See statements of Hon. Roy McMurtry, Q.C. in *Ont. Leg. Debates*, June 16, 1976 at 3399, and F. W. Callaghan, Q.C. in *Ont. Leg. Debates*, Supply Committee, October 28, 1976 at S-2413.

<sup>122</sup> See remarks of Hon. Roy McMurtry, Q.C. in *Ont. Leg. Debates*, November 28, 1977 at 2320.

Kenneth Chasse, the federal government's representative. Professor A. F. Sheppard of the University of British Columbia has been asked to join the Task Force as full-time research advisor.

The Task Force's primary mandate is to proceed to draft uniform evidence legislation; the task is a difficult one, given the extent of its subject matter and the time constraints under which it operates. It will be some considerable time before one will be able to assess the success of the venture. At the present time it offers a hope for a rational and national development of evidence law, an almost unique example, regrettably, of federal-provincial co-operation, and an illustration of the continuing vitality of the sixty year old Uniform Law Conference of Canada. While it is impossible to know exactly which direction the Task Force will take, it is probable that the overriding concern for uniformity will steer it between the alternate futures of drastic systemic change and limited local reform. The St. Andrew Resolution has in effect made every assessment contained in this symposium interim and tentative.

### VIII

As pointed out earlier, the Ontario and Canada Reports are a result of very different exercises, informed by different views of the need for reform and the effective limits of change. They contrast in substance, style and extent. When both reports are compared, it becomes less easy to reject the federal Report in its totality, as systemic change. For the Ontario Report above all emphasizes that it is possible, even desirable, to take a pragmatic view of evidence reform, effecting necessary reforms, revising discrete areas, discarding obsolete doctrine, moving from each local area to another. In law, as in medicine, plastic surgery is largely cosmetic and transplantation of fundamental parts is hazardous and unpredictable. Save where the entire body is diseased, surgery is best local, precise, studied and careful. The Ontario Report, by emphasizing that reform, albeit modest reform, is necessary and overdue, prevented the more dramatic reforms of the federal Report from being easily rejected.

The reception afforded to the two reports suggests certain conclusions for law reformers.<sup>123</sup> First, that reformers should not over-estimate the benefits of a radical simplification of legal rules. At a certain point, the Byzantine niceties of misleading specificity are simply exchanged for the unknowable exercise of judicial caprice in the name of equity, flexibility and discretion. Wigmore drew back from the Model Code of Evidence on this point:

[A] Code, aiming as it does to serve as a practical guide in trials, must not be content with abstractions, but must specifically deal with all the concrete rules,

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<sup>123</sup> Compare the statement of Mr. Justice Antonio Lamer:

The previous year, the Canadian Law Reform Commission had tabled a law on evidence in code form, which was expressed in terms of principles and was preemptive in character. It was probably unwise of them to have put forward their proposals in this code form since many sensitive areas were involved. It was not readily acceptable and the proposals would now probably have to be phased in gradually. Therefore he agreed on the importance of not attempting unification, codification and reform all at once.

Commonwealth Secretariat, *Law Reform in the Commonwealth* (1977 Meeting of Commonwealth Law Reform Agencies) at 37.

exemplifying the application of an abstraction, that have been ruled upon or enacted 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 answer is, first, that both Bench and Bar need concrete guidance in order that a normal routine be ordinarily followed for speedy dispatch 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 — by forbidding the review of the Trial Court's application of them except in extreme instances.<sup>124</sup>

Secondly, that although the constituency served by a law reform commission must be the larger community of the general public, nevertheless where reform will drastically affect the legal profession it is necessary to make special efforts to convince them of the wisdom of the proposals. Wigmore cautions reformers about the dangers of inflicting reforms upon a legal profession that is largely unsympathetic to, and unprepared for, the new principles. The European move to a free weighing of proof [*freien Beweiswürdigung*] in the early nineteenth century had resulted in a long period of uncertainty: "judicial trials have been carried on for a century past . . . by uncomprehended, unguided, and therefore unsafe mental processes."<sup>125</sup> Reform, to be effective, must rest on a firm scientific base, and gain the approval and understanding of those who must act within the new system of rules. To effect a radical simplification of the law would be dangerous without the support of the profession. Wigmore's own codification of the law of evidence, simplified and arranged on a rational basis, extends to 242 rules set out over 544 pages.<sup>126</sup>

Lastly, we may need to rework our concepts of codification and reassess the supposed benefits that are to flow from the introduction of a code.<sup>127</sup> I do not think that the ideal of codification should be abandoned, but we must recognize that the ideal must be achieved gradually and patiently, and that more urgent reforms will not wait for it.<sup>128</sup>

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<sup>124</sup> Wigmore, *A Code of Evidence*, *supra*, note 73 at xii; see also Wigmore, *supra*, note 10, Vol. I, s. 8(c) at 262.

<sup>125</sup> J. H. Wigmore, *The Principles of Judicial Proof* (2d ed. Boston: Little, Brown, 1931) at 4.

<sup>126</sup> Wigmore, *supra*, note 73. The attempt was described as ". . . a set of rules that read like the Internal Revenue Code or the instructions for assembling mail-order toys . . . . The quest for certainty in a set of hard-and-fast rules to govern the admissibility of evidence is doomed to failure."

K. W. Graham, *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco* (1971), 4 *Loyola U. L. Rev.* 279 at 299.

<sup>127</sup> Cross, *Reform in the Law of Evidence* (1961), 24 *Mod. L. Rev.* 32 at 61.

<sup>128</sup> Cardozo, *A Ministry of Justice* (1921), 35 *Harv. L. Rev.* 113 at 117: Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years . . . . Something less ambitious, in any event, is the requirement of the hour. Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them.

What does codification entail? In its most radical sense, codification represents an attempt to remake the law in a logically and semantically precise pattern: the objective is to attain a comprehensive, exclusive (and indeed pre-emptive) statement of the law, expressed in terms of underlying principles and values, and organised in a logical structure. This contrasts markedly with the generally held understanding of codification in the United States. For example, the main objectives of the evidence codification currently being undertaken by the New York Law Revision Commission are as follows:

1. to simplify and consolidate rules presently scattered throughout the State's decisional and statutory law and restate them in the more easily accessible form of a moderately sized, one-volume evidence manual;
2. to revise or eliminate rules which have become archaic and ill suited to the conditions of present-day litigation, or have otherwise proven unsound; and
3. to promote speedy, inexpensive, and just determination of factual issues.<sup>129</sup>

In this more limited sense, much useful work remains to be done toward codification. We may choose to move towards a more comprehensive statement of rules, but leave the doctrine of precedent intact. Indeed, it is quite possible that the recommendations of the new Uniform Evidence Law Task Force might be embodied in such a form. However more sweeping systemic changes do seem to be out of the question at present.

Not that one doubts the need to develop and discuss ideas about such systemic change. It may ultimately be argued that neither the Ontario nor the Canada Report was sufficiently thorough-going in its review of the law, sufficiently attentive to empirical examination of the practical operation of the rules, or sufficiently radical in its recommendations.<sup>130</sup>

For the most part, the Commissions centered their work on doctrinal analysis, examining reported cases, academic writing, and the legislation, both existing and proposed, of other jurisdictions. Very little empirical or systematic study of the operations of the rules of evidence in trial courts has been carried out anywhere, and the methodological and practical difficulties of undertaking such research would be considerable.<sup>131</sup> In many areas, however, one can doubt whether effective research is possible at all.<sup>132</sup>

Further work along the lines suggested by the federal Report is necessary, but I suspect that evidence reform will not be delayed on that count. The practical orientation of reformers drawn from the ranks of the legal profession makes them impatient with criticism that suggests that remedial action

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<sup>129</sup> *Report of the Law Revision Commission for New York for 1977* (1977, Leg. Doc. No. 65) in *McKinney's Session Law News of New York*, May, 1977, at A-93.

<sup>130</sup> For a harsh attack along these lines, see Graham, *supra*, note 126.

<sup>131</sup> Valuable work has been done by Professor Anthony N. Doob: see *Evidence of Identity and Limiting Instructions* (1973), 15 *Crim. L.Q.* 119; *Psychology and Evidence* in M. L. Friedland, ed., *Courts on Trial* (Toronto: University of Toronto Press, 1975) at 40. *Some Empirical Evidence on Judicial Interim Release Proceedings* (1975), 17 *Crim. L.Q.* 258; *Some Empirical Evidence on the Effect of s. 12 of the Canadian Evidence Act Upon an Accused* (1972), 15 *Crim. L.Q.* 88.

<sup>132</sup> Law Reform Commission of New South Wales, *Working Paper on the Rule Against Hearsay* (1976) at 284.

must await a truly comprehensive study of the day to day operation of the trial: "And it may be doubted whether the suggested research is really necessary to achieve the objective of having rules which can be understood and applied with ease by the courts . . . Faced with an absence of research, and the present impossibility of achieving it, are we to defer any proposal for reforming the law of evidence for a long time when less elaborate observations and the teachings of common sense show that substantial advantages would follow at once from some reforms?"<sup>133</sup>

The focus of the reform may limit vision. Evidence is so inextricably bound up with our processes of dispute resolution and with substantive rules of law that it must be approached in the broadest way. Perhaps both these reports will become part of a process of reform that achieves this objective, that looks at evidentiary rules as part of a re-examination of the total method of social dispute resolution, not as a limited and academic study. "If we are to do justice to our concept of justice we soon must analyze the values and mechanics of our entire dispute resolution system, bring together what we now call procedure, evidence, judicial administration, and trial practice, and place the proof system in its proper focus."<sup>134</sup>

To reform evidence law requires us to look beyond the present and to go beyond the law of evidence. It will be a continuous, on-going process. According to Mill, Bentham "found the philosophy of judicial procedure, including . . . evidence, in a more wretched state than even any other part of the philosophy of law."<sup>135</sup> However, when he describes Bentham's work in this area as carrying "it at once almost to perfection; [he] left it with every one of its principles established, and little remaining to be done even in the suggestion of practical arrangements,"<sup>136</sup> Mill freezes the necessary development of practical arrangements,<sup>136</sup> he freezes the necessary development of the law. Such a formulation, while generous to Bentham, denies a future to the law. The possible forms that the future may take has been the major concern of this article, and, implicitly, of the articles that follow. This symposium is a contribution to, as well as a preliminary assessment of, the future development of Canadian evidence law. As such it is not merely about law reform, it is part of it.

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<sup>133</sup> *Id.*

<sup>134</sup> Mill, *Beyond the Law of Evidence* (1967) 40 S. Calif. L.R. 1 at 37.

<sup>135</sup> J. S. Mill, "Bentham," in *Essays on Ethics, Religion and Society*, ed. J.M. Robson (Toronto: University of Toronto Press, 1969) at 104.

<sup>136</sup> *Id.*