THE COMMON LAW AND THE EVIDENCE CODE: ARE THEY COMPATIBLE?

Neil Brooks*

The only direction I was given in preparing for this panel was that the title of the session would be "The Proposed Federal Evidence Code." This gave me the freedom to pull from my files any one of a number of speeches that I have given in the past three or four years in which I have spoken in laudatory and glowing terms about how the Code reconciles the various interests of our procedural system and how it places the rules of evidence on a sound empirical basis. I have chosen instead, to speak about an aspect of the Code of which I have less confidence, but which at the end of the day might be the most far-reaching. This aspect relates to the issue of the nature and methodology of a Code; in particular, the methodology of the Evidence "Code". This topic is of more general interest than other aspects of the Code, and it raises significant questions about the relationship between the civil and the common law that will eventually have to be confronted in all areas of the law. That Law Reform Commission of Canada is specifically required to address itself to this issue. The Commissioner's statutory objects include the study of, "the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions."[1] A recurrent criticism of the Evidence Code in the common law regions of Canada has been that it is a "Code". Even those who would agree that the laws of evidence are in need of drastic reform resisted the notion that they ought to be codified. The concern accounting for this resistance, if not expressed, was always apparent: a Code is a civilian concept and, therefore, foreign to the common law, and could not, as lawyers were fond of analogizing, be grafted onto it. This argument was often taken to be so self evident that simply labelling the Code civilian was intended to end debate about its merits. Representative of the comments was one made by the Ontario Criminal Lawyer's Association "... it would be far better to adapt our existing Statutes so as to improve them, rather than experimenting with a concept (a Code) foreign to our common law heritage."[2] Unfortunately,

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* Associate Professor of Law in the Faculty of Law at Osgood Hall, University of Toronto.

1 *Law Reform Commission Act*, R.S.C., 1970 (1st Supp.), c.23, é.11(b).

2 Letter to Mr. Attorney (Ron Basford), in *Criminal Lawyer's Association Newsletter*, vol. 2, issue 6, p. 5 (April 1977). See also Anderson, *A Criticism of the Evidence Code: Some Practical Considerations*, 11 U.B.C. Law Rev. 163 (1976).

because many common law lawyers use the word "civilian" as simply an emotive and pejorative term, referring generally to legal cultures dominated by an inquisitorial system in which the rights of the accused are jeopardized, or an all-embracing Code under which the law is rigid and unanalytical, it is difficult to extract from these criticisms a specific proposition that can be verified or refuted. My argument in this paper will, therefore, be general. I will argue that the concept or methodology of a Code of Evidence is not alien to the common law. While my arguments will be addressed to this question in particular, they relate to an even more general proposition: There is no reason why the same legislative enactment cannot be enacted in common law Canada and civil law Canada and be consistent, or at least not inimical to, the judicial methodologies of both systems.

Although this issue would appear to raise the notoriously difficult question of the differences between the common and civil law, this is a debate which I hope to avoid. I would not want my argument to be viewed as yet another attempt to inflict the corrupting effect of the common law upon Quebec Civil Law. [3] The issue can to some extent be fairly skirted because whatever the essential differences between the common and the civil law, the existence or nonexistence of a Code is a minor one. [4] Although it might seem peculiar to speak of a common law system if all the law in that system were codified, nevertheless, it would still be necessary to distinguish, for example, the English legal system, even if codified, from the French system. Civil law and codified law are not synonymous terms. France and Germany were described as civil law countries before codification took place, and today, Scotland and South Africa are properly referred to as civilian in some sense and they do not have Codes. [5]

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3 See Baudouin, *The Impact of the Common Law on the Civilian System of Louisiana and Quebec*, in J. Dainow (ed.), *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 1 (1973).

4 For a thorough examination of the difference see A.A. Ehrenzweig, *Psychoanalytic Jurisprudence* 109-141 (1971); see also Sawer, *The Western Conception of Law*, in 2 International Encyclopedia of Comparative Law 1-26 (1975); but see A.T. Von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law* 3 (1957). Some comparativists argue that while it is not the fact of a Code alone that distinguishes the common law system from the civilian system, what does distinguish them is the underlying ideology of codification. And that this ideology is not abridged simply by the adoption of a Code in a common law jurisdiction:

> An entirely different set of ideas and assumptions is associated with the California Civil Code, or with the Uniform Commercial Code as adopted in any American jurisdiction. Even though such codes may look very much like a French or German Code, they are not based on the same ideology, and they do not express anything like the same cultural reality.

J.H. Merryman, *The Civil Law Tradition* 33 (1969).

5 R.B. Schlesinger, *Comparative Law: Cases - Text - Materials* 234-5 (30 ed. 1970).

Codification: A Definition

In spite of the intensity and passion with which many common law lawyers inveigh against the notion of codification, there is surprisingly little common ground about what a Code is, and how it differs from a statute or other form of legislative enactment. Codification, in its broadest sense, simply describes the reduction of the law to a written form. It is in this sense that common law lawyers often use the term. When Parliament passes a statute dealing with an area of law that was previously left entirely to decisional law, lawyers are apt to say that the law has been codified. Thus, the concept of codifying the law of Evidence has been criticized by some by comparing it to the "codified" rules regulating drunken driving and the problems of interpretations that have arisen under that legislation. Used in this sense codification is not any different than any other form of legislative enactment. However, as a matter of convenience in usage, codification ought to be distinguished from both a revision of statutory law (which is an exercise undertaken periodically by the Federal and Provincial governments in an effort to rationalize present statutory law by renumbering it and occasionally pruning out obsolete sections) and also a consolidation (which is an exercise of bringing together into one legislative enactment a number of legislative enactments that deal with the same subject area). The more difficult task, of course, is identifying the characteristics which distinguish a Code from any other statutory enactment dealing with a specific area of law. When does an Evidence Act or a Criminal Act become an Evidence Code or Criminal Code?

Most commentators agree that in modern usage "Code" describes a legislative enactment that is comprehensive, systematic, pre-emptive and stated in terms of principles.[6] Professor Hawkland has briefly described the first three of these attributes:

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6 See Donald, *Codification in Common Law Systems*, 47 Aust. L.J. 160 (1973); Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 Indiana L.J. 355, (1966-67); Lobingier, *Codification*, in 2 *Encyclopedia of the Social Sciences* 606, (1930); Lawson, *A Common Law Lawyer Looks at Codification* 2 Inter-American Law Review 1 (1960); Bayitch, *Codification in Modern Times*, in A.N. Yiannopoulos (ed.), *Civil Law in the Modern World* (1965); Goodrich, *Restatement and Codification*, in Reppy (ed.), *David Dudley Field: Centenary Essays* 241 (1949); R.B. Schlesinger, *Comparative Law: Cases - Text - Materials* 235 (3d ed. 1970). Some of the best writing on the concept of codification in the common law is contained in the literature about the Uniform Commercial Code, see for example, Gilmore, *Legal Realism: Its Causes and Cure*, 70 Yale L.J. 1037 (1961); Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stanford L. Rev. 621 (1975); Fanswaorth, *A General Survery of Article 3 and an Examination of Two Aspects of Codification*, 44 Tex. L. Rev. 644 (1966); Hawkland, *Uniform Commercial Code Methodology*, [*1962*) *U.* Ill. L.F. 291.

> "A 'code' is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies. (Footnotes omitted) [7]

These attributes of a legislative enactment are to some extent discrete: for example, a legislative enactment could be comprehensive but not pre-emptive of the common law or drafted in terms of principles. Accordingly, because "Code" is a word that is used to describe a legislative enactment that has a number of specific characteristics and these attributes are to some extent discrete, to ask whether the law of evidence, or any other area of law, ought to be embodied in a Code, is not likely to be fruitful. The concept is too general to be meaningfully debated. The prospect of an intelligent joinder of issues would be enhanced by debating specific questions, such as the following:

1. In the subject area should the legislative enactment embrace most of the law, should it be comprehensive?

2. How should the statute be interpreted, in particular:
   (1) Should the words used in the statute be given meaning by reference to the purpose of the legislation rather than the plain meaning of the words used?
   (2) Should the prior common law be of no precedential value in interpreting the statute?

3. Should the legislative enactment pre-empt the common law, and unprovided for cases be resolved by reference to the principles and policies underlying the statute?

4. Should the statute be systematically arranged?

5. Should the statute be drafted in terms of general principles rather than in terms of specific detailed rules?

If such questions were debated separately on their merits with respect to a particular legislative enactment, it is less likely that the common law lawyers would be distracted by vague instincts that the concept of codification is inherently evil. Of course, if sufficient of the above questions are answered in the affirmative, "code" continues to be a useful word to describe the resultant legislative enactment.

General Concerns About Codification

Before turning to the characteristics of the Evidence Code, and

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7 Hawkland, *Uniform Commercial Code Methodology*, [1962] U. Ill. L.F. 291, 292.

the question of whether these characteristics are consistent with common law methodology, I would like to set aside a number of arguments or concerns about codification that I will not be considering. Although they are matters which have crept into discussions about the Evidence Code, I will not deal with them here in any detail as I think they are in large measure too relevant to any serious assessment of the merits of the Evidence Code. [8] Setting them out here may help to further define my argument:

1. A Code, no matter how well drafted, cannot be self-executing. Its success depends ultimately upon the attitude of the courts. In the past, common law judges have on occasion completely mangled sensible statutory schemes by resorting to jibberish about the plain meaning of words, maxims of statutory construction such as "Statutes in derogation of the common law are to be strictly construed," and by demonstrating generally a callous insensitivity to the need to collaborate with the legislature in implementing contemporary social policy. Given these attitudes of the courts it has been suggested that a Code, particularly one that requires the Courts to apply principles and one that is pre-emptive of the common law, is not feasible.

There is, alas, a complaint that cannot be taken lightly. The undying allegiance to the policy judgments that underlie the seamless web of the common law that many judges appear to have and their apparent inability to construe legislation to further legislative purposes, must be a matter of concern to anyone who is concerned with democratic law-making. On the other hand, to draft legislation on the assumption that the Courts are not willing or able to fairly discharge the tasks delegated to them is to yield to judicial blackmail.

The attitude of the Courts must be distinguished from their institutional competence. Important institutional constraints do impinge upon both the legislature and the courts in law-making. These considerations were not, I hasten to add, ignored in the drafting of the Evidence Code.

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8 For a general discussion of arguments for and against codification and citations to the literature see generally Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, in New York Law Revision Commission, *Report of the Law Revision Commission* for 1955; Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, in New York Law Revision Commission, *Report of the Law Revision Commission* for 1955; Speidel, Summers and White, *Teaching Materials on Commercial Transactions* 1-12 (1969); Stone, *A Primer on Codification* 29 Tulane Law Review 303 (1955); R. Pound, 3 *Jurisprudence ch.* 19 (1959).

2. One of the arguments frequently raised in the United States during the protracted debate about codification in that country in the nineteenth century was that the common law was not susceptible to formulation in statutory form. Carter, the leading opponent of codification, argued:

> The fallacy (and it is a gross one), wrapped up in these plausible assertions that whatever is known can be written, and that if a rule of law can be written by a judge in an opinion, it can be written and enacted in a Code, consists in the false assumption that courts lay down rules absolutely, whereas they lay them down provisionally only. [9]

This argument is still made occasionally by common law lawyers. I must confess, however, that I have never been able to give it any meaningful content. Perhaps the argument is simply a variation of the argument that the common law is flexible and can grown to take account of new conditions, whereas a Code is always rigid and, therefore, soon outdated. If that is what is meant by the assertion "The common law of evidence cannot be expressed in statutory form", it is an argument that I will deal with later. On the other hand, perhaps what is meant by the remark is that the law of evidence cannot be expressed in statutory form because it is whatever the judge says it is in a particular case. If so, I would agree with the assertion but simply ask whether that is a very satisfactory state of affairs.

3. A great deal of the literature on codification is devoted to speculations about the motivations of the codifiers. It has been suggested that there is a close historical relationship between codification and the evolution of more egalitarian societies. On the other hand, it has been argued that history reveals that Codes are the tools of despotic governments. [10] Some authors view Codes, historically, as instruments of nationalization. [11] The Evidence Code was motivated by more of these factors and, in spite of the occasional (one assumes whimsical) allegation to the contrary, it is not an integral part of a larger conspiracy to assimilate English speaking

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9 J. Carter, *The Proposed Codification of Our Common Law* 25-26 (1884).

10 ... codification can be viewed as part of the whole historical movement which gradually transformed societies whose structures had been based on social heirarchy and inequality into societies based on democracy and equality.

Maillet, *The Historical Significance of French Codification*, 44 Tulane L. Rev. 681, 687 (1970).

11 Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 Inter-Am. L. Rev. 11, 17-22 (1959).

Canada into Quebec. Like the codification movement in Quebec [12] the motivations for the Evidence Code were entirely practical. A judgment was made that the goals of the procedural system could be more nearly achieved by an Evidence Code.

4. The spirit of democracy is invoked both by those who support and those who oppose Codes. Civilians are fond of arguing that a Code is more democratic than the common law in its preparation and its implementation. Indeed, it has been argued that the legal profession in common law countries has always opposed codification because a Code is more democratic. In a review of two recent biographies of Joseph Story, Morton J. Horwitz suggested that one of the reasons that Roscoe Pound rejoiced in the defeat of the codification movement in the nineteenth century was that:

> Codification was democratic law-making. The rule of the common law maintained the separation between law and politics. The former conferred the primary law-making powers on an untutored populace; the latter enabled the legal profession to control the scope and form of legal change. [13]

5. An argument often put forward in support of codification, which also has a clear ideological basis, is that a Code will make the law more accessible and more readily intelligible to the average citizen. This is perceived as being an important value because of the direct relationship between legal demystification and democracy.

On the issue of simplification, the proponents of codification have unfortunately often overstated their case. For example, Justian declared:

> We ordain that our formulation of the law, which with God's help we have composed shall have the name of Digest or Pandects: No jurists of posterity shall dare to add their commentaries to it or try their verbosity to confuse the comprehensive clarity of the Code. [14]

Napoleon said that his aim to have a Code so simple and convenient in its arrangement that the French peasant, reading it in its single, slim, pocket-book form by candlelight would be able to know his legal rights.

The critics of the Evidence Code — assuming perhaps that the drafters were inspired by Justin and Napoleon — were fond of

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12 See Brierly, *Quebec's Civil Law Codification*, 14 McGill L.J. 521 (1968); Crepeau, *Civil Code Revision in Quebec*, 34 Louisiana L. Rev. 921, (1974); Stone, *To Codify or Not to Codify: Derivation of Louisiana Law*, 9 A.B.A. International and Corp. Bulletin 16 (1964-65).

13 Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 Am. Journal of Legal History 275 (1973); see also Tushmet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law*, 81 Wisconsin L. Rev. 81, 106-109 (1977).

14 Quoted in Scarman. *Codification and Judge-Made Law: A Problem of coexistence*, 42 Indiana L.J. 355, 357 (1966-67).

pointing out that such complete simplicity could not be obtained, and therefore a "Code" was futile. Others even perceived (and rejected) the ideological basis of the argument. One critic remarked that the goal of simplicity "smacks of a longing for "people's courts" where "justice" will be done with despatch and simplicity, without formality and fancy verbiage. This has been achieved in a number of countries behind the Iron Curtain."[15] The proponents of the argument that because complete simplicity cannot be achieved and, therefore, a Code should not be attempted, commit, of course, the logical fallacy of bifurcation. The impossibility of drafting a Code of Evidence that would permit a layperson upon reading it to become an evidence scholar does not foreclose the possibility of drafting a Code that is at least more accessible and easier to understand than the present law of evidence. Some would say that much of value would be achieved if the law of evidence could be made more comprehensible even to lawyers.

6. As a final preliminary matter, I am concerned here with the meaning of the word Code when used to refer to a single piece of legislation. I am not using it in the sense of an all-embracing codification of the law such as the classic codes of the civil law world. Nor do I wish to enter the larger debate of whether all the common law is doomed to codification.[16]

Characteristics of a Code

In discussing the compatibility of the Evidence Code and the common law, I will discuss only three characteristics of the Code: it is comprehensive, pre-emptive of the common law and drafted in terms of principles. It is these characteristics that are most frequently alleged to make it "foreign" to the common law and different in kind from statutes traditionally enacted in common law jurisdictions. Indeed, much of the debate has centered on the fact that the Code is drafted in terms of principles rather than specific detailed rules.

1. *Comprehensive*

A statute is drafted against the background of a body of law, much of which is to be preserved. Details of the law are to be changed and only those details to be changed are enacted in statutory form. A Code, on the other hand, is designed to set out the

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15 Written Comments Received From the Public Relating to The Laws of Evidence 26 (1976).

16 Many of the criticisms of codification relate only to some form of all-embracing codification. See Hahlo, *Codifying The Common Law: Protracted Gestation*, 38 Mod. L. Rev. 23 (1975).

whole law relating to a particular subject in a comprehensive manner. It is to form the basic source of legal rules in that field. This does not necessarily mean that the Code contains all the detailed rules governing the subject which it treats. Certainly the Code of Evidence contemplates that some specific rules of evidence will arise that are not specifically covered by the Code. Examples of rules that might be found outside the Code are rules regarding burden of proof or authentication that relate to a specific offence or document. As a simple matter of convenience these rules of evidence are most appropriately found in the statutes dealing with the particular subject matter to which they relate.

The Code is comprehensive, however, in the sense that all of the basic rules of evidence are set out in the Code. Only detailed rules that might form exceptions or illustrations of these general rules and which relate to particular matters, will be found outside the Code in other statutory instruments. The comprehensiveness of the Code is apparent from its general sections. The Code states that except as provided in the Code or any other Act: all relevant evidence is admissible;[17] every person is competent and compellable to testify;[18] no testimony is privileged;[19] all hearsay evidence is admissible.[20]

For a legislative enactment to be comprehensive, it must identify an autonomous branch of the law. Some matters fall clearly under the heading "evidence" because they deal with the admissibility of evidence and reflect procedural values. However, the classification of other matters such as burden of proof, various discovery devices and judicial notice are more troublesome. At the end of the day the decision of whether or not to include these peripheral matters in the Code was made largely on the basis of convenience of reference and historical precedent.

A comprehensive statement of the law has two important advantages in the area of evidence: firstly, it renders the law more accessible; secondly, it permits evidentiary problems to be placed in the context of the whole of the law of evidence and thus to be resolved in a manner that is consistent with the underlying principles of this body of law.

A priori there would seem to be little room for differences of opinion with respect to the desirability of expressing the law relating

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17 Law Reform Commission of Canada, *Report on Evidence* s. 4(1) (1975).

18 Ibid s. 54

19 Ibid s.32

20 Ibid s.27

to a particular subject matter in written form and collecting it, as much as possible, within the four corners of one document. It would seem obvious that the law would then be easier to learn and easier to find. It cannot be maintained seriously that one can find the answer to a given problem of evidence more quickly by searching through the digests and encyclopedias, ferreting out the cases, reading them, analyzing them, and then abstracting their ratio than by simply looking at a Code, finding the relevant section and interpreting it. This is particularly so with respect to the rules of evidence since most evidence rulings are made in the lower courts and even though they may deal with important points of evidence they may never get appealed because the case may be settled or for some other reason not appealed. Thus on any particular issue there are likely to be a series of cases, many duplicative, many irrelevant, many decided without reference to other similar cases. Anyone who has had the unfortunate experience of researching an evidence problem in any depth knows what a frustrating and perplexing task it is.

Accessibility is an important value particularly with respect to the rules of evidence because evidence problems frequently arise for the first time during the course of a trial when the judge or lawyers have little time to research the law before it is applied. Furthermore, if the rules are accessible, experienced and inexperienced counsel in that situation will be placed on a more equal basis. At present experienced counsel are able to manipulate obscure cases in a very intimidating fashion. In the face of such authority, the judge and less experienced counsel are often reluctant to have the trial adjourned so that they can retire to the library and seek out the relevant case law. A comprehensive statement of the law, such as a Code, would enable problems to be tied down to a particular section. The section could be referred to in court, and if necessary, its meaning debated.

The existence of a readily available and authoritative statement of the rules of evidence would also be extremely helpful in conducting the trial of cases in provincial courts, where often a library or even an encyclopedia on evidence law is not available. A Code will reduce the possibility of erroneous rulings, and thus, the number of appeals, and will generally expedite the trial of such cases.

The rules of evidence must also be known to practitioners who do not appear in court. A draftsman, for example, must often take into account problems that might at some time result in litigation. He must draft, therefore, with problems of proof in mind. With a code, each lawyer will have a pamphlet of the rules.

The rules will remain accessible because the various provisions of the Code can be easily annotated as they are interpreted by the courts. Amendments can be made when needed and new sections added. All sources of evidence law can thus remain readily available.

The second advantage of a comprehensive statement of the law is that it permits evidentiary problems to be placed within the context of the rules of evidence as a whole. For instance, if a document is to be admitted into evidence, three evidentiary problems commonly arise: First, if a document is being admitted as truth of the matters asserted in it, the document must come within one of the exceptions to the hearsay rule. In a code, all of these exceptions and the conditions upon which they rest are set out. The relevant exception, if any, can be quickly noted and the conditions of that exception reviewed. Second, the document must be authenticated. The common law developed numerous rules, or numerous methods, by which a document must be authenticated. That is to say, the common law developed numerous rigid requirements of proof that have to be followed to prove that a document is what it purports to be. Again, in a code there would be a single rule dealing with authentication. If particular methods of authentication were required in specific instances, they would all be conveniently set out so that a quick reference would inform counsel of the best way to authenticate a particular document. Finally, before a document is admitted, the proponent of the document must prove that it is an original or, if it is not an original, that it comes within one of the exceptions to the best evidence rule. This rule and the exceptions to it would be set out in the Code. Counsel could quickly review the section to see what the definition of best evidence is and what exception, if any, a non-original document might come within.

Under the present law, when an objection is made to the admission of a document the exact basis for the objection is not always clear, and the above grounds for excluding the document often confused. Moreover, even after an exhaustive review of the problem and a search through the sources, one is often left with a disquieting feeling that there is an obscure rule of evidence or case that might be dredged up to hold the evidence inadmissible.

Even apart from these practical advantages, a comprehensive statement of evidence law was necessary once the decision was made that the bias in the rules of evidence should be changed from a bias in favour of exclusion to a bias in favour of admissibility. The underlying philosophy of the Evidence Code is that all relevant evidence is admissible. The only way this change in emphasis could be achieved was by stating this principle and then proceeding to articulate all, and the only, exceptions to it. Finally, a comprehensive statement was necessary in order to facilitate the adoption of an overall and literally consistent conceptual framework so that the Code could be pre-emptive of the common law.

2. *Pre-emptive*

Invariably gaps in a Code's comprehensiveness will be found.

All factual patterns that might emerge cannot be anticipated. Thus the Code must provide a methodology for resolving what have been variously described as "unprovided for," "doubtful," "hard" or "unenvisaged" cases.[21] One solution would be to have the judge return to common law principles to resolve unprovided for cases. This methodology is commonly adopted in common law jurisdictions. All the commercial codes in the United States, for example, have a common law saving clause. Generally a clause is adopted such as:

> In any case not provided for in this Code the rules of law and equity including the law merchant shall govern.[22]

The Code or statute is regarded as being essentially supplementary to the common law jurisprudence. When a controversy is not covered directly by the statute, even though it might be within the general subject area of the statute, no further reference is made to the statute.

The alternative methodology for resolving unprovided-for cases is to direct the judge to look to the underlying concepts and theories of the Code and apply them in resolving the question. When the judge confronts a gap or an unforeseen situation, his or her duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codified law. The Code becomes the only source of law in the subject area. It pre-empts all the previous law. This is, of course, the methodology of statutory construction used in most civil law jurisdictions and the methodology commonly ascribed to a Code.[23]

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21 Dickinson, *The Problem of the Unprovided Case*, 2 *Recueil D'Etudes Sur Les Sources Du Droit En L'Honneur De Francois Geny* 503 (1935).

22 N.I.L. para. 196, quoted in Gilmore, *On Statutory Absolescence*, 39 U. of Col. L. Rev. 461, 466-467 (1967). Under the Uniform Commercial Code it is unclear whether the courts should reason by analogy to the Code itself in resolving unprovided for cases or whether they should resort to the principles of the common law. See Young, *Review of G. Gilmore, Security Interests in Personal Property*, 66 Colum. L. Rev. 1571, 1574-77 (1966); Hawkland, *Uniform Commercial "Code" Methodology*, [1962] U. Ill. L.F. 291 (1962); Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 Law & Contemp. Prob. 330 (1951).

23 > (The civilian). . . looks at the articles of a Code not as mere rulings, but as particular expressions of more general rules. Therefore, if no express answer to a certain problem is found in the Code, it is not improper to consider various articles in order to induce from them a more general rule and to apply this if it can give a solution. It has sometimes been said that articles of a code are not only law, but sources of law. This is true, not only in the sense that the courts may, by deduction, decide on the implications of a certain article, but also in the sense that the courts may, if necessary, use induction to discover the general rules implied in the provisions of a code and then, reverting to deduction, develop the full potential of these rules in the solution of the problem at hand.

Under the Evidence Code this latter methodology is explicitly adopted. The judge must resolve unprovided for cases by reference to the principles embodied in the Code. Section 3 provides:

> Matters of evidence not provided for in this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code. [24]

Thus, the judge must ask, in resolving unprovided-for cases: given the reasons, the purposes, and the policies underlying the provisions of the Code, how would the legislature have resolved this particular problem? He or she looks to analogous problems and analogous considerations that are covered or dealt with in the Code. The judge does not ask: how would a common law judge have resolved this problem if this statute did not exist?

If the law of evidence is a unified body of knowledge and is comprised of rules that are designed to reconcile certain procedural

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23 (Continued)

Tunc, *The Grand Outlines of the Code*, in B. Schwartz (ed.), *The Code Napoleon and the Common-Law World* 19, 31 (1956).

> It may be that the problem pressing for adjudication is not controlled by the code article.... Nevertheless, the orthodoxies of civilian technique call for the use of a code text by way of analogy to meet the problem of the unprovided case. This is a striking difference from the British tradition, where we encounter theories that statutes should not be given effect in situations that they actually control. The civilian, however, is accustomed to regard a code text as having the same sort of projective value as the common law regards the decisions of the judges as having. Thus, the statutory text enjoys a vitality even greater than it was intended to have. The technique of the civilian in solving the unprovided case, thus becomes a struggle over the projective value of code articles.

Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification?* 47 Harv. L. Rev. 1367, 1378-79 (1934).

See also Monow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tul. L. Rev. 351 (1943); Tate, *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673, (1970); Von Mehren, *The Judicial Process: A Comparative Analysis*, 5 Am. J. Comp. L. 197, 204 (1956); Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L.J. 1037, 1043 (1961). In England when the English and Scottish Law Commissioners began working on the codification of contract law, the issue of how unprovided for cases would be resolved lead to serious differences of opinion. See Chloros, *Principle, Reason and Policy in the Development of European Law*, 17 Int. and Comp. L.Q. 849, 863-4 (1960).

24 Law Reform Commission of Canada, *Report on Evidence*, s.3 (1975). Unfortunately this section has a ring to it which is very close to that of a section in the Russian Civil Code. Section 4 of the Soviet Civil Code provides:

> In the absence of legislative enactments or decrees bearing upon the decision of a case, the court shall decide the case guided by the general policies of the workers and peasants government.

Cited in E.W. Patterson, Jurisprudence 286 [1953].

principles, and is not simply a ragbag of multifarious rules decided on an ad hoc basis, it seems self-evident that its interpretation and application should be consistent with these underlying principles. This can only be achieved if judges turn to the Code, rather than to the common law, to extract premises for judicial reasoning in areas where there is a gap in the Code. To draw upon the common law would involve the risk that credence would be given to a principle which the Code had explicitly or implicitly rejected in other areas. Although the adoption of this methodology was clearly inspired by the civil law tradition, it is not a methodology that should be foreign to the mental processes of good common law lawyers, or in any way inimical to the common law tradition.

The reasoning process involved in using the policies and principles embodied in the Code as a premise for judicial reasoning is not much different from the reasoning process involved when a common law judicial craftsperson uses precedent. The judge distills from a precedent a principle and then uses it as a premise in reasoning about the problem before him. Precedents are used in effect as indications as to how the law has reconciled competing interests in resolving the particular problem. The same kind of deductive reasoning is involved in construing a Code. The only difference is that the judge does not turn to cases to derive the legal principles which will form the premises for judicial reasoning, he or she turns to the Code. The judge tries to implement the legislative design of the Code by extending the policies and the reasons underlying it. He or she looks to analogous sections rather than analogous cases. [25]

Furthermore, common law courts frequently, or at least occasionally, do use principles embodied in a statute as a premise for judicial reasoning and numerous commentators have argued that this is a form of reasoning that they should engage in with more

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25 If it is correct that the grand style of appellate judging involves looking at the situation before the court in terms of its type situation and arriving at a conclusion as to what is the best policy, then if you look at the precise language of the statute and at the situation before you and the reason for the language seems to be present in the situation, you can expand by analogy or, if the reason is absent, limit the statutory language. This is a perfectly permissible reasoning by analogy with the statutes instead of with cases; the same principle exactly. You can say to yourself, "This is the reason for the rule which is enunciated here; the explicit language does not cover the situation which has arisen; should I apply the policy? Are the situations sufficiently similar so that the reasons that make this a good policy in the situation covered precisely by the language should carry over to the situation which is not precisely covered by the language?"

S. Mentschikoff, Commercial Transactions 11 (1969).

frequency.[26] Justice Traynor has collected an impressive number of cases where the courts have argued by analogy from statutes. Indeed, he found that in certain periods of history common law judges agressively pursued the use of statutes as judicial premises in the development of the common law. He observed:[27]

> ... the chatty year books were replete with creative lawmaking in the courts on the basis of statutes. Judges used the eyes at the back of their heads to note statutory rules as a source for analogous decisions.

Other commentators have discerned a recent trend in relying on statutes as a basis for analogical reasoning.[28]

Drafted in Terms of Principles

A characteristic commonly ascribed to a Code is that it is drafted in general terms, in principles, that must be referred to in resolving particular cases. A statute, by comparison, is drafted in terms of detailed rules; an effort is made to foresee and specifically cover every possible factual circumstance.[29] The Evidence Code, by

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26 Landis, *Statutes and the Sources of Law*, in R. Pound (ed), *Harvard Legal Essays* 213 (1934); Schaefer, *Precedent and Policy* 19 (1956); Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4 (1936); Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1900); Page, *Statutes as Common Law Principles*, [1944] Wisc. L. Rev. 175; Thorne, *The Equity of a Statute and Heydon's Case*, 31 Ill. L. Rev. 202 (1936).

27 Traynor, *Statutes Revolving In Common Law Orbits*, 17 Catholic U.L. Rev–401, 405 (1968).

28 Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 Yale L.J. 258 (1972); 3 C. Sands, *Statutes and Statutory Construction: A Revision of Sutherland Statutory Construction* para. 53.01-53.02: R. Schlesinger, *Comparative Law: Cases - Text - Materials* 398 (30 ed. 1970).

29 W. Dale, *Legislative Drafting: A New Approach* (1977); In the Preface to their "Draft Evidence Code" the Scottish Law Commission gave the following explanation for drafting in terms of principles. It is worth quoting at length:

> It is clear that the form of a code must differ radically from that of an existing British statute. The present form of such statutes is conditioned by the fact that they are drafted against the background of the body of existing law, details of which it is desired to change. A code, on the other hand, is designed to set out the whole law relating to a particular subject in a comprehensive and systematic way, and to form the basic source of legal principle in that field. It is neither designed simply to effect alterations to existing law, though it may do so incidentally, nor simply to restate the law, though in fact it may do this; it is designed rather to supplant the existing law completely in a particular field. In this situation the particularised drafting which is thought appropriate to existing legislation would be out of place. It is not desirable to put the Courts in a straitjacket from which they will inevitably seek to escape; the history of foreign codifications suggests that attemps to envisage all possible situations are conspicuous only by their failure.
>
> A code, therefore, should be drafted with the primary aim of enunciating

and large, is drafted in general terms.[30] Is this style of drafting incompatible with the common law tradition? The vociferous criticisms made against the Code on the grounds that it was drafted in the civilian style, or that it gives too much discretion to the judge because it is drafted in terms of general principles, is an indication that at least some people feel it is incompatible. A review of the costs and benefits of drafting in terms of general principles or in terms of detailed rules, however, reveals that the question of what style of drafting to choose is pragmatic and that the same issues and considerations confront a draftsperson in both common and civil law systems.

Before discussing the considerations that led the draftpersons of the Evidence Code to draft, in the main, in terms of general principles, let me define my terms. The distinction between detailed and specifically drafted rules and rules drafted in terms of general principles is similar to the distinction made by some authors between rules and principles, rules and discretion, and formal and nonformal decision-making.[31] Since, however, I do not wish to enter the more general debate raised by these authors, I will stipulate definitions.[32]

To apply a rule, or a detailed legislative provision, the judge needs to look only at a limited range of information. The facts he must find in order to decide if the rule applies are specific, usually obvious, discrete, and easily determined. An example of a rule would

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29 (Continued)

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

Scottish Law Commission, *Draft Evidence Code* 3-4 (1973).

30 "A codifying Act on the law of evidence, drafted in the continental fashion, has been produced by the Canadian Law Reform Commission." Dale, *Legislative Drafting: A New Approach* 339 (1977).

31 See R. Dworkin, *Taking Rights Seriously* (1977); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359 (1975). Sartorius, *Social Policy and Judicial Legislation*, 8 Am. Phil. Q. 151 (1971). Raz, *Legal Principles and the Limits of Law*, 81 Yale L.J. 823 (1972).

32 For a similar analysis see Ehrlich and Posner, *An Economic Analysis of Legal Rulemaking*, 3 Journal of Legal Studies 257 (1974); Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

be a section which reads: "All prior consistent, out-of-court statements made by a witness are inadmissible." Normally, the judge will be able to determine whether the rule applies with a high degree of certainty and without considering the policies that led to its enactment. However, even with such an apparently straightforward rule an understanding of its purpose will be necessary, in some cases, to determine its application; for example, in deciding whether "conduct" in this context can amount to a statement.

By contrast, the application of a principle requires the judge to consider the entirety of a factual situation and to assess whether it should apply by reference to its purpose. In applying a principle, the judge will have to engage in weighing the competing interests as well as making a factual judgment. For example, instead of having a rule such as the one stated above, excluding prior out-of-court statements, the Evidence Code contains a section requiring the judge to exclude evidence if its probative value is outweighed by the danger that its proof and disproof would consume an undue amount of time. This is, of course, the purpose of the rule which excludes prior statements. It is designed to expedite trials.

Throughout the rules of evidence, or any area of law for that matter, the decision of whether to draft in terms of rules or principles has to be made. What I would like to do then is review some of the considerations that must be taken into account in deciding whether to draft rules with specificity or to draft rules of higher generality. To return to the point of my argument, these factors would be important whether one were drafting in a civil or a common law jurisdiction. And there is no reason why a consideration of these factors should inevitably lead to the conclusion that drafting should always be done in terms of detailed rules in a common law jurisdiction.

Benefits of Drafting in Terms of Rules

One of the most frequently claimed virtues of rules is that their application is certain. This general proposition subsumes a whole series of arguments offered in favour of detailed rules: they facilitate private planning, thereby reducing litigation; they act as a curb on the arbitrary powers of the judge; they ensure equality before the law; and, they result in more democratic law-making because it is the elected representatives who assume the responsibility for making the necessary value choices. All these arguments depend for their validity upon the proposition that the application of rules is predictable.

There would appear, on its face, to be little more room for disputing the proposition that a rule is more likely than a principle to lead to predictable results. By definition the number of factors that a decision-maker must take into account in applying a rule are fewer

than those to be considered in applying a standard. Furthermore, the application of a rule does not involve the weighing of competing interests. It is important, however, to go beyond such a facile assertion. A number of observations about the predictability of the application of rules as compared to the predictability of the application of principles may be made.

In many instances, what appear to be rules are simply principles masquerading as rules. Thus, the claimed advantages of predictability are illusory. A number of concepts in evidence law illustrate this phenomenon; for example, the concept of competency. Lawyers often advert to the rule that young children are incompetent to give testimony. The Evidence Code does not contain a rule dealing explicitly with the competency of witnesses. Rather, a section provides that the judge can exclude evidence if its probative value is outweighed by the danger either that it will mislead the jury or consume an undue amount of time. Critics have alleged that this is but another instance in which a perfectly workable and certain rule has been replaced by a discretionary principle. Such an allegation assumes that the rules of competency are self-executing, or that they give the judge greater guidance in specific instances than the principle that "where, because of a witness' perceptual capabilities or moral development, his or her testimony is of slight probative value and might mislead the jury or consume an inordinate amount of time, it should be excluded." The Evidence Code does not change the present law. It simply makes explicit the judgment that must be made in holding a witness incompetent to give testimony.

Another example of a concept which involves the application of a principle and not a rule is the concept of legal relevancy. In the Code, relevancy is defined as logical relevancy and then a provision is added which permits the judge to exclude relevant evidence if its probative value is outweighed by, for instance, the undue consumption of time. This is another example, so it is often alleged, of where the drafters have replaced a rule (that evidence must be legally relevant to be admissible) with a principle or discretion (that requires the judge to weigh the probative value of offered evidence against the dangers of prejudice, the needless consumption of time and so on). But, what is "legal relevance"? By what process of reasoning does a judge reach the conclusion that evidence is legally relevant? He cannot apply a standard of logical relevance alone. Even in a simple trial a logician could point to logically relevant evidence that would consume months to hear. Therefore, where the judge rules evidence legally irrelevant, he is invariably engaged in a balancing process. He is balancing the probative value of the evidence against the amount of time that it would consume to hear evidence against the amount of time that it would consume to hear evidence tending to prove and disprove the fact. Again, the Code does not increase the amount of

discretion a judge has in ruling on the admissibility of evidence, it simply recognizes that this evidentiary concept, the concept of legal relevancy, embraces the application of a principle.

Many evidentiary concepts are similar to the two just mentioned. Their label tends to obscure the judgmental element involved in applying them. All that the Code does is make the principle or discretion explicit. The drafters attempted to compel judges to address themselves expressly to the relevant considerations in applying evidentiary concepts so that a weighing of the competing interests becomes, not only an explanation for the judge's decision, but also part of the justification for his or her decisions.

Rules often do not lead to certainty because they provide judges with the opportunity of engaging in conceptual reasoning. The collateral fact rule is an example. In the early nineteenth century, judges used the term collateral fact to describe a legal consequence. Evidence was excluded because it bore so indirectly on the issues in the case that its probative value was outweighed by the danger that the admission of evidence tending to prove or disprove it would consume an inordinate amount of time. Subsequently judges began phrasing this principle as a rule - evidence of collateral facts is inadmissible. They began to use the term collateral itself as a premise for legal reasoning. This lead to great uncertainty in the jurisprudence because if no reference is made to the reason for using it, the term "collateral" can assume many shades of meaning. The meaning of evidentiary concepts such as res gestae, burden of proof and similar fact evidence, are similarly indeterminate because of the effort the judges make to attach meaning to them by reference to their ordinary usage or the facts of previous cases. [33]

Even if rules have a specific reference, their rigidity and the fact that they can never perfectly implement the reasons for their existence also tends to introduce in trials an aforeseen lack of predictability. It has been observed countless times that courts, torn between the duties of staying within the law or reaching a just result, frequently accommodate the latter by manipulating the former. It was to this well-established process that Holmes directed his epigrammatic remark, "hard cases make bad law". Decisions arrived at through the technique of manipulation and adverse construction may result in justice for the immediate parties. However, they lead to great uncertainty in the application of the law and leave in their wake a twisted law to haunt lawyers and confuse judges in subsequent cases not involving the same "fireside equities". This is seen again and again in the laws of evidence. Indeed, the whole of the case law dealing with the rules relating to corroboration can be

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33 See J. Stone, *Legal Systems and Lawyer's Reasonings* Ch. 7 (1969).

rationally explained only on this basis. Apellate court judges, who are of the view that in a particular case there is insufficient evidence to convict the accused, frequently resort to some aspect of the law of corroboration to achieve their desired result, a new trial. They might hold that the trial judge did not properly explain the rules relating to corroboration to the jury, the evidence the trial judge found to be corroborative could not in law be corroborative, or that the judge made some other error relating to the countless distinctions and refinements that have been engrafted into this body of law. The obscure flexibility that this introduces into the law is, of course, much more pernicious than that introduced by principles. Stating the rules in terms of principles directs the courts to consider and rule directly on the dangers that might arise in specific situations. It permits the courts a safety valve to prevent distortions and the consequent pernicious uncertainty of rules.

The uncertainty inherent in the application of principles is often greatly exaggerated. Principles such as good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness abound throughout the law, and uncertainty has not resulted. Empirical evidence about the predictibility of the application of principles is available by reviewing the experience with the Uniform Commercial Code in the United States. Karl Llewlyn, who was primarily responsible for drafting Article 2 of the Code, employed many broad standards. This drafting sytle was implicitly based on the claim that ideas, like "reasonableness" and "good faith", provide greater predictability in practice than an intricate and technical rule system.[34] The Article has not given rise to excessive litigation and has survived with few amendments.[35]

While some of the principles used in the Code may appear vague in the abstract, their application will usually not be in doubt in specific factual situations. Furthermore, as jurisprudence develops in the "doubtful" cases, the principles will be given even more specific content, by what John Dickinson has aptly referred to as "the downward elaboration of principles."[36]

A final thought on this question of the predictability of rules. Even conceding that the application of rules is more predictable than principles, evidence is an area of law where certainty is not the all important requirement it is often assumed to be. Rules of evidence are generally not designed to act as standards of conduct,

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34 See W. Twinning, *Karl Llewellyn and The Realist Movement* 322 (1973).

35 See Gilmore, *On Statutory Obsolescence*, 39 U. of Col. L. Rev. 461, 473 (1966-67).

36 Dickinson, *Legal Rules: Their Application and Elaboration*, 70 U. Penn. L. Rev. 1052, 1058 (1931).

as rules that people deliberately intend to invoke in ordering their affairs (except to the extent that a person relies on them in fashioning a transaction so that it can be easily proved at trial, and under any system it would generally be easy to plan to ensure admissibility); nor are rules of evidence designed to encourage or discourage certain kinds of social or economic activity (except in the area of privilege: if the purpose of a privilege is to foster candor, people must have confidence that at trial the rule will operate to render their confidential statements inadmissible). Certainty is, of course, important in those areas of law that are designed to facilitate private ordering to deter people from or encourage them to engage in certain activities. In the main, the purposes of the rules of evidence are: to further certain procedural interests, such as expedition, finality, and administrative convenience; and to ensure, to the extent possible, and within the parameters of the judicial trial, that disputes are resolved on their merits.

Predictability becomes more important when a dispute arises and the parties have to predict the outcome of possible litigation. If the evidentiary rules offer predictability at this stage, outcome of the case will be easier to predict, thus increasing the likelihood of settlement and reducing the total cost of dispute resolution. Further, if a case which is doubtful on its merits goes to trial, predictability in the application of evidence rules will reduce the costs of trial by reducing the number and length of voir dires and the number of appeals on evidentiary matters. Yet, the importance of predictability, even at these stages of the process, can be exaggerated. Seldom will the possible admission of one or two items of evidence be a determinative factor in deciding whether to go to trial. And the costs of preparing an offer of proof that is later ruled inadmissible are not nearly as great as the costs involved when a case is not decided on its merits.

Costs of Drafting in Terms of Rules

Even assuming that rules are more certain in application than principles and that there is a need for certainty in evidence law, this benefit must be weighed against the costs of enacting rules as opposed to principles.

The most obvious and, in many cases, the most severe cost of rules is that a rule will never perfectly implement the policies underlying its formulation; it will, in some cases, be over inclusive, and, in others, under inclusive. This is necessarily so because by definition a rule excludes relevant information from the decision-making process.

The rules relating to spousal competency can be used to illustrate this cost. A policy decision might be made that certain relationships in society deserve protection to the extent that one party to

such a relationship should not be compelled to testify against the other because that will endanger the relationship. How should this policy be implemented? Since the family relationship is perhaps the most important such relationship, a rule could be enacted that one spouse cannot be compelled to testify against the other. An obvious problem with this means of implementing the policy is that, in some cases, such a rule does not implement the policy, and in other cases, it extends far beyond the policy. For instance, what about a common law relationship? Clearly, the rationale would cover the relationship but the rule would not. What about a married couple who have been separated for a number of years or whose relationship has completely broken down? The rationale would not extend to them but the rule would.

The extent of this cost depends upon how nearly the rule implements the policy and how serious, in terms of social costs, is the failure to cover all the situations to which the policy of the rule would extend. In most areas of law, guidelines can probably be formulated to assist in resolving this question. In Evidence law, for example, the under- or over-inclusiveness of a rule to implement the policy that evidence of slight probative value should be excluded if its proof and disproof will result in an undue delay of the trial (such as a rule excluding collateral facts or prior consistent statements,) is less serious than the under-inclusiveness of a rule designed to exclude evidence that might tend to prejudice the trier of fact against the accused in a criminal case. The former policy is concerned with economic costs, the latter with protecting innocent persons. This consideration undoubtedly accounts for the fact that judges are more willing to recognize that they have a residual discretion to exclude prejudicial evidence than they are willing to recognize that they have a discretion to exclude merely time-consuming or confusing evidence.

This cost of rules, the fact that they are both over- and under-inclusive, is particularly serious with many of the present rules of evidence and it is related to another attack made on conceptualism by the American Realists. The Realists noted that concepts almost invariably emerge which abstract reality at too high or too general a level in order to ensure that the rule being developed is not under-inclusive. Thus they attacked concepts such as "master and servant", "property", and "consideration" because they lumped together socially disparate situations that needed differential treatment. Such criticism can easily be made of many rules of evidence. The hearsay rule, for example, classifies together all assertions made outside of a particular courtroom in a particular case and treats them alike. It is a concept that abstracts reality at such a general level that the differences it ignores are vastly more important than the single similarity upon which it is based. As Professor Lowinger

has noted, "It is almost self-evident that there can be little utility in a class which is so broad as to include the prattling of a child and the mouthings of a drunk, the encyclical of a pope, a learned treatise, an encyclopedia article, a newspaper report, an unverified rumor from anonymous sources, an affidavit by a responsible citizen, a street corner remark, the judgment of a court, and innumerable other equally disparate sources of information." [37]

To reduce the coverage of rules - to finely-tune their application - exceptions might be created to carve out situations in which the rule is obviously over-inclusive. The courts, for example, have created a series of exceptions to the hearsay rule. Indeed no two authors can agree on the number. However, as well as introducing into the law an immense degree of complexity, this method of attempting to make rules "just" often leads to arbitrariness. For example, the present rule that spouses cannot be compelled to testify against one another is subject to over thirty exceptions. The application of these exceptions can lead to the following anomalous results: if a man is charged with the rape of a woman, his wife can be compelled to testify against him; if he is charged with the murder of the same woman, she cannot; if a man is charged with attempting to commit buggery his wife can be forced to testify against him; if he commits it, she cannot; if a man murders his wife's mother, sister or child, his wife cannot testify against him even if she wishes. The rule is often justified on the grounds that society has an interest in preserving the marriage relationship because of the harm caused the children by a marriage breakdown, and yet children can be compelled to testify against parents and vice versa. Thus, this cost of rules, that they often must abstract reality at a high level of generality so as not to be under-inclusive and are therefore often over-inclusive, cannot be cured in most cases without introducing enormous complexity and a degree of arbitrariness into the law.

A second cost of rules is that they tend to freeze the law. The values or conditions of one period of time become encased in a rule that is not changed to account for changing values or conditions. The application of principles more readily admits a solution to this problem. For example, the common law rules relating to best evidence could not be applied to computer printouts, but the principle clearly covered them. The statutory rules creating a marital privilege could not be extended to cover an increasing number of common law relationships or extended families. By contrast, a common law principle relating to the waiver of formal proof for notorious facts embraces new scientific developments as they emerge.

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37 Loevinger, *Facts, Evidence and Legal Proof*, 9 Western Reserve L. Rev. 154, 165-166 (1950).

Another cost of rules, in this area at least, is that they render the law incomprehensible to lay people. Rules, as mentioned, are arbitrary and their purpose is often obscure. Principles on the other hand explicitly reflect their purpose and will often be comprehensible to the non-lawyer as a result. Furthermore the principles underlying the hundreds of detailed rules of evidence are few in number. Compare the thirty pages of the Evidence Code to Wigmore's ten volumes on common law evidence. The analysis involved in deciding whether to draft a rule or a principle can only be made after a careful weighing of the costs and benefits of using one approach as opposed to the other. In drafting the Evidence Code the drafters were often of the view that the benefits of drafting a principle in a particular section, outweighed the costs. While this method of drafting might have been inspired by the civilian system, the arguments in favour of drafting in such a style do not derive from any premises "foreign" to the common law. Furthermore, in determining the generality of the drafting in a civilian jurisdiction the same kind of analysis must presumably also be undertaken.

Conclusion

The characteristics of the Evidence Code that are most frequently alluded to in asserting its compatibility with the common law - its comprehensiveness, the fact that it is pre-emptive of the preceding decisional law, and the generality of its drafting - were ascribed to the Code only after a careful analysis of the advantages and disadvantages of such attributes. They cannot be discredited simply by referring to them as foreign to the common law. The common law lawyer and the civilian lawyer may have different instincts, acquired through the socialization processes inherent in their respective systems, as to what a legislative enactment should look like. However, in the process of rational law reform the value of these instincts falls away. The law reformer must engage in a dispassionate weighing of costs and benefits. If the end product looks more civilian than common law (or vice versa), so be it. The advantage we have in Canada is that the process of reform can draw on the experience of both systems of law. This advantage will hopefully not be lost because of narrow-minded provincialism.