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CALIFORNIA'S "RESTATEMENT" OF EVIDENCE: SOME REFLECTIONS ON APPELLATE REPAIR OF THE CODIFICATION FIASCO

by *Kenneth W. Graham, Jr.**

In 1923 the American Law Institute (ALI) decided that a "Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law."¹ The ALI undertook instead to draft a Model Code of Evidence. The Code was not adopted in any state and was bitterly attacked by a Committee of the State Bar of California,² largely because of provisions thought to increase the power of the trial judge.

Responding to criticisms of the Code, the Commissioners on Uniform State Laws in 1953 promulgated a much more modest program of reform—the Uniform Rules of Evidence. When the Uniform Rules had received the imprimatur of the ABA and were being considered for adoption in other states, the California legislature directed the Law Revision Commission to study the possibility of enacting the Rules as law in this state.³ After studying the problem for nearly a decade the Commission came to the conclusion that what California needed was not the Uniform Rules but a Restatement of California Evidence. This parody of progress was, with little detailed consideration, enacted by the Legislature as the California Evidence Code, thus becoming perhaps the most successful bad joke of all time.

The Code became effective on January 1, 1967.⁴ Or did it? It is the thesis of this article that in practice the Evidence Code has been largely ignored, that it should be ignored, and that the proper task of the appellate courts is in showing trial judges the way to a grander and more progressive ignorance of its complexities and absurdities.⁵

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¹ MODEL CODE OF EVIDENCE viii (1942).

² *Report of Committee on Administration of Justice on Model Code of Evidence*, 19 CAL. ST. B.J. 262 (1944).

³ 7 CAL. LAW REVISION COMM'N 29, 32 (1965).

⁴ CAL. EVID. CODE § 12 (West 1968).

⁵ Compare the remarks of a distinguished jurist: "Do you suppose anybody in the last 25 years . . . observed all these complicated rules of evidence that we have had? I don't believe anybody has known them. I have taken pride in not knowing them."

I. THE EVIDENCE CODE IN ACTION (INACTION?)

There has always been reason to suspect that the law of evidence as applied by the trial courts has not necessarily resembled the doctrines espoused in appellate opinions and scholarly tomes.⁶ Even in my brief trial practice I encountered one judge who thought that a witness could testify to his own out-of-court statements without violating the hearsay rule. I met several others who seemed to think that anything said in the presence of the defendant did not constitute hearsay.⁷ No doubt these idiosyncratic views of the rules of evidence do much to add spice to the life of a trial lawyer.

Given the complexity of the rules of evidence one might expect that judges would not be immediately familiar with all the nuances. What is surprising is the kind of fundamental misunderstanding of basic rules often encountered in trial courts. The magnitude of the errors is matched only by the persistence of the judges in adhering to them despite the most strenuous argument and citation of learned authorities.

Some readers may already be either nodding assent or mouthing a rebuttal of my observations based upon their own experiences in court. We have very little empirical evidence or other systematic study of the operations of the rules of evidence in trial courts. Though one can learn much by reading appellate opinions, even a man who had spent as much time in this activity as Wigmore was prepared to concede that one could not tell much about the importance of a rule from the number of times it was raised on appeal. As a result of this lack of hard data, much of the debate over the rules involves simply an exchange of anecdotes rather than any intelligent discussion on the effect of the rules in the trial of cases.

There is, however, some evidence beyond the mere anecdotal to suggest how the law of evidence is administered in the trial courts. Recently a book published for the benefit of criminal trial judges in the Los Angeles Superior Court listed these grounds for objections to evidence:

I tried cases for thirteen years and got along without all these technicalities." 19 ALI PROCEEDINGS 225 (1942) (remarks of Augustus Hand).

⁶ See, e.g., *Shallenberger v. Duncan*, 244 Cal. App. 2d 197, 53 Cal. Rptr. 77 (1966); Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952).

⁷ This "Iron Rule of Hearsay", as it was known among lawyers who worked in one court where it was applied, was one easily administered. To know whether or not a statement was admissible all one had to know was where the defendant was when it was uttered.

- (1) Incompetent
- (2) Irrelevant
- (3) Immaterial
- (4) Hearsay
- (5) Leading and suggestive
- (6) Calling for a conclusion
- (7) Asked and answered
- (8) Assuming facts not in evidence
- (9) Argumentative
- (10) Not the best evidence
- (11) Beyond the scope of direct or redirect
- (12) Compound and complex
- (13) Unintelligible
- (14) Calls for an opinion
- (15) No proper foundation
- (16) Self-incriminating
- (17) No corpus delicti established
- (18) Calls for a privileged communication
- (19) Cumulative
- (20) Self-serving
- (21) The probative value of the evidence is substantially outweighed by its undue consumption of time and its unduly prejudicial, confusing, and misleading character.

There are several noteworthy features of this list. First, with the exception of the privilege against self-incrimination, none of the constitutional objections to the admissibility of evidence in criminal cases are mentioned. Second, at least half of the objections are not to the admissibility of evidence but to the form in which it is solicited. Finally, and most pertinent here, well over half of the objections are either non-existent or insufficient as a matter of law to raise an existing objection—if the Evidence Code is taken as “the law”. This point requires further elucidation.

The first objection (incompetent) is valid only if understood in the narrow sense that a person is disqualified to be a witness if he cannot communicate adequately or is unable to comprehend his obligation to tell the truth.⁸ If it implies more, as is suggested by placing it adjacent

⁸ CAL. EVID. CODE § 701 (West 1968).

to the other two members of the Traditional Trinity (irrelevant, and immaterial), then it must be characterized as not justified by any provision of the Code. Though it may be a convenient and harmless practice to refer to all inadmissible evidence by such a catchall phrase,⁹ the cases are legion that the word is inadequate to raise a specific objection.¹⁰

Turning to the third objection, it can be flatly stated that there is no provision of the Evidence Code which authorizes the exclusion of evidence on the ground that it is "immaterial". Under the Code the notion that the court should not hear evidence tending to prove a fact that under the pleadings or substantive law is not an issue in the action is subsumed under the objection on grounds of irrelevance.¹¹ If this is all the objection implies, it is redundant; if it has further connotations then it simply is unauthorized by our evidence statutes.

Objection number six (calling for a conclusion) is a puzzler. It is either an alternative way of stating objection number fourteen (calls for an opinion) or is also an objection that has absolutely no basis in the Code.¹²

The objection (number seven on the list) that a question has been "asked and answered" raises a point that is also involved in numbers eight (assuming facts not in evidence), nine (argumentative), twelve (compound and complex), thirteen (unintelligible), nineteen (cumulative) and twenty (self-serving). Here too, as anyone who has studied the Code will realize, there is no explicit recognition in the Code of any of these objections however hallowed they may have become by usage in the trial courts.¹³

However, an able trial lawyer, in a practitioner's manual which exhibits a quaint affection for these objections to form, believes that they are authorized by Evidence Code section 765: "The court shall exer-

⁹ Unfortunately, though the Evidence Code neither uses nor defines the term, other California statutes do refer to competent testimony, apparently using the phrase as a synonym for admissible testimony. *E.g.*, CAL. CODE CIV. PROC. § 437c (West 1967). However, judicial discussion is often imprecise. *Cf.* *Larsen v. Johannes*, 7 Cal. App. 3d 491, 86 Cal. Rptr. 744 (1970).

¹⁰ B. WITKIN, CALIFORNIA EVIDENCE § 1288 (2d ed. 1966) [hereinafter cited as WITKIN]; 1 J. WIGMORE, EVIDENCE § 18 n.24 (3rd ed. 1940) [hereinafter cited as WIGMORE]; C. MCCORMICK, EVIDENCE § 52 (1954) [hereinafter cited as MCCORMICK].

¹¹ CAL. EVID. CODE § 210 (West 1968); WITKIN, *supra* note 10, at § 301.

¹² *But see* *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd.*, 8 Cal. App. 3d 978, 981, 87 Cal. Rptr. 770, 773 (1970) (testimony could have been objected to as "mere conclusion").

¹³ *See, e.g.*, *People v. Cruz*, 264 Cal. App. 2d 350, 363, 70 Cal. Rptr. 603, 611 (1968).

cise control over the mode of interrogation of a witness so as (a) to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and (b) to protect the witness from undue harassment or embarrassment."¹⁴ It is true, of course, that the broad discretion conferred by this section would permit a judge to prohibit a question on the grounds, *inter alia*, that it had been "asked and answered".¹⁵ However, this section also permits the judge to take the position that these objections to the form of the question invite quibbling over insubstantial matters and detract from rapid, distinct and effective ascertainment of the truth. While it may do no violence to traditional usage to refer to an attempt to invoke a discretionary power as an "objection", this custom conceals an important distinction between an objection that a question has been "asked and answered" and, say, an objection that it calls for "hearsay".

The key words in the statute are "the *court* shall exercise . . . control . . .".¹⁶ The emphasis is one that many trial lawyers abhor but one that must be kept in mind. Whether hearsay is admitted or not is left to the parties; if they choose to try their case on gossip it is usually not thought that the trial judge should interpose objections to this mode of proof. If objection is made, however, the objector is customarily considered to have a right to have such evidence excluded. But as to the kinds of objections we are considering here, section 765 places control in the trial judge, not in parties. The adversaries may wish to spend hours in tedious quibbling over the form of questions or in repetitious questioning of a witness on minor points, but the trial judge ought to be able to prevent either abuse.

That this is more than a quibble over words is amply demonstrated by the struggle for evidentiary reform. An important point of contention has been the desire of the reformers to give more power to the trial judge, to make him master of the trial as he was supposed to have been at common law—an attempt vigorously resisted by lawyers anxious to confine the role of the judge to that of umpire.¹⁷

¹⁴ E. HEAFEY, JR., CALIFORNIA TRIAL OBJECTIONS § 7.3 (1967) [hereinafter cited as HEAFEY]. Mr. Heafey comes up with 27 objections to evidence, exclusive of privileges, conveniently charted on the end papers of his manual. His list differs in a number of respects from the Los Angeles roster considered in the text but is no less imaginative in regard to objections to the form of the question. This may be more reflective of customs north of the Tehachapis than of any personal preferences of the author.

¹⁵ It would also authorize the action of a judge I once observed sustaining an objection to questions on the grounds that they were "tedious".

¹⁶ CAL. EVID. CODE § 765 (West 1968) (emphasis added).

¹⁷ See, e.g., *Report, supra* note 2, at 263-66.

Moreover, it is likely that nomenclature has important psychological ramifications in the approach of the trial judge to a dispute over mode of proof. When an attorney calls on the court to exercise the discretionary power to exclude admissible evidence under Evidence Code section 352¹⁸ it invokes an entirely different attitude in both the attorney and judge than is involved if he can claim that he has a *right* to have evidence excluded under that section.¹⁹

Other objections in the list are equally objectionable. Number 15 (no proper foundation) is so vague as to be meaningless. There are innumerable situations in which evidence is inadmissible without the proof of certain preliminary facts but, unless it is obvious from the context, the trial judge has no way of knowing whether the objector means that there is, for example, no proof of personal knowledge or that the testimony is irrelevant without proof of connecting facts. In order to preserve the point for appeal, the objector must specify particularly the respect in which the foundation is deficient, which usually requires the invocation of some other objection from the list.²⁰ Similarly, if the judge sustains the objection in such general form, the proponent of the evidence is entitled to know what evidence he must produce to make the proffered evidence admissible.

Objection number 18 (calls for a privileged communication) presents a similar problem. There are a host of such privileges²¹ and an objection that does not specify which one, is probably insufficient. It will not always be obvious from the situation which privilege is being invoked since, for example, a communication to a physician may be protected by the attorney-client privilege²² or a confession to a psychotherapist may be excluded on constitutional grounds.

Objection number 20 (self-serving) is an excellent example of trial court evidentiary law. Surely any attorney would hope that all of the evidence he introduces will serve his cause; to suggest that evidence be excluded on that ground seems ridiculous. The fact that a piece of evidence is "self-serving" may be relevant in determining its admissibility

¹⁸ "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

¹⁹ The distinction is made quite clear with respect to section 352 objections in HEAFEX, *supra* note 14, at § 33.3, but he makes no mention of the trial judge's discretion with respect to other objections to the form of questions.

²⁰ WITKIN, *supra* note 10, at § 1293.

²¹ Mr. Heafey lists 15 "privileges". HEAFEX, *supra* note 14, at § 34-49.

²² CAL. EVID. CODE § 952 & comment (West 1968).

under some other objection but nothing in the Evidence Code suggests that this is an independent ground for exclusion.²³

The most marked departure from the Evidence Code, however, is objection number 17 which provides for exclusion on the grounds that there has been "no corpus delicti established". Here, however, the authors are to be pardoned since it has apparently escaped the attention of most commentators that this rule was repealed by the Evidence Code—at least so far as it relates to the admissibility rather than the weight of evidence.²⁴ The repeal was perhaps not intended, but it was accomplished nonetheless.²⁵

The Code provides that, except as otherwise provided by statute, all relevant evidence is admissible.²⁶ The Law Revision Commission comment makes clear that the intent was to abolish all limitations on the admissibility of evidence except those based on a statute or constitutional provision.²⁷ Since the confession of a defendant is of obvious relevance, and the rule requiring independent proof of the crime as a prerequisite to its admission is solely a creation of case law, it follows that this objection is no longer tenable.

The reader may agree that the list of objections does not indicate significant conformity with the Evidence Code, but may still wonder what all this proves. However, the same list of objections, sometimes with the addition of the obsolete objection on the grounds of impeaching one's own witness, is a ubiquitous phenomenon of evidentiary lore in Los Angeles County. It appears, for example, in a training manual of the District Attorney. It has been published many times since the adoption of the Evidence Code in local legal newspapers. Some of the same objections are contained in a practice manual distributed by the California Continuing Education of the Bar in connection with its program on the Evidence Code.²⁸ This certainly suggests, if it does not prove, that the Code has not been particularly influential for practitioners and judges.

²³ For example, this might be one way of pointing out to the court that a hearsay statement claimed to be admissible as a declaration against interest lacks the required disserving characteristics. If such a statement is inadmissible, it is because it is hearsay, not because it is "self-serving". Cf. WITKIN, *supra* note 10, at § 457; *People v. Cruz*, 264 Cal. App. 2d 350, 363, 70 Cal. Rptr. 603, 611 (1968).

²⁴ HEAFEY, *supra* note 14, at § 29.1; WITKIN, *supra* note 10, at § 474.

²⁵ *But see* *People v. Starr*, 11 Cal. App. 3d 574, 583, 89 Cal. Rptr. 906, 912 (1970) (majority held repeal neither intended nor accomplished).

²⁶ CAL. EVID. CODE § 351 (West 1968).

²⁷ *Id.*, comment.

²⁸ HEAFEY, *supra* note 14 *passim*.

But pseudo-empiricism aside, one might have expected from a perusal of the Code itself that it was destined to be an ineffective force in the actual trial of cases.

II. THE EVIDENCE CODE—EDEL OF EVIDENTIARY REFORM

Why a statute as reactionary as the California Evidence Code was adopted is a difficult question.²⁹ How it came to be adopted is reasonably clear.

Perhaps the most significant decision the Law Revision Commission made, after it had been charged by the Legislature with the task of considering evidence reform, was to confine its research to simple doctrinal analysis. In deciding the existing state of the law the Commission and its various consultants relied entirely upon appellate reports and the various compilations of and commentaries upon the work product of appellate judges. At no time did the Commission attempt to determine whether the doctrines they were studying bore any relationship to the trial of cases, and if so what effect the rules had upon the objectives of a fair system of justice.³⁰

Anyone not familiar with the history of procedural reform might be shocked at the notion that, in deciding what rules are needed for the fair and efficient administration of justice, one would look everywhere but the courts in which these trials are taking place. However, from the time of David Dudley Field to the present, the great struggles over pro-

²⁹ Since those associated with the drafting of the Code have always been at great pains to point out that the Code is almost entirely a codification of pre-existing law, it does not seem necessary to document that fact. See, e.g., 7 CAL. LAW REVISION COMM'N 34 (1965); Dutton & Harvey, *Preface* to J. McBAINE, CALIFORNIA EVIDENCE MANUAL 3 (Supp. 1969); ASSEMBLY INTERIM COMMITTEE ON JUDICIARY, *Hearings on Proposed Code of Evidence* at 12 (Dec. 16, 1964). Of course, intent and achievement may not always have matched, as in the case of the repeal of the corpus delicti rule. Readers who think "reactionary" is a bit strong should consider that the Code rejects reforms that even the American Bar Association favors.

³⁰ One should, perhaps, keep in mind two somewhat different sorts of empiricism. One is the question of whether the suppositions of evidentiary doctrine with regard to the conduct of men in and out of court can be supported by the theories and investigation of other disciplines, such as psychology. The limited amount of such investigation in the literature casts doubt upon many of the psychological assumptions upon which the rules are based. See, e.g., Hutchins & Slesinger, *Some Observations on the Law of Evidence-Memory*, 41 HARV. L. REV. 860 (1928); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1. The other kind of empirical inquiry is whether or not the rules, regardless of soundness on other grounds, are susceptible of being administered in the trial courts without sacrificing other important values such as speed and efficiency. It is the latter inquiry that is considered in this article.

cedural reform have been waged on doctrinal rather than empirical terms. Arguments were too often couched in terms of "notice pleading" versus "fact pleading" and too little attention was given to the question of whether it made any difference in practice which system was applied.

The failure to consider empirical studies had a number of effects on the Code. One is that the Commission wasted a good deal of time and created a good deal of complexity resolving scholastic debate of little practical import on the trial of cases. For example, California is rescued from the heresy of calling presumptions "evidence";³¹ like the Pope dividing up South America, the Commission splits the field of presumptions, giving part to the Thayer-Wigmore crowd and part to those who follow Morgan-McCormick.³² The power of the judge to determine the admissibility of evidence is made the subject of a ritual so complex that even its drafters are hard put to explain it.³³ In short, when one reads some parts of the Code and its comments, he is hard put to know whether he is examining the work product of lawyers or theologians.³⁴

On the basis of the material reviewed in the first section of this paper and some observation of trial courts,³⁵ I suspect that if the Commission had done any research it would have discovered that, statistically, most objections to evidence at trial are to the form of the question, to the relevance of the evidence, to the adequacy of authentication of documents or to the qualifications of witnesses to render opinions.³⁶ Yet it is in precisely these areas that the Code offers little help to the trial judge.³⁷

³¹ CAL. EVID. CODE § 600 (West 1968).

³² *Id.* § 601 & comment.

³³ *Id.* §§ 401-06. See *Hearings, supra* note 29, at 28-35.

³⁴ Of course, evidentiary scholarship quite often seems to exhibit more concern for tidiness of theory than for other values, but it is ironic to see lawyers who have rejected reforms proposed by scholars on grounds of practicality succumb to one of scholarship's most loathsome diseases.

³⁵ As part of a study of preliminary hearings, observers were stationed in various courts to record, *inter alia*, the objections to evidence that were made. See K. GRAHAM & L. LETWIN, A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES 2-3 (1969). The observations in the text are based on extrapolations from that data, though for a number of reasons that will occur to the reader, one must be reluctant to assume that practice in this area is necessarily reflective of trial practice generally.

³⁶ The same conclusions may be suggested by the quite different emphasis given the various rules in practitioner's works such as that of Mr. Heafey and in studies based on appellate opinions such as *Witkin*.

³⁷ See CAL. EVID. CODE §§ 350, 765, 801, 1401 (West 1968). Each of these statutes is so general that one not well grounded in the case law would be hardpressed

In contrast, the issue of whether non-assertive conduct is or is not hearsay is one that, while being beaten to death by the writers,³⁸ would probably not be recognized in practice by more than 1% of the lawyers and judges in this state. Indeed, perhaps for this reason, there are only a handful of appellate cases that present the issue. Nonetheless, the drafters of the Code take great pride in having settled once and for all this burning question.³⁹

A more serious result of the failure of the Commission to do any empirical study is that it left the Commission at the mercy of practicing lawyers who have few inhibitions about expanding their personal experiences into Universal Truths. Talking to lawyers and judges is obviously one way to get some empirical insights but as anyone who has ever done field research can testify, one cannot rely upon what practitioners think is happening as a sure guide to the real world, particularly where self-interest is involved.⁴⁰

This leads us to a second facet of the Commission's methodology that led to its result. Though cooperation with other disciplines is hardly novel any longer, the Commission chose to regard evidentiary reform as exclusively the province of lawyers. Not only did the Commission not consult experts in other fields or laymen interested in justice, it appears to have given the State Bar of California what amounted to a veto power over reform.⁴¹

Precisely why lawyers have so vehemently opposed procedural reform is a question worth sociological study. Perhaps it is enough to ob-

to apply them to simple situations. Compare with these generalities the elaborate scheme for determining preliminary facts. *Id.* §§ 401-06.

³⁸ See materials collected and cited in ASS'N OF AMERICAN LAW SCHOOLS, *SELECTED WRITINGS ON EVIDENCE AND TRIAL* 744-93 (Fryer ed. 1957).

³⁹ CAL. EVID. CODE § 1200, comment (West 1968).

⁴⁰ Typical of the kind of bold assertion that passes for fact among trial lawyers is this statement of a member of the Advisory Committee on the Federal Rules of Evidence, explaining the basis for the proposed Rules on hearsay: "The Committee chose a middle ground, reaching into its collective experience in thousands of trials to determine what types of hearsay have proven to be quite reliable." Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061, 1072 (1969). The author does not pause to explain how trying thousands of cases would give one any idea of the reliability of hearsay. Perhaps "collective experience" is like "woman's intuition"; only those that have it can understand it.

⁴¹ See 7 CAL. LAW REVISION COMM'N 5-8 (1965); *Hearings, supra* note 29, at 54. Since the Commission was composed entirely of lawyers, the possibilities for conflict with the State Bar seem minimal. Still it is significant that various members of the State Bar Committee have told me that the Commission accepted more than 90% of the suggestions of the State Bar for changes in the Code and that those suggestions that were not accepted were of little consequence.

serve that, like mankind in general, lawyers who may be quite liberal on most topics become quite conservative when it is proposed that they change the way they do business. It is clear that, for whatever the reasons, the organized bar in California historically has been cool to evidentiary reform.⁴²

There are several troubling aspects of permitting lawyers to make the rules governing the admissibility of evidence at trial. To some extent it involves the fox as a sentry at the henhouse. How interested will a lawyer be, who is paid per trial day, in promoting efficiency and in exploring questions like the added time required to try cases because of the exclusionary rules?⁴³ Consider in this regard that when cases take weeks to try, when calendars are clogged or when foolish rules are applied to the detriment of a just result, the public is most likely to lay the blame for this state of affairs on the judges, not the lawyers.

The situation is aggravated by the fact that the lawyers selected to influence the shaping of the rules are drawn from a narrow segment of the bar. The oligarchic nature of the State Bar of California is a matter of common knowledge. The big firm lawyer with an army of research associates and thousands of dollars to try his cases is probably not going to be much interested in simplifying the law so as to reduce his advantages over the lawyer representing less monied interests. Nor will he be terribly interested in exploring the question of what economic and social interests the rules of evidence favor or what kinds of rights are not vindicated because necessary proof is made prohibitively expensive by the rules.⁴⁴

⁴² The report which rejected the Model Code does not even pretend to be an objective study of the law of evidence and the need for reform; it is simply a diatribe against change. *Report, supra* note 2 *passim*.

⁴³ One should also note that the Canons of Ethics do not provide much guidance for the attorney with respect to his role in these kinds of activities. I am informed that in at least one case (not the Evidence Code) lawyers supposedly functioning pro bono as representatives of the State Bar were in fact paid for their services by clients with an interest in the matter under consideration. I am not prepared to say that this ought to be unethical but it is sufficiently troublesome that one might expect at least the consent of all parties concerned required by Rule 7 of the *Rules of Professional Conduct of the State Bar of California* in situations involving conflicting interests.

⁴⁴ The State Bar Committee which studied the Model Code seemed quite assured that the rules of evidence were a bulwark of the propertied classes (and that it was the function of the State Bar to defend those class interests!). *See Report, supra* note 2, at 264, 271, 282. Their instincts may be correct but there is nothing in the report that suggests why this should be so. It is perhaps of some significance that the only useful statutory reform in the last 50 years has been the creation of the business records exception to the hearsay rule and that the change was supported in part by the argument that the courts looked silly in not relying on documents that businessmen were accustomed to

Anyone who doubts the impact of the lawyer's class biases on the Code need look only at the part aptly labeled "privileges". The corporate executive wishing to cheat a bit on his income tax can protect his finagling under the attorney-client privilege;⁴⁵ the construction worker consulting the ubiquitous tax accountant is denied this benefit. The matron from Beverly Hills can pour out her secrets (at \$100 per hour) to her favorite psychiatrist;⁴⁶ the out-of-work domestic consulting a social worker gets no similar favor.

By and large trial lawyers tend to be unduly enthusiastic about the excesses of the adversary system, including wrangling over the admissibility of evidence. They are not dissatisfied with a system which makes the lawyer the key figure in the trial and handcuffs the judge, the only lawyer in the courtroom with any reason to be concerned about the public interest in justice.⁴⁷ It has been said that a lawyer is an expert on justice in the same way that a harlot is an expert on love.⁴⁸ It was to this expertise that the Law Revision Commission surrendered the drafting of the Code.

rely upon. See, e.g., E. MORGAN *et al.*, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 51-63 (1927). It would be foolish to suppose that businessmen were the only or even the principal beneficiaries of this change, though that is possible. My colleague James Krier [Acting Professor of Law, University of California, Los Angeles] has made a convincing case for the proposition that the rules governing burden of proof operate to the benefit of environmental polluters. All of these issues are concealed, however, by the forms of doctrinal manipulation that pass for scholarship in the field of evidence.

⁴⁵ Assuming that the cheating goes beyond the sort customarily approved under the rubric of "avoidance", one might think that the communications are *not* protected because of the exception for consultations in aid of the commission of a crime or fraud. CAL. EVID. CODE § 956 (West 1968). However, the burden of proving the exception is apparently on the government and it is hard to see how that burden could be carried without disclosure of the communications, a disclosure forbidden by the Code. *Id.* §§ 915, 917 (West 1968). It is hard to avoid the conclusion that this "exception" is for all practical purposes only a public relations device rather than a useful evidentiary rule.

⁴⁶ The Law Revision Commission apparently concluded that the practice of psychiatry should be fostered on the basis that everyone knows how useful psychiatry is to society. The Commission cites no evidence of this, presumably because no such evidence exists. The conclusion that there is a need for such a privilege is based on "several reliable reports" that some patients have refused treatment because of the lack of a privilege. 7 CAL. LAW REVISION COMM'N 195 (1965). Most sane persons would be likely to think that psychiatrists do more harm by selling their patient's secrets to national magazines than they do by disclosing them in court.

⁴⁷ Indeed, the State Bar's response to the Model Code shows almost as much contempt for the judiciary as it does for the principal draftsman of the Code, the late professor E.M. Morgan. *Report, supra* note 2 *passim*.

⁴⁸ I have been unable to find the source of this remark but am too certain that it is not original to try to claim it as my own.

The result was predictable. The vision of the Code is firmly fixed on the 19th century.⁴⁹ It assumes that a trial is a trial and that one set of rules will serve for all. It ignores the fact that much judicial business has gone to administrative tribunals not bound by the rules of evidence, and makes no attempt to learn from the experience of other fact-finding bodies. It never asks why most of the business of the courts involves disputes between those who in one way or another can litigate without bearing the expense themselves. Criminals or businessmen or those whose property is taken by eminent domain can litigate at the expense of the taxpayers; the insurance companies and severely injured claimants can charge their expenses off to the driving public, but how many other legal issues go unresolved because the rules of evidence have made justice too expensive?⁵⁰ Not once did the drafters ask what kinds of cases the courts ought to be handling for the rest of this century and what sorts of rules of evidence we should have to make it possible to best adjudicate those disputes.⁵¹

The method which the Commission chose to do its work tended to maximize the influence of lawyers and other special interest groups on the final shape of the Code. After spending years studying the Uniform Rules and issuing reports which contained tentative recommendations that they be adopted as amended,⁵² the Commission abruptly rejected the Uniform Rules, proposed the Code, and had it adopted in great haste by the Legislature.⁵³ The motivations for this sudden

⁴⁹ There are any number of examples of this. See CAL. EVID. CODE § 1605 (authentication of Spanish land grants); § 1312 (hearsay exception for entries in family bibles) (West 1968).

⁵⁰ Even in the case of criminal trials, in Los Angeles County the leading form of trial is not the traditional trial by jury with the full rights of confrontation, but rather a form of continental trial where the judge reads the record before the committing magistrate. See K. GRAHAM & L. LETWIN, *supra* note 35, at 142-49. Although some form of similar truncated trial on the basis of depositions would seem to be possible in civil cases, as far as I am aware the so-called "trial on the transcript" has been limited to criminal cases.

⁵¹ One might well conclude that by the turn of the century the courts will actually try only criminal cases. The major part of their business would consist of reviewing for procedural fairness the adjudications of a host of subsidiary administrative tribunals. This trend seems well fixed in the business of the appellate courts, as the inspection of recent advance sheets will disclose.

⁵² See 7 CAL. LAW REVISION COMM'N 3 (1965).

⁵³ The last of the Commission's studies of the Uniform Rules was released in June of 1964 and contains not the slightest hint that the Commission was going to report to the Legislature that the Uniform Rules not be adopted. See 6 CAL. LAW REVISION COMM'N 3 (1964). Nor was there any indication that the Commission, which had then been at work "studying" the Uniform Rules for eight years, was about to complete its work. *Id.* at 1003. Yet three months later the Code was printed and

change are not apparent to the outsider and the Commission never chose to explain its new found haste.

As far as the adoption of the Code was concerned this meant that the Commission was cut off from critical response to its final product. Unlike the proposed Federal Rules of Evidence, which have already been the subject of extensive consideration in law reviews,⁵⁴ the Code was little noticed. Well-organized lobbies such as the District Attorneys were able to defeat some of the proposed changes,⁵⁵ but no voices in favor of reform were heard in the legislative hearings.⁵⁶ Instead of deliberation suitable to the scope of the codification, the legislators were urged to adopt the Code with whatever defects it might have because the Law Revision Commission could later come up with corrective amendments.⁵⁷ Though perhaps this is typical of the legislative process, the procedure by which the Code was adopted looks not like serious codification but rather like an act of faith on the part of the legislators, trusting that if the State Bar and Commission were in favor of the Code it could not be too bad.

The product of this process may best be described by the Commission's own characterization of another codification:

Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in

distributed to members of the State Bar, two days of hearings were held by Assembly Interim Committee on the Judiciary in December of 1964, the Commission's Final Recommendation was published in January of 1965, and the Code was adopted a few months later.

⁵⁴ See, e.g., *Symposium on the Proposed Federal Rules of Evidence*, 15 WAYNE L. REV. 1076 (1969) & 16 WAYNE L. REV. 134 (1970).

⁵⁵ Most notably the attempt to restrict the use of felony convictions to impeach. Compare PROPOSED EVIDENCE CODE § 788, 7 CAL. LAW REVISION COMM'N 141-42 (1965) with CAL. EVID. CODE § 788 (West 1968). See *Hearings, supra* note 29, at 94-131.

⁵⁶ Witnesses at the hearings were limited to individuals connected with the drafting of the Code whose testimony was filled with swooning over their achievements ("we are eliminating just hundreds and hundreds of defects") and representatives of special interests seeking particular dispensations from the effect of proposed rules, such as District Attorneys opposed to change in the use of felony convictions to impeach, psychiatrists seeking an expansion of privilege, and Industrial Accident Commission referees urging that the Code not apply to them. *Hearings, supra* note 29 *passim*. The only witness not carrying an ax to be ground was Mr. Bernard Witkin whose testimony was brief and not particularly helpful.

⁵⁷ *Hearings, supra* note 29, at 16.

the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a trial.⁵⁸

Complete proof of this indictment would require several volumes but perhaps probable cause may be established by the following evidence.

Item 1.

Many of the Code's provisions are accomplished by indirection: repeals by silent implication, as in the corpus delicti rule;⁵⁹ legislation by comment rather than by statute, as in the case of the presumption sections which contain in the comment elaborate "rules" for instructing the jury, rules that are nowhere to be found in the statute itself;⁶⁰ incorporation by reference of pre-existing law, as in the rules on opinion testimony.⁶¹ Several significant changes lie buried in the definitions.⁶² The result is that the Code is a booby trap for anyone who thinks he can simply open it and find a quick answer to an evidentiary question.

Item 2.

The Code fails to treat some important and highly disputed subjects. For example, there has been a good deal of debate about the use of real

⁵⁸ 7 LAW REVISION COMM'N 30 (1965). The Commission was speaking of the Field Code but it is not at all clear that they knew what they were talking about. The suggestion that Field intended to codify the common law and that his omissions were from ignorance rather than the intent to eliminate a particular rule finds little support in the historical materials. See generally R. POUND, *David Dudley Field: An Appraisal*, FIELD CENTENARY ESSAYS 1 (A. Reppy ed. 1949); A. REPPY, *The Field Codification Concept*, *id.* at 17. Field's rules appear strange today because of the great shift in evidentiary thinking attributable to Thayer and Wigmore, who led the movement away from theories of evidence espoused by continental thinkers that were influential on Field and others. But a contemporary lawyer would be equally puzzled by the approach taken in any 19th century treatise on evidence. The Commission's criticism of the efforts of earlier drafters did not, however, prevent them from reenacting some of Field's statutes or lifting language from the work of the 1937 Code Commission without acknowledging the source. Compare, e.g., CAL. EVID. CODE § 765 (West 1968) with WHITTIER, A TENTATIVE DRAFT OF A PARTIAL RECODIFICATION OF THE CALIFORNIA LAW OF EVIDENCE 29 (1937). The Commission's unwillingness to give appropriate credit to its predecessors may have been for reasons of politics rather than plagiarism. To admit that Evidence Code section 352 is taken almost verbatim from Rule 303 of the much-despised Model Code of Evidence might well have started the Bar frothing at the mouth. See *Report*, *supra* note 2, at 269.

⁵⁹ See text at notes 24-25 *supra*.

⁶⁰ CAL. EVID. CODE §§ 604, 606 & comments (West 1968).

⁶¹ *Id.* § 800; see also text at notes 93-102 *infra*.

⁶² CAL. EVID. CODE §§ 210, 225, 240, 250 (West 1968).

proof, or as it is sometimes called, "demonstrative evidence".⁶³ The Code hardly mentions this mode of proof, to say nothing of attempting to regulate it. Nor does the Code suggest that its drafters were familiar with any technological innovations since the invention of carbon paper. One who wishes to introduce a document or a copy of a document is given a set of elaborate rules to follow,⁶⁴ and the introduction of a tape-recording is left to the imagination.⁶⁵

Item 3.

A few Code sections are incomprehensible. For example: "A writing may be authenticated by evidence of the genuineness of the handwriting of the maker."⁶⁶ If the reader thinks he can make something of that, he ought to consider the adjacent code sections which seem to cover all of the possible means of proving that the handwriting in a disputed document is that of the supposed author.⁶⁷

Item 4.

The Code in many places simply ducks difficult evidentiary issues.⁶⁸ For example, the abolition of the hypothetical question has been a target of the reformers for years.⁶⁹ The relevant Code provision⁷⁰ borrows part of the language of the Uniform Rule, but omits a portion which explicitly deleted the requirement of the hypothetical question.⁷¹ At one stage in the drafting the Commission rejected abolition and wrote its own provision governing the form of expert testimony; hence it is obvious that the Commission was aware of the issue.⁷² Yet

⁶³ See materials collected in A.A.L.S., *supra* note 38, at 668-95.

⁶⁴ CAL. EVID. CODE Div. 11 (West 1968).

⁶⁵ Under the Code a recording is a "writing". *Id.* § 250. This means that the "best evidence" rule, the authentication requirements, and all of the other regulations governing the use of documents are applicable. However, the various exceptions to these regulations presuppose documentary evidence and their applicability to these new kinds of "writings" was apparently never considered by the drafters.

⁶⁶ *Id.* § 1415. This section was taken from section 1940 of the old Code of Civil Procedure. One wonders whether it may have been retained because the drafters did not know what it meant and were afraid to repeal it for fear that they might somehow alter the law.

⁶⁷ *Id.* §§ 1413, 1416-19 (West 1968).

⁶⁸ The classiest example of this cut-and-run philosophy is the section which says that the privilege against self-incrimination applies when the federal or state constitution requires its application. *Id.* § 940. Why this superfluous section was included is anybody's guess.

⁶⁹ See, e.g., MODEL CODE OF EVIDENCE Rule 409 & comment (1942).

⁷⁰ CAL. EVID. CODE § 802 (West 1968).

⁷¹ UNIFORM RULE OF EVIDENCE 58.

⁷² 6 CAL. LAW REVISION COMM'N 916-17 (1964).

when it later went back to the language of the Uniform Rules it failed to explain how it resolved this important issue. The comment to the Code section does not so much as mention the hypothetical question, though there is language that suggests that the intent was that it still be used. Commentators have understandably reached different results as to the status of the rule.⁷³

The issue whether the trial judge is bound by the rules of evidence in deciding upon the admissibility of evidence is also unclear. In order for a dying declaration to be admissible, for example, it must be shown to have been made under a sense of immediately impending death.⁷⁴ Can the trial judge consider the contents of the asserted dying declaration in order to decide that this factual requirement is met or can the opponent object that this is the forbidden use of hearsay?

The answer to the question has important ramifications for the impact of the exclusionary rules: if the opponent can use an objection to block evidence which would reveal that the rule does not apply, there will be much more evidence excluded than under the contrary rule. Once again the Law Revision Commission refused to give an explicit answer.

The proposed Federal Rules specifically provide that in ruling on the admissibility of evidence the judge is not bound by the exclusionary rules.⁷⁵ At one point in its deliberations the Commission accepted this sensible result.⁷⁶ For example, why should the prosecution have to call to the stand every police officer who participated in the attempt to subpoena a witness in order to show that the witness is unavailable for the purposes of using a hearsay statement? However, by the time the Code went to the Legislature this provision had been dropped without explanation.

Does this mean that the exclusionary rules apply to hearings to determine admissibility? Once again the lawyer or judge seeking an answer to that question will be left guessing. On one hand the general section governing applicability of the Code seems to suggest that the rules apply.⁷⁷ On the other hand, a section dealing with privileges

⁷³ See, e.g., HEAFY, *supra* note 14, at § 20.9 (hypothetical required); *Advisory Committee's Note*, PROP. FED. R. EVID. 7-05 (1969) (hypothetical apparently not required under Evidence Code § 802); Miller, *Beyond the Law of Evidence*, 40 S. CAL. L. REV. 1, 30 (1967) (who knows?).

⁷⁴ CAL. EVID. CODE § 1242 (West 1968).

⁷⁵ PROP. FED. R. EVID. 1-04(a) (1969).

⁷⁶ 6 CAL. LAW REVISION COMM'N 19-21 (1964).

⁷⁷ CAL. EVID. CODE § 300 (West 1968).

says that the judge cannot compel the revelation of privileged material in order to decide the existence of the privilege—a provision that would seem superfluous if the exclusionary rules did govern hearings to determine the admissibility of evidence.⁷⁸

Finally, consider the question whether in order to be admissible hearsay statements must comply with rules governing testimonial proof, such as the requirement of personal knowledge or the opinion rule. Here the scope of the hearsay rule is involved. There will be considerably more hearsay admitted if the proponent need not show personal knowledge and if hearsay opinions are admissible. The Code provides no sure answer to this question.

Most of the exceptions to the hearsay rule contain the phrase “not made inadmissible by the hearsay rule”, in order, we are told, to make it clear that the exception only serves to surmount the hearsay rule.⁷⁹ On the other hand, the Code carefully defines a person who makes a hearsay statement as a “declarant”, to distinguish him from the witness who testifies to the statement.⁸⁰ The opinion rule and the requirement of first-hand knowledge, however, only apply to witnesses.⁸¹ If the intent is to make these rules not apply to hearsay statements, the result probably changes California law but in a direction that can be supported by policy and has been urged by some commentators.⁸²

Mr. Witkin, however, rather confidently asserts that such rules are applicable, relying on a statement in a comment that all other exclusionary rules apply.⁸³ This does not get us very far because the comment does not explain what it means by exclusionary rules. Surely one can argue that the opinion rule is one governing the form of testimony and not a rule of exclusion; if the witness gives an opinion he may, after objection, testify to the facts which lead him to the opinion. Such repair is not usually possible with a hearsay declarant.⁸⁴

The notion that declarants are not subject to the rules regulating “witnesses” may be supported by the treatment of particular exceptions. For example, the admissions exception is stated in the same manner as all others, yet the comment says that the statement “need not be one which

⁷⁸ *Id.* § 915.

⁷⁹ *Id.* § 1200, comment.

⁸⁰ *Id.* § 135.

⁸¹ *Id.* §§ 702, 800.

⁸² McCORMICK, *supra* note 10, at § 18.

⁸³ WITKIN, *supra* note 10, at § 461.

⁸⁴ McCORMICK, *supra* note 10, at § 18.

would be admissible if made at the hearing."⁸⁵ If Mr. Witkin is correct in concluding that this means the requirement of knowledge and the opinion rule do not apply to admissions,⁸⁶ how is it possible to conclude that these rules do apply to other statutory hearsay exceptions which are phrased in the same way? Furthermore, if rules governing witnesses are automatically applicable to hearsay declarants, why is it that some of the hearsay exceptions specifically include requirements such as personal knowledge or state that the hearsay statement must have been one that would have been admissible if it had been made at trial?⁸⁷

Item 5.

Some of the provisions of the Code are just plain silly.

Take as an example the use of testimony given at a prior trial. It has been argued that this should not be classified as hearsay;⁸⁸ but even if one accepts the decision to treat it as such, most people would agree that it is one of the more reliable forms of hearsay. The Evidence Code expands the use of such testimony, but still subjects it to a severe set of rules, supposedly to safeguard the rights of the opponent to cross-examine.⁸⁹ However, once the proponent gets over these hurdles he may prove the prior testimony by any means; he is not required to produce a transcript of the testimony, even if one is available.⁹⁰ Theoretically, he could call some courtroom loungeer who heard the juiciest parts of the direct testimony and slept during the cross-examination. What now of the opponent's right of cross-examination?

Lovers of jesuitical distinctions ought to admire the rules governing the hearsay exception for past recollection recorded. The Code provides that the record may be read into evidence but that it may not be received in evidence except upon motion of the opponent.⁹¹ The only justification offered for this rule is that it is supposed to be existing law, conveniently ignoring the fact that the purpose of the old rule was to preserve the fiction that the use of the document did not involve hearsay at all!⁹²

⁸⁵ CAL. EVID. CODE § 1220, comment (West 1968).

⁸⁶ WITKIN, *supra* note 10, at § 499.

⁸⁷ CAL. EVID. CODE §§ 1230, 1237, 1238, 1261 (West 1968).

⁸⁸ MCCORMICK, *supra* note 10, at § 230 & n.5.

⁸⁹ CAL. EVID. CODE §§ 1291-92 (West 1968).

⁹⁰ *Id.* § 1290.

⁹¹ *Id.* § 1237(b).

⁹² 3 WIGMORE, EVIDENCE § 754 (3rd ed. 1940).

Item 6.

Some Code provisions send the lawyer on a wild goose chase through the other sections of the Code—and which still provide no answers. Suppose that he wants to know what kinds of opinions lay witnesses are permitted to give. Opening the Code to section 800 he discovers that “his testimony in the form of an opinion is limited to such an opinion as is permitted by law. . . .”⁹³ That is very helpful.⁹⁴

Seeing the handy cross-reference, the attorney quickly thumbs to the definition of “law”. “Law”, he reads, “includes constitutional, statutory, and decisional law.”⁹⁵ Since there are no readily apparent statutory or constitutional rules governing opinion testimony, he is left to decisional law. But what decisional law? If, as the drafters say, the enactment of the Code sweeps away all the old limitations, aren’t those old cases no longer good law?⁹⁶

Not quite. If he reads carefully the comments to section 800, he discovers that it was the view of the drafters that the use of the word “law” was intended to incorporate by reference all of the old cases on opinion testimony.⁹⁷ Shaking his head, the lawyer tosses the Code on the shelf and goes back to his dog-eared copy of *Witkin*.

If he had explored a bit more, the lawyer would be even more puzzled about the status of pre-existing case law. For example, the hearsay rule provides that hearsay is inadmissible “except as provided by law.”⁹⁸ By analogy to the treatment in section 800, this must mean that any hearsay that was admissible under the prior decisional law is admissible under the Code. Apparently not. In examining the comments to section 1230⁹⁹ one discovers that the Law Revision Commission believed that it had repealed the case of *People v. Spriggs*¹⁰⁰ insofar as it holds that a declaration against interest may be admitted even if the declarant is available. And if *Spriggs* is no longer in effect insofar as it contradicts the Code, how can it be said that any other decision that does not conform to the Code is not also ineffective? If this is so, then isn’t it misleading to talk about hearsay being admissible

⁹³ CAL. EVID. CODE § 800 (West 1968).

⁹⁴ The rest of the section, purporting to lay down a general statement of existing law, is too abstract to add much. *Id.*

⁹⁵ *Id.* § 160.

⁹⁶ *Id.* § 351, comment.

⁹⁷ *Id.* § 800, comment.

⁹⁸ *Id.* § 1200.

⁹⁹ *Id.* § 1230, comment.

¹⁰⁰ 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

under the decisional law? The fact is that it must be admissible under the statute or not at all.

There is one explanation, but it is so devious that it is hard to believe that it is intended. This is to argue that "decisional law" has two meanings: (a) the old cases and (b) the cases decided after the Code. The first definition applies to "law" as used in section 800, and the latter in section 1200.¹⁰¹

But whatever body of decisional law is meant, surely it is a parody of the whole notion of codification to send the lawyer or judge scrambling to the digests to determine what the rules are.¹⁰²

"Hold on a minute," the fair-minded reader will no doubt be saying by now, "no codification could possibly cover every aspect of the law of evidence." Exactly. It was futile for the Commission to pursue a set of rules that would hog-tie the trial judge, a vision which every trial lawyer should recognize as moonshine.¹⁰³ As Wigmore has demonstrated, it is possible to reduce his ten volumes to a set of rules that read like the Internal Revenue Code or the instructions for assembling mail-order toys.¹⁰⁴ But making such a set of rules work is another question.

I would emphasize that my present objection is not that nonsense codified remains nonsense; what I am suggesting is that the quest for certainty in a set of hard-and-fast rules to govern the admissibility of evidence is doomed to failure. The good judge will see that justice is done even if it means the rules have to be read in an exotic fashion or must be deliberately misunderstood. The malicious judge can rely on the remoteness and expense of appellate control to permit him to do what he likes with evidence. And the occasional incompetent judge becomes twice as unpredictable when applying a complex body of doctrine.

It is for this reason that the all but unanimous conclusion of students of evidence has been that the rules need to be simplified and reduced in number. This of necessity means that the trial judge must have a good deal of discretion, that many if not most evidentiary rulings must be recognized as "judgment calls". But the Law Revision Commission

¹⁰¹ For a suggestion that the use of decisional law was intended to permit decisions to alter the Code, see 7 CAL. LAW REVISION COMM'N 34 (1965).

¹⁰² See, for example, the Commission's own justification for codification of the law of evidence. *Id.* at 29.

¹⁰³ The State Bar Committee that rejected the Model Code had a dedication to this objective that bordered on the pathological. See *Report, supra* note 2 *passim*.

¹⁰⁴ J. WIGMORE, CODE OF EVIDENCE (1942).

chose to reject this approach and sought instead "a clear, authoritative, systematic, and internally consistent statement of the existing law."¹⁰⁵ For the most part, as I believe I have demonstrated, they failed in this impossible task. The Evidence Code can be called a "kind of evidence bible"¹⁰⁶ only by one with an extremely cynical view of the role of that book in influencing the conduct of mankind.

III. THE EVIDENCE CODE AND THE APPELLATE COURTS

Despite the fact that the handling of evidentiary issues in appellate courts is more easily documented, the impact of the Code at this level is as yet difficult to discern. There are, nonetheless, some indications that the Code is having no greater impact on the habits and thinking of judges at the appellate level than at trial.¹⁰⁷ One problem is in determining whether or not a particular case is governed by the Code. Unless the opinion specifically states that the case was tried before the Code became effective or mentions other data from which this may be inferred, it is often impossible to know whether the Code is being ignored or is simply not applicable.

The desirability of ignoring the Code may be illustrated by the recent case of *People v. Ricketts*.¹⁰⁸ The defendant was arrested driving a car that had been stolen; his story was that he had borrowed the car from a friend at MacArthur Park after first inquiring of the friend whether it was stolen or not. The friend then apparently "vanished", though his sister and another witness corroborated the defendant's story. In rebuttal the prosecution, after an extended hearing out of the presence of the jury, was permitted to prove that when previously arrested with another stolen car, the defendant had claimed that it was borrowed from a friend in MacArthur Park. The defendant, who had pleaded guilty

¹⁰⁵ 7 CAL. LAW REVISION COMM'N 34 (1965).

¹⁰⁶ *Id.*

¹⁰⁷ Even in cases where it is apparent the court has considered the Code, one finds them falling back on pre-Code nomenclature. See, e.g., *People v. Barrett*, 2 Cal. App. 3d 142, 148, 82 Cal. Rptr. 424, 427 (1970) (referring to burden of "going forward with a prima facie case"); *Marocco v. Ford Motor Company*, 7 Cal. App. 3d 84, 86 Cal. Rptr. 526 (1970) ("admissions against interest"). The California Supreme Court can be found asserting the admissibility of evidence under a non-existent *res gestae* rule. *People v. Terry*, 2 Cal. 3d 362, 395 n.15, 466 P.2d 961, 992 n.15, 85 Cal. Rptr. 409, 430 n.15 (1970). Cases can be found in which the Code is ignored, and evidentiary issues are resolved in reliance on pre-Code cases and even *Corpus Juris Secundum*. E.g., *Southern Cal. Edison Co. v. Superior Court*, 5 Cal. App. 3d 829, 833-34, 85 Cal. Rptr. 579, 583 (1970).

¹⁰⁸ 7 Cal. App. 3d 441, 86 Cal. Rptr. 647 (1970).

to that charge, admitted at the present trial that he had been lying when he told the officer the story in the previous case.

Since the theft took place in 1968, the Evidence Code must have been in effect at the time of trial.¹⁰⁹ The court of appeal, without so much as mentioning the Code, held the evidence admissible. Was this a sensible result? Of course. Did it comply with the Evidence Code? Of course not.

The Evidence Code specifically provides that a witness cannot be impeached by the introduction of "specific instances of his conduct."¹¹⁰ The only relevance of the prior story was as proof that the defendant's testimony in the present case was also false; if the defendant had not testified as he did or if the prior story is assumed to be true, the evidence of the prior story would be irrelevant to the present case. The prosecution, then, was attempting to prove a previous lie to support an inference that the present testimony was untrue—exactly what the Evidence Code forbids.

The court of appeal, in reliance on an earlier case,¹¹¹ sought to justify admissibility on the basis of the rule permitting evidence of other crimes, apparently reasoning that the false story was part of the defendant's *modus operandi*. However, the mere fact that the defendant may have a particular *modus operandi* does not make evidence of it admissible; it must still be relevant to some issue in the case. In the present case, the evidence of the prior false story (as distinguished from the prior theft) is not relevant to any out-of-court conduct of the defendant; it is relevant only to his credibility as a witness.

The court of appeal did not cite the Evidence Code sections governing the use of prior crimes and it is not clear that the Code was consulted. The Code specifically provides that its rules with respect to character to prove conduct, including the use of prior crimes, are not applicable to the use of such evidence for purposes of impeachment.¹¹² Hence, if the court of appeal had followed the Code, the jury would have been deprived of a valuable bit of evidence in the case.

The soundness of the court's decision can be seen, however, if one looks to the policy of the rule rather than its formal statement in the Code. Normally, proof that a present witness is a liar by showing past

¹⁰⁹ CAL. EVID. CODE § 12 (West 1968).

¹¹⁰ *Id.* § 787.

¹¹¹ *People v. Pell*, 258 Cal. App. 2d 379, 383, 65 Cal. Rptr. 603, 605 (1968). This was a pre-Code case and involved the proof of a prior robbery, not a prior lie.

¹¹² CAL. EVID. CODE § 1101(c) (West 1968).

instances of lying opens up what may be a time-consuming and distracting trial of a collateral issue. The fact that the witness lied to his father about cutting down the cherry tree is of limited interest where the question is who ran the red light; few courts would want to hear evidence pro and con on "Who killed Cock Robin?" simply to establish that one of the present witnesses spoke falsely on that issue.

In *Ricketts*, however, the defendant conceded the falsity of the story by his guilty plea and in his testimony on voir dire. Furthermore the admitted false story and the defendant's defense were so markedly similar both in content and context as to be quite relevant to the issue of guilt. Thus, the only violation of the Code was of the letter rather than the policy of the no-specific-instances rule.

It is, of course, not clear from the *Ricketts* opinion whether the appellate court was aware of the problems the Code presented or whether it simply performed what McNaughton has called "a creative mistake". Suppose for a moment that the court realized the Code explicitly prohibited what the trial judge had done. What is the court to do?

One option available to a judge in this situation would be to write an opinion construing the statute to permit this result. The problem with this approach, putting aside the question of whether one can in good faith so construe the statute, is that it is from just such minor growths that evidentiary cancers begin. If the court says that the Code permits the use of specific instances in the one case in one hundred when the policy of the rule is not violated, one can predict with some confidence that the court will soon see the other ninety-nine cases and be faced with the task of explaining why the reasoning in *Ricketts* does not apply to cases where the lie is not admitted by the defendant or where the stories are not such that the falsity of one is as probative of the falsity of the other. In other words, in order to do right in one case, the court would have to gum up the workings of a rule that is just fine in the vast majority of the cases.

Another approach which avoids the difficulty of complicating the law is to hold that the admission of the other lie was error, but that it was harmless. Perhaps this abuse of the harmless error rule is more defensible than some, but it is questionable whether the court could have reached the result in *Ricketts* without coming too close to the border of legitimacy. This will probably be true in most cases like *Ricketts*, since it is only when he thinks that the ruling will make a difference that the trial judge will be tempted to go counter to an explicit provision of the Code.

Still another approach, perhaps the most sensible, would be to simply give the trial judge a wild card—discretion to admit evidence otherwise barred by the rules in appropriate cases, subject only to review for abuses of the discretion. Indeed, there is language in *Ricketts* which suggests that the court of appeal viewed admissibility here as a matter of discretion. Sadly, however, this is the least promising because of the opposition of trial lawyers who prefer to see vast discretion wrapped in the mumbo-jumbo of rules that no one understands rather than indecently exposed to more realistic scrutiny.

Given the alternatives,¹¹³ there is much to be said for simply ignoring the Code. This insures that the opinion will not appear in the annotations to section 787 to confuse the issue for those who grab the Code for quick guidance in the mine-run case, yet remains available as a possibility in cases where the issue is important enough for the attorney or judge to dig further into the decisional rubble. Furthermore, failure to mention the Code gives the court a handy out in other cases where it thinks the Code rule ought to be applied. The court can simply cite the California doctrine that a case decided in ignorance of a statutory provision is no precedent, and even trial judges are not bound by it.¹¹⁴

There may be some cases, however, in which studied ignorance will not work. Furthermore, some judges may be of the view that it is illegitimate in any case. Are there any methods, other than ignoring the Code, by which appellate courts can trim away some of the statutory underbrush? I believe that there are at least four other doctrines which will assist in appellate reform of evidence law.

The first, and least controversial, is the old standby—statutory construction. Using ambiguous and loosely framed statutes as a basis for constructing doctrine that the drafters never dreamed of is a time-honored method of avoiding legislative nonsense. What appeared in the last section as vices, from the standpoint of answers at the trial level, become virtues for appellate rationalization of the law of evidence.

Appellate reconstruction of the evidence statutes is aided by several features of the Code. One is that the Law Revision Commission seems

¹¹³ An alternative I have not considered, believing it unjustified under the rules, is for the court to decide the case but not to publish its opinion. Though there is something to be said for not publishing opinions which involve points of evidence, *Ricketts* seems to me to involve "a change in an established principle of law." CAL. R. CT. 976(b). Perhaps one could argue "law" means substantive, not adjective law.

¹¹⁴ *Alferitz v. Borgwardt*, 126 Cal. 201, 58 P. 460 (1899).

to have invited the courts to improve on their handiwork. Though admitting that some parts of the Code were designed to hamstring judicial development, the Commission added that ". . . the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law."¹¹⁵ The Commission asserts that this open-endedness extends only in the direction of greater admissibility, not toward the creation of new exclusionary rules.¹¹⁶

Apparently what the Commission had in mind were the various sections of the Code built around the word "law", which we have previously seen may be ambiguously defined so as to include decisions of appellate courts. If this is taken to refer to post-Code as well as pre-Code decisions, then large areas of the law including such problems as hearsay, authentication, and opinion are open to appellate revamping.¹¹⁷

Another aspect of the Code, which the Commission probably did not have in mind, was the method of drafting vague statutory language then explaining what was meant in the comments to a particular section.¹¹⁸ The legislature itself seems to have taken the comments as seriously as the Code, for in a number of instances legislative committees took the trouble to rewrite the commentary.¹¹⁹ This leaves it open to the courts to ignore the comments on grounds that the language of the Code is "unambiguous" or that this method of legislation is illegitimate since the comments never complied with the constitutional requirements for statutory enactment.¹²⁰

Hasty amendment in the legislature left some inconsistencies in the Code that may aid in appellate repair. For example, in response to the police lobby the legislature did not adopt language that would have limited the use of felony convictions to impeach to convictions for crimes involving lying or false swearing.¹²¹ Though the intent may

¹¹⁵ 7 CAL. LAW REVISION COMM'N 34 (1965).

¹¹⁶ *Id.*

¹¹⁷ CAL. EVID. CODE §§ 800, 802, 1200, 1400 (West 1968).

¹¹⁸ The best example is the treatment of presumptions, though the Code is strewn with this kind of draftsmanship. *Id.* §§ 604, 606.

¹¹⁹ In some cases the rewritten commentary attempts to alter the effect of the language of the Code without amending the Code itself. *See, e.g., Id.* § 356.

¹²⁰ For a discussion of a problem created by such legislating *see* *People v. House*, 12 Cal. App. 3d 756, 768, 90 Cal. Rptr. 831, 838 (1970) (concurring and dissenting opinion).

¹²¹ Compare PROPOSED CODE § 788, 7 CAL. LAW REVISION COMM'N 141, 142 (1965) with CAL. EVID. CODE § 788 (West 1968). *See Hearings, supra* note 29, at 117-26.

have been to continue the old law permitting the use of any felony, the legislature neglected to amend an adjacent statute which seems to restrict impeachment to crimes involving capacity for truth and veracity.¹²² Moreover, it left the statute with language which has been interpreted in the federal courts as making admissibility of convictions discretionary with the trial judge¹²³ and failed to consider at all whether the general power to exclude unduly prejudicial evidence would extend to felony convictions offered to impeach.¹²⁴

Another doctrine which will assist in appellate reform of the Code is the peculiar notion that in some sense evidentiary statutes are not binding upon the courts. Expressions of this philosophy have been understandably guarded and it is thus not clear whether the doctrine is based upon legislative intent, the constitutional prerogatives of the courts, or what. But, as the Supreme Court made clear in *People v. Spriggs*,¹²⁵ for the last 100 years the courts have viewed the evidence statutes as simply another body of law to be drawn upon or ignored as is necessary to arrive at the proper rule.¹²⁶

In addition to 100 years of legislative acquiescence in this doctrine, it can be argued that the legislature explicitly adopted it in enacting the package of statutes which included the Evidence Code.¹²⁷ A host of

¹²² CAL. EVID. CODE § 786 (West 1968).

¹²³ CAL. EVID. CODE § 788 (West 1968) says such convictions "may" be shown for purposes of impeachment. In *Luck v. United States*, 348 F.2d 763, 767-68 (D.C. Cir. 1965) a statute with similar language was interpreted as making admissibility discretionary with the trial judge.

¹²⁴ CAL. EVID. CODE § 352 (West 1968). It has been held that the common law power of the judge, codified in section 352, gives him the authority to exclude felony convictions offered to impeach. *United States v. Palumbo*, 401 F.2d 270, 273 (2d Cir. 1968). Despite this, California cases have held that the prosecution has a right to introduce such convictions and the trial judge is powerless to exclude under 352, but the reasons given are not terribly impressive. *People v. Romero*, 272 Cal. App. 2d 39, 77 Cal. Rptr. 175 (1969); *People v. Kelly*, 261 Cal. App. 2d 708, 68 Cal. Rptr. 337 (1968). *But see People v. Chacon*, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1969) (trial court has discretion to preclude introduction of prior convictions offered as proof of element of crime if prejudicial effect outweighs legitimate purpose of admission).

¹²⁵ 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

¹²⁶ The earlier cases have the flavor of, but do not cite, the now-repudiated maxim calling for strict construction of statutes in derogation of the common law. *See Holland v. Zollner*, 102 Cal. 633, 637, 36 P. 930, 931 (1894); *People v. Ah Sam*, 41 Cal. 645, 653 (1871). In *Spriggs* the court speaks about the need for development where the statutes are silent or inexplicit, however there was nothing inexplicit about the language of the Code of Civil Procedure limiting declarations against interest to those against pecuniary interest. 60 Cal. 2d at 871-74, 389 P.2d at 379-80, 36 Cal. Rptr. at 842-43.

¹²⁷ *See WITKIN, supra* note 10, at § 9.

statutes were repealed by the legislature upon the Law Revision Commission's statement that the statutes did not state existing law!¹²⁸ But for the doctrine under discussion, surely that would rank as an extremely odd notion. Application of this doctrine can be expected to be rare but it does permit the courts to adopt better rules of evidence even in the face of statutory language which attempts to make reform impossible.

A third method by which appellate courts may reform evidentiary practices is by the use of doctrines other than the exclusionary rules. An example of this is *People v. Collins*¹²⁹ where the California Supreme Court held statistical evidence inadmissible on behalf of the prosecution in a criminal case. Though the result has a nice feel, the court's attempt to justify it in terms of the traditional rules of evidence is somewhat awkward.¹³⁰ Apparently recognizing this, the court went on to argue that even if the traditional rules could be satisfied, the prosecutor's use of the evidence was improper. What the court seems to be saying, though not very explicitly, is that even if the evidence were admissible, the prosecutor was guilty of misconduct in having introduced and used it as he did in argument.

Perhaps the most useful doctrine for this purpose, though largely unused to date, are rules prescribing what constitutes sufficient evidence. Because of the Anglo-American fascination with exclusionary rules, little attention has been paid to devising means for evaluating the probative worth of evidence. Yet such rules will obviously be needed as the exclusionary rules are whittled away.

A good example is *People v. Crooks*.¹³¹ In that case the prosecution, attempting to prove grand theft, called a police officer to the stand, qualified him as an expert in criminal methodology, then had him testify that apparently innocent conduct on the part of the defendant was part of a well-known *modus operandi* for accomplishing theft called

¹²⁸ See, e.g., 7 CAL. LAW REVISION COMM'N 30, 310-11 (1965).

¹²⁹ 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968).

¹³⁰ The court speaks about the evidence lacking any adequate "foundation". *Id.* at 327-28, 438 P.2d at 38-39, 66 Cal. Rptr. at 502-03. There is, of course, no requirement in the Code for "foundation" though this language is sometimes used to indicate that some factual prerequisite to the use of an evidentiary doctrine has not been satisfied. The court, however, never makes clear just what rule of evidence it thinks is involved. At some points in the opinion the court sounds as though it were arguing that the evidence was irrelevant and at other points it appears to be saying that it was improper opinion evidence because the expert witness was wrong. The court's reluctance to rely on either ground is understandable since both are preposterous.

¹³¹ 250 Cal. App. 2d 788, 59 Cal. Rptr. 39 (1967).

"the creeper". The appellate court was torn between the possibilities of abuse of such testimony and a reluctance to fall back on discredited evidentiary doctrines.¹³² Yet a simple solution is to hold the evidence admissible but insufficient by itself to sustain a conviction.¹³³

The final method of appellate avoidance of the Code rules is the use of constitutional doctrine. The impact of the confrontation clause on the Code's hearsay provisions represents simply one possibility.¹³⁴ Another is that the privilege for marital communications may be required by the *Griswold*¹³⁵ rationale. Still another is the possibility of violation of a defendant's right to a jury trial by improper application of judicial notice provisions.¹³⁶ It remains to be seen whether the Sixth Amendment right to compulsory process to obtain witnesses is satisfied where the witnesses are gagged by the exclusionary rules.

It is clear, then, that the Evidence Code presents no insuperable hurdle to appellate reform of the law of evidence. The needs of reform have been clear for the last half-century: simplification of the rules, a presumption in favor of admissibility of evidence, and a large measure of discretion in the trial judge. Such reforms are, of course, much more easily accomplished by rule making or statute than case-by-case but it is now clear that the needed reforms are not forthcoming from the legislature.

Thirty years ago when the rules of procedure were as in need of reform as the rules of evidence are today, a jurist in Florida stated the problem in terms that best describe the task of appellate courts in California in dealing with the Evidence Code:

It is inconceivable that litigants of the present who transact business by the press of a button . . . traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam to travel the highway of justice on the back of an ass. . . . We owe it to society to hike the administration of justice off the ass. . . .¹³⁷

¹³² *Id.* at 789, 59 Cal. Rptr. at 40. Every attempt to explain why the testimony should not be admitted ends up somewhere in the vicinity of the rule which once forbade opinion testimony on the "ultimate issue".

¹³³ The court referred to "situations in which the help derived from the expert is too appreciable to permit a conviction to stand." *Id.* at 792, 59 Cal. Rptr. at 41.

¹³⁴ *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968); *People v. Green*, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969). *But see California v. Green*, 399 U.S. 149 (1970).

¹³⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹³⁶ *People v. Billon*, 266 Cal. App. 2d 537, 72 Cal. Rptr. 198 (1968).

¹³⁷ *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. R. Civ. Proc.*, 145 Fla. 223, 230, 199 So. 57, 60 (1940) (Terrell, C.J.).