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Progress Is Our Only Product: Legal Reform and the Codification of Evidence

Michael Ariens

Twentieth-century reform of the American law of evidence was initially premised on the ideals of legal progressivism, ideals splintered by American legal realism. In preparing the American Law Institute's Model Code of Evidence from 1939 to 1942, Harvard Law School professor Edmund M. Morgan attempted to reconstitute the framework of reform in light of the challenge of legal realism. The Model Code was based on granting greater discretion to the trial judge and changing the goals of the trial from a search for truth to a "rational" resolution of disputes. In large part due to these apparently radical and "corrosive" changes, the Model Code failed to win professional support and was not adopted by any state. The structure of the Model Code was used for the two subsequent evidence codification efforts, the Uniform Rules of Evidence and the Federal Rules of Evidence. These codification efforts found greater academic favor in part because they fit within the post-World War II jurisprudence of reasoned elaboration. The Federal Rules also enjoyed extraordinary professional favor because the drafters explicitly affirmed truth as the goal of the rules. The irony is that the framework of the Federal Rules, since they are based on the Model Code, contradicts this message.

I. INTRODUCTION

The story of 20th-century American legal thought is often told as a history of labels, from Sociological Jurisprudence through Critical Legal Studies and beyond. If people play any role, it is as characters, emblems of theories they apparently represent. Oliver Wendell Holmes, Jr., for exam-

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ple, is cast as either the demonic positivist or the mature "modern" jurist. Lon Fuller characterizes the secular Natural Law scholar.¹ Additionally, modern American legal thought is often structured as a story of Law in the abstract; Law as heavenly conception versus Law as social fact. What is missing from these pictures is the relationship of legal thought and substantive legal doctrine. Fierce "intramural" debates about the efficacy of change in legal doctrine may serve as a proxy for a larger battle among divergent jurisprudential views. Conversely, differences among competing jurisprudential views may mask underlying similarities, similarities that reduce the differences from a clash of "paradigms" into another intramural struggle, albeit one at a broader level than a doctrinal debate. Understanding particular doctrinal disputes in light of their shared assumptions may provide a ground-level perspective from which to assess shifts in 20th-century American legal thought.

My concern in this article is to discuss recent American jurisprudential currents by locating them in an unlikely place: the work of Harvard Law School Professor Edmund M. Morgan,² specifically his work as Reporter to the American Law Institute's (ALI) Model Code of Evidence. I contend that Morgan, although not considered a jurisprudential thinker like a Lon Fuller, crafted the Model Code of Evidence as a jurisprudential response to both the devastating criticism of the trial process by "realists" like Leon Green, Thurman Arnold, and Edward Robinson, on the one hand, and to the (then) "reactionary" views of John Henry Wigmore and the practicing legal profession, on the other hand. Morgan's efforts to structure the Model Code of Evidence were an attempt to re-form the ideals of legal progressivism, to find a "middle way" between the extremes that threatened the legal order. Instrumentally, the Model Code was a failure, since no state adopted it. However, the drafters of the Uniform Rules of Evidence used the Model Code as the basis for codifying the law of evidence, and the drafters of the Federal Rules of Evidence (FRE) acknowledged using the Uniform Rules as their starting point. With the enactment of the Federal Rules of Evidence in 1975 and with the adoption

1. Compare Robert S. Summers, *Lon L. Fuller* (Stanford, Cal.: Stanford University Press, 1984), with Peter Read Teachout, "The Soul of the Fugue: An Essay on Reading Fuller," 70 *Minn. L. Rev.* 1073 (1986). But see John Henry Schlegel, "The Ten Thousand Dollar Question," 41 *Stan. L. Rev.* 435 (1989), reviewing Laura Kalman, *Legal Realism at Yale, 1927-60* (Chapel Hill: University of North Carolina Press, 1986) ("Kalman, *Legal Realism*") (suggesting the necessity of individualized portraits to understand American legal realism).

2. Morgan received bachelor's, master's, and law degrees from Harvard University, the last coming on 1905. He practiced law in Duluth, Minn., for seven years before he joined the faculty at the University of Minnesota School of Law. In 1917 Morgan joined the Yale Law School faculty, where he remained until 1925, when he returned to his alma mater. Morgan retired from Harvard in 1950. He then began teaching at Vanderbilt Law School, where he taught until 1963. He died in 1966. See Mason Ladd, "Edmund M. Morgan—In Memoriam," 79 *Harv. L. Rev.* 1546 (1966).

by 34 states of evidence codes modeled on the FRE, the *structure and theory* of the Model Code survived in the FRE, although this was and is rarely acknowledged.³

The parentage of the Federal Rules of Evidence is rarely acknowledged in part because of the notoriously short memory of Americans (and American lawyers) and in part because recognizing the theory of the Model Code requires the legal profession to confront painful issues the legal profession has tried to avoid for 50 years. The particular issue raised by the Model Code was its denial that the rules of evidence exist to ascertain the truth. The more general rules raised by the reaction to the Model Code, and to subsequent evidentiary codification efforts, is the idea of progress. In the study of the law and reform of the rules of evidence, almost all legal scholars and the entire legal profession have avoided discussing these issues.⁴ Thus, articles praising or condemning the extent of judicial discretion in the Federal Rules of Evidence brush only gently against those unarticulated assumptions governing the idea of judicial discretion.

To understand the context in which the Model Code of Evidence was framed requires a discussion of the rise of legal progressivism in the early 20th century as well as the impact of those academics branded legal realists in the 1930s. The spectacular failure (and later success) of the Model Code of Evidence may allow us to understand notions of legal reform and that post-World War II jurisprudence categorized as reasoned elaboration or legal process.

3. There was a brief mention of the Model Code of Evidence. "The Committee acknowledges its indebtedness to its predecessors in the field of drafting rules of evidence. The American Law Institute Model Code of Evidence, Uniform Rules of Evidence, New Jersey Rules of Evidence, and California Evidence Code, with their supporting studies and commentaries, were invaluable in suggesting general approaches and organization as well as particular solutions." Letter of Submission to Standing Committee on Rules of Practice and Procedure, 46 F.R.D. 173, 180 (1969) (written by Albert E. Jenner, Jr., chairman of the Advisory Committee on Rules of Evidence).

4. The exception, in my view, is Kenneth Graham. See 21–25 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* (St. Paul, Minn.: West, 1977–89) ("Wright & Graham, *Federal Practice*"); Kenneth W. Graham, Jr., " 'There'll Always Be an England': The Instrumental Ideology of Evidence," 85 *Mich. L. Rev.* 1204 (1987), reviewing William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985) ("Twining, *Theories of Evidence*"); *id.*; "The Persistence of Progressive Proceduralism," 61 *Tex. L. Rev.* 929 (1983), reviewing Julius Byron Levine, *Discovery: A Comparison between English and American Civil Discovery Law with Reform Proposals* (1982).

II. AMERICAN LEGAL THOUGHT AND LEGAL REFORM

A. Introduction

The Federal Rules of Civil Procedure, implemented in 1938,⁵ and the Federal Rules of Evidence, enacted in 1975,⁶ are designed, we are told, to promote the “just, speedy, and inexpensive determination of every action.”⁷ They are to be “construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”⁸ The stated goals of these transsubstantive rules, then, are that the truth be determined and disputes be justly resolved.⁹

The foundational assumptions underlying the claim that the Federal Rules of Civil Procedure and the Federal Rules of Evidence are instruments that permit the discovery of truth and the “just” resolution of disputes are three related phenomena: first, the general “optimistic rationalism”¹⁰ pervading most of Western legal and intellectual thought from the Enlightenment;¹¹ second, the legal “progressivism”¹² of influen-

5. In the Rules Enabling Act of 1934 Congress authorized the Supreme Court to prescribe general rules of practice and procedure, which were to become effective if Congress took no action during a regular congressional session to nullify them after being reported to Congress. 28 U.S.C. § 2072 (1934). By order dated 20 Dec. 1937, the Supreme Court adopted the Federal Rules of Civil Procedure, which were then transmitted to Congress by the Attorney General in Jan. 1938. Congress took no action during that congressional session to nullify the new Federal Rules of Civil Procedure. On 16 Sept. 1938, the Rules became effective. See text accompanying notes 71–77.

6. Rules of Evidence, Pub. L. 93-595, 88 Stat. 1926 (1974).

7. Fed. R. Civ. P. 1.

8. Fed. R. Evid. 2.

9. See text accompanying notes 130–39, discussing the change from perceiving the rules of evidence as a way to ascertain the truth to a perception of the rules as part of the process of creating a politically convenient way to settle disputes.

10. Twining, *Theories of Evidence* vii; see also Lawrence M. Friedman, *A History of American Law* 663–64 (2d ed. New York: Simon & Schuster, Touchstone, 1985) (“Friedman, *History of American Law*”) (“This state of mind is part of the general debris of a world-wide movement of recent centuries that can be called, for want of a better name, rationalism”); Calvin Woodard, “The Limits of Legal Realism: An Historical Perspective,” 54 *Va. L. Rev.* 689, 691–94 (1968) (noting that the process of secularization of society is based on the growth of rationalism, the development of science, and the invention of new technology); John Merryman, *The Civil Law Tradition* 28–29 (2d ed. Stanford, Cal.: Stanford University Press, 1985) (discussing the influence of the spirit of “optimistic rationalism” on the codification of French private law in the Code Civil of 1804).

11. Twining, *Theories of Evidence* 1–18. See also William Twining, “Evidence and Legal Theory,” 47 *Mod. L. Rev.* 261, 272 (1984); *id.*, “The Rationalist Tradition in Evidence Scholarship,” in Enid Campbell & Louis Waller, eds, *Well and Truly Tried* 211, 242–49 (1982) (“Twining, ‘Rationalist Tradition’”). In “Evidence and Legal Theory,” Twining notes that this pervasive optimistic rationalism has been challenged in the history of ideas by the thought of “Croce, Collingwood, Freud, Mannheim, Marx and Weber,” *id.* at 274, and in legal thought by “contemporary writing on judicial processes.” *Id.* I believe that the “oppo-

tial early to mid-20th-century American reformers,¹³ who acted as catalysts for both procedural and evidentiary reform; and third, the jurisprudential reaction to American legal realism, which coalesced after World War II into legal process or reasoned elaboration.¹⁴

The Federal Rules of Civil Procedure and the Federal Rules of Evidence were explicitly presented as means to the goals of "truth" and "jus-

sitional" thought of Freud, Marx, and Weber remains largely that, and "most" legal and intellectual thought is pervaded by Enlightenment thought. Cf. Alasdair MacIntyre, *After Virtue* (2d ed. Notre Dame, Ind.: University of Notre Dame Press, 1984). Additionally, Twining cites no writers discussing the judicial process. A recent compilation of divergent thought concerning the judicial process is Stephan Landsman, *American Bar Association Section of Litigation Readings on Adversarial Justice: The American Approach to Adjudication* (St. Paul, Minn.: West, 1988).

12. See generally G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," 58 *Va. L. Rev.* 999 (1972).

13. On William Draper Lewis, former dean of the University of Pennsylvania School of Law and founder and executive director of the American Law Institute, see N. E. H. Hull, "Restatements and Reform: A New Perspective on the Origins of the American Law Institute," 8 *Law & Hist. Rev.* 55, 81-86 (1990). See also 21 Wright & Graham, *Federal Practice* at § 5005 ("There can be little doubt of the ties between the A.L.I. and legal scholars of Progressive political leanings, for the Institute was led for many years by William Draper Lewis, former Dean of the University of Pennsylvania Law School and an active Progressive").

On Charles E. Clark, dean of the Yale Law School and Reporter for the Advisory Committee drafting the Federal Rules of Civil Procedure, see 4 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1004 (St. Paul, Minn.: West, 1987) ("Wright & Miller, *Federal Practice*"). Clark was dean of Yale Law School from 1929 until 1939, when he was appointed to the U.S. Court of Appeals for the Second Circuit. See Eugene V. Rostow, "Judge Charles E. Clark," 73 *Yale L.J.* 1 (1963); see generally Kalman, *Legal Realism* 115-40 (cited in note 1). John Henry Wigmore was author of the definitive treatise of the law of evidence, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1st ed. 1904-5; 2d ed. 1923; 3d ed. Boston: Little, Brown & Co., 1940) ("Wigmore, *Treatise*"). See Edmund M. Morgan, Book Review, 20 *B.U.L. Rev.* 776, 793 (1940) ("Not only is this the best, by far the best, treatise on the Law of Evidence . . ."). In *Theories of Evidence* 172, Professor Twining cites approvingly a description of Wigmore as "the last Mid-Victorian." I agree with this assessment, but Wigmore was a legal progressive, as distinct from a legal formalist. It is true, however, that his political conservatism led him to urge the ABA to join the fight against Communism during the first Red Scare of 1919-21 and caused him to rail against those legal academics who supported Sacco and Vanzetti in the mid- to late 1920s. An interest in legal reform does not and did not require a political liberalism or progressivism. See, e.g., Friedman, *History of American Law*, 674 ("'Law reform,' in the sense the organized bar uses this term, is really a measure for professional defense."). On Wigmore, see William R. Roalfe, *John Henry Wigmore: Scholar and Reformer* (Evanston, Ill.: Northwestern University Press, 1977) ("Roalfe, *Wigmore*"). The most important legal progressive was Roscoe Pound, whose 1906 speech to the American Bar Association, later published under the title "The Causes of Popular Dissatisfaction in the Administration of Justice," 29 *A.B.A. Rep.* 395 (1906) ("Pound, 'Popular Dissatisfaction'"), was the catalyst for legal progressivism.

14. See G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," 59 *Va. L. Rev.* 279 (1973); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 159-78 (Lexington: University Press of Kentucky, 1973) ("Purcell, *Crisis of Democratic Theory*") (showing the early reaction against realism); Akhil Amar, "Law Story," 102 *Harv. L. Rev.* 688 (1989) (review essay of the third edition of Hart & Wechsler's *The Federal Courts and the Federal System*).

tice” in part due to this broader Western and narrower American intellectual milieu. These goals were also channeled by a deep public and professional reverence for both Law and the Rule of Law. Finally, the legal profession was dedicated to the beauty and utility of the adversary system, the hallmark of the “Anglo-American” system of adjudication. These explicit statements were not part of the wellspring of the Federal Rules of Evidence, the American Law Institute’s 1942 Model Code of Evidence. Part of the failure of the Model Code of Evidence was due to its apparent disavowal of these goals.

The abiding belief of early 20th-century legal progressive thought was that legal reform could rationally aid in the progress of a legal system toward consensual notions of “truth” and “justice.” Legal realism, while having little contemporary impact on the legal profession, shattered a jurisprudential faith in legal progress toward truth and justice. The restructuring of legal progressive thought into reasoned elaboration or legal process after World War II required a fundamentally different justification for a “rational” and progressive administration of justice. This justification, however, was unacceptable to a legal profession then essentially unaffected by legal realism. While legal academics could no longer faithfully argue that the goal of the trial was truth, nor that the administration of justice was concerned with substantive rather than procedural justice, the legal profession and the public continued to believe in both goals. Invoking the goals of truth and justice to garner public and professional support was necessary to the passage of the Federal Rules of Evidence; the structure of the Federal Rules, because it is based on the Model Code of Evidence, undermines those goals.

B. Optimistic Rationalism

William Twining describes the tenets of “optimistic rationalism” as a congeries of beliefs in truth, reason, and justice under law.¹⁵ Events occur independently of human observation, and past events can be truthfully reconstructed in the present, although “establishing the truth about alleged past events is typically a matter of probabilities or likelihoods falling short of complete certainty.”¹⁶ Ascertaining the truth is accomplished by listening to experts explain and interpret relevant data and through the “common-sense” generalizations of society.¹⁷ In adjudicating disputes, establishing the truth must be based on relevant evidence and justice can be accomplished only if the truth is established on the basis of relevant evi-

15. Twining, *Theories of Evidence* viii (cited in note 4).

16. *Id.* at 13.

17. *Id.* at 14.

dence. Further, justice can be accomplished only if the method of fact finding is “rational.” Rational decision making means making decisions based on inferences from relevant evidence. Rational decision making based on relevant evidence will thus lead the fact-finder to the truth and to “correctness”¹⁸ in decision making. The search for truth, then, is at the core of a system of justice. Since, however, decisions about the truth of factual allegations occur in an imperfect, human setting, the concern for justice is not a concern for an idealized justice but a justice under [positive] law,¹⁹ which means that truth will not always be discovered or a correct decision rendered and further means that the goal of “correctness” may be matched or superseded by other social goals.

The “Anglo-American” system of adjudication—the adversary system—structures and channels these tenets of optimistic rationalism. Unlike trial by compurgation or trial by ordeal, the adversary system was perceived as a rational system for the discovery of truth²⁰ and the pursuit of justice. In the adversary system, each participant, with the notable exception of the parties, plays a significant role in fulfilling the requirements of optimistic rationalism. The attorneys for the parties investigate and sift the facts pertinent to their (opposing) cases and offer and object to the introduction of evidence; the judge impartially decides disputed issues of law, including the admissibility of evidence; and the jury, given the conflicting evidence presented by both parties and instructions on the applicable law by the judge, decides the disputed issues of fact and renders a verdict for a party. This system provides checks on abuses by counsel (by the judge), by the judge (by counsel on appeal), and by the jury (through jury instructions, limiting their purview to issues of “fact” and, in egregious cases, permitting the court to render a judgment notwithstanding the verdict or to inquire into the validity of the verdict), and so limits any departures from rationality.²¹

C. Legal Progressivism and Procedural Reform

The story of the codification of the rules of evidence is further linked to the story of legal progressivism, for the interest in a code of evidence

18. Twining uses the phrase “rectitude of decision.” *Id.*

19. *Id.*

20. See 5 Wigmore, *Treatise* § 1367 (3d ed. 1940) (cross-examination “is beyond any doubt the greatest single engine ever invented for the discovery of truth”). See also Twining, *Theories of Evidence* 161 (cited in note 4) (“Wigmore placed far more emphasis on the role of the law of evidence as a means for promoting the search for truth than on its role in constraining that search in the interest of other values and policies”). See text accompanying notes 130–39.

21. Cf. Pound, “Popular Dissatisfaction” at 404–5 (disparaging the ideal that a trial was a sporting contest and pleading for a procedure allowing a judge to independently search for truth and justice).

rules is based on the legal progressives' spirit of legal reform. In 1904–5, Wigmore's *Treatise*²² was published. This four-volume first edition was an immediate critical and commercial success. Dean²³ Wigmore became the unchallenged authority on the law of evidence in America.²⁴

The publication of Wigmore's *Treatise* was "the most important event in the history of the law of evidence in this century."²⁵ Wigmore's *Treatise* was not simply a compendium of cases and a rationalization of inconsistencies in the law of evidence but also a call for reform. If the legal system was to be a rational system for the discovery of truth, as Wigmore believed, the rules of evidence needed to be applied consistently with those goals and to be workable in practice, that is, in trials. Wigmore's ideas for reforming the law of evidence were part of the emergence of legal progressivism, or sociological jurisprudence,²⁶ led by Roscoe Pound.

In 1906 Pound spoke at the annual meeting of the American Bar Association in St. Paul, Minnesota, about the reasons for public dissatisfaction with the administration of justice in American courts.²⁷ Among the reasons for public dissatisfaction with the American legal system²⁸ was contentious procedure, which turned litigation from a search "for truth

22. Wigmore, *Treatise*. The first important treatise on the law of evidence in America was written by Harvard Law School Professor Simon Greenleaf and first published in 1842. The title of Greenleaf's book was *A Treatise on the Law of Evidence*. Greenleaf's treatise was preceded in America only by Swift, *Digest of the Law of Evidence*, which apparently had little impact. See 21 Wright & Graham, *Federal Practice* at § 5001. See also Twining, "Rationalist Tradition" at 231 (cited in note 11). Initially, Greenleaf's treatise was written for his students but became the authoritative source of the American law of evidence for the rest of the 19th century. See Twining, *Theories of Evidence* 5. The 16th, and final, edition of *Greenleaf on Evidence* was edited by Wigmore, then a professor at Northwestern University Law School, in 1899. Little, Brown & Company, the publishers of *Greenleaf on Evidence*, were impressed with Wigmore's efforts to the extent that they asked him to author a treatise on the law of evidence, which resulted in Wigmore's monumental *Treatise*. 21 Wright & Graham, *Federal Practice* at § 5001.

23. Wigmore was named dean at Northwestern University Law School in 1901, a position he held until 1929. After military service in Washington, D.C., during World War I, Wigmore preferred the appellation "Colonel."

24. The death in 1902 of Wigmore's evidence teacher at Harvard Law School, James Bradley Thayer, and the publication of Wigmore's *Treatise* to replace Greenleaf left Wigmore as the dominant evidence scholar within both legal academia and the legal profession.

25. 21 Wright & Graham, *Federal Practice* at § 5001. The following paragraph draws heavily on that work.

26. See generally White, 58 *Va. L. Rev.* (cited in note 12); See also Roscoe Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605, 608–9 (1908) (contrasting a mechanical jurisprudence with a "sociological movement in jurisprudence").

27. Pound, "Popular Dissatisfaction" at 403 (cited in note 13).

28. *Id.*

(1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

and justice”²⁹ into a game or sport “that the parties should fight out . . . in their own way without interference.”³⁰ Decrying the sporting theory of justice, Pound cited Wigmore for the proposition that this view inaccurately depicted the adversary system. The sporting theory disfigured the administration of justice and mistakenly led even the “most conscientious” judge to believe that he was “not to search independently for truth and justice”³¹ and to assume that “errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial.”³² This gave the community “a false notion of the purpose and end of law.”³³

Pound’s call was for a true “scientific jurisprudence”³⁴ based on the use of experts to make the legal system more efficient. Making judges “scientists” would instill in judges an expertise which would create a greater efficiency in the administration of justice. It would also alter the administration of justice by creating an emphasis on substantive justice in the courts. Two years later, Pound fleshed out both these themes in a *Columbia Law Review* article. The science of law was a means to the end of “reason, uniformity, and certainty.” A scientific jurisprudence was a search for full justice, for “solutions that go to the root of the controversies,”³⁵ for equal justice, and for exact justice. Law was scientific in order to eliminate “the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance.”³⁶ The scientific administration of justice, however, was not to be confused with a mechanistic jurisprudence, although a degeneration of legal science could lead to stagnation and “petrification” in the legal system.

The antidote to the problem of “petrification” was “a pragmatic, a sociological legal science.”³⁷ “The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.”³⁸

Pound then noted that the law of procedure and evidence suffered

29. *Id.* at 405.

30. *Id.*

31. *Id.*

32. *Id.* “The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?” *Id.* at 406. A related problem was the “injustice of deciding cases upon points of practice, which are the mere etiquette of justice.” *Id.* at 408.

33. *Id.* at 406.

34. See 21 Wright & Graham, *Federal Practice* at § 5001.

35. Pound, 8 *Colum. L. Rev.* at 605.

36. *Id.*

37. *Id.* at 609.

38. *Id.* at 609–10.

“especially from mechanical jurisprudence.”³⁹ An insistence on perceiving procedure and evidence in conceptual terms led judges to view them as ends rather than means, and Pound gave examples of this error. He concluded by suggesting the enactment of “a common-sense and business-like procedure.”⁴⁰

The advent at the beginning of the 20th century of sociological jurisprudence,⁴¹ also known as legal progressivism, progressive proceduralism,⁴² and progressive-pragmatism,⁴³ was part of the general progressive movement⁴⁴ and specifically part of the intellectual departure from formalism.⁴⁵ Pound, the progenitor of sociological jurisprudence, relied, like all good progressives, on the “ideology of bureaucracy”⁴⁶ to support his efforts at reforming the legal system. In general, “[p]rogressivism believed in the management of government by experts and advocated the expansion of the executive branch, primarily in the form of administrative regulatory agencies, at the expense of the Congress and the courts.”⁴⁷ Specifically, formalist jurisprudential theory employed a priori reasoning rather than reasoning based on actual economic and social conditions.⁴⁸ The use of

39. *Id.* at 617.

40. *Id.* at 620.

41. Roscoe Pound, “Liberty of Contract,” 18 *Yale L.J.* 454, 464 (1909).

42. 21 Wright & Graham, *Federal Practice* at § 5005.

43. Hull, 8 *Law & Hist. Rev.* at 85 (cited in note 13).

44. On progressivism generally, see Robert H. Wiebe, *The Search for Order, 1877–1920* (New York: Hill & Wang, 1967), and Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Vintage Books, 1955). On general intellectual thought in the late 19th and early 20th centuries, see Henry Steele Commager, *The American Mind: An Interpretation of American Thought and Character since the 1880's* (New Haven, Conn.: Yale University Press, 1950), and on developments leading up to progressivism, see Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1977).

45. See Morton White, *Social Thought in America: The Revolt against Formalism* (New York: Viking Press, 1949). An excellent and empathetic exploration of legal formalism is Thomas Grey, “Langdell’s Orthodoxy,” 45 *U. Pitt. L. Rev.* 1 (1983). Grey suggests that “the heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order.” *Id.* at 11.

46. See 21 Wright & Graham, *Federal Practice* at § 5001. The ideology of bureaucracy was one tenet held in common by both legal progressives and realists. See Kalman, *Legal Realism* 31 (cited in note 1) (discussing Clark and Arnold). On Thurman Arnold’s views, see Douglas Ayer, “In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period,” 23 *Stan. L. Rev.* 1049, 1085 (1971) (“The isolation of efficiency from other values led to an insistence on government by experts”); cf. Neil Duxbury, “Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence,” 10 *Oxford J. Legal Stud.* 11, 21 (1990) (“Arnold, however, was no potential reformer”).

47. White, 58 *Va. L. Rev.* at 1003 (cited in note 12). In efforts to reform the law of evidence, however, legal progressives like Edmund Morgan used the specter of administrative tribunals replacing trial courts to persuade the legal profession to support evidentiary reform. See Edmund M. Morgan, “The Future of the Law of Evidence,” 29 *Tex. L. Rev.* 587, 607–9 (1951).

48. Pound, 8 *Colum. L. Rev.* 605 (cited in note 26). See Edmund M. Morgan et al., *The Law of Evidence: Some Proposals for Its Reform* xiv (New Haven, Conn.: Yale University Press, 1927) (“Morgan, *Law of Evidence*”) (denigrating evidence writers basing their decisions on “a priori arguments”).

disinterested experts in adjudication would make the administration of justice more rational and just. Such reform was a gradual reform, conservative in the sense of taking the best from the American past and molding it to the present. Political and legal progressives, as their name suggests, believed in the evolution of human progress, a gradual but continued movement toward greater enlightenment about the human condition. As advocates for efficiency, expertise, and progress, progressives claimed that their movement was nonideological. All bureaucrats, including judges, if correctly trained and learned as “scientists,” could act disinterestedly in support of progress. Finally, some legal progressives, including Pound and Wigmore, believed in moral absolutes. While society’s values were often inchoate and in flux, there was some consensus about values.⁴⁹

Pound’s ideas for legal reform gradually captured the attention of influential academics and “elite” members of the legal profession. In a 1937 article looking back at the early proposals for legal reform, Wigmore called Pound’s 1906 speech “the spark that kindled the white flame of progress.”⁵⁰ Wigmore noted that on the morning after Pound’s speech was given, he met with William Draper Lewis, then of the University of Pennsylvania, and they, along with others, “resolved to do *something* about it in our own limited spheres.”⁵¹ In 1936, a writer discussing the third draft of the proposed Federal Rules of Civil Procedure in the *American Bar Association Journal* traced the movement for reform of the rules of civil procedure to Pound’s 1906 speech.⁵²

When Pound spoke to the American Bar Association, he was dean of the University of Nebraska School of Law, a “hitherto obscure Nebraska jurist.”⁵³ Two years later, Wigmore recruited Pound to Northwestern,⁵⁴ and shortly after that, he was named Story Professor of Law at Harvard Law School. By 1916, Pound was dean at Harvard, and during his 20-year term he consolidated Harvard’s preeminence in legal education.⁵⁵ The

49. See White, 58 *Va. L. Rev.* at 1007–8. See also Pound, “Popular Dissatisfaction” at 415 (cited in note 13) (“Absolute theories of morals and supernatural sanctions have lost their hold”). John Henry Wigmore, Preface, *Code of Evidence* xiii (3d ed. 1942) (“ALL THE RULES IN THE WORLD WILL NOT GET US SUBSTANTIAL JUSTICE IF THE JUDGES AND THE LAWYERS HAVE NOT THE CORRECT LIVING MORAL ATTITUDE TOWARDS SUBSTANTIAL JUSTICE”). See also John Henry Wigmore, “The American Law Institute Code of Evidence Rules: A Dissent,” 28 *A.B.A.J.* 23 (1942) (“The purpose of these formulations is not merely to restate the rules of Evidence as they are, but as they *ought to be* and *can predictably be*”) (emphasis in original).

50. John Henry Wigmore, “The Spark That Kindled the White Flame of Progress,” 20 *J. Am. Jud. Soc’y* 176 (1937).

51. *Id.* at 178 (emphasis in original).

52. Edgar Bronson Tolman, “Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules,” 22 *A.B.A.J.* 783, 784 (1936).

53. Hull, 8 *Law & Hist. Rev.* 58 (cited in note 13).

54. Wigmore, 20 *J. Am. Jud. Soc’y* at 178.

55. On Pound, see Paul Sayre, *The Life of Roscoe Pound* (Iowa City: State University of Iowa, 1948); David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Conn.: Greenwood

preeminence of Pound at Harvard and Wigmore at Northwestern eased the transition of the legal academy from formalist to "progressive-pragmatist" notions of jurisprudence.

In 1912, the ABA recommended the adoption of a uniform set of procedural rules prepared by the Supreme Court for use in federal common law litigation.⁵⁶ The next year, a midwestern lawyer named Herbert Lincoln Harley founded the American Judicature Society for the purpose of improving the American administration of justice.⁵⁷ Two members of its first board of directors were Wigmore and Pound.⁵⁸ At about the same time, the Association of American Law Schools recommended the creation of a juristic center for the advancement of jurisprudence.⁵⁹ The United States's entry into World War I stalled efforts to implement this plan,⁶⁰ but they began afresh in 1920.⁶¹ Also in 1920, the Commonwealth Fund sponsored a Legal Research Committee to aid legal reform. The Legal Research Committee, composed of Pound, Judge Benjamin Cardozo, and other well-known members of the legal profession, commissioned a study on the law of evidence.⁶² The chairman of the Evidence Committee was Edmund M. Morgan, then a professor at Yale Law School. Wigmore was named a member of the committee.⁶³ Two years later, the conservative Chief Justice Taft urged the merger of law and equity in a speech before the ABA.⁶⁴ That same year, a Permanent Organizing Committee met and discussed the likely work of the newly created juristic center.⁶⁵ In February 1923, the first meeting of that organization, now called the American Law Institute, took place in Washington, D.C.⁶⁶ The institute, comprised of many of the most influential lawyers, judges, and legal aca-

Press, 1974). Regarding Harvard's preeminence, compare Arthur Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1967) ("Sutherland, *The Law at Harvard*"), with Kalman, *Legal Realism* (cited in note 1).

56. Tolman, 22 *A.B.A.J.* See also 4 Wright & Miller, *Federal Practice* at § 1003 (cited in note 13). An exhaustive treatment of the reform of federal civil procedure is Stephen B. Burbank, "The Rules Enabling Act of 1934," 130 *U. Pa. L. Rev.* 1015 (1982).

57. Herbert Harley, "The American Judicature Society: An Interpretation," 62 *U. Pa. L. Rev.* (1913); see "A Salute to Herbert Harley," 58 *A.B.A.J.* 161 (1972).

58. Harley, 62 *U. Pa. L. Rev.* at 353.

59. See Hull, 8 *Law & Hist. Rev.* at 62-65.

60. *Id.* at 65.

61. *Id.* at 67-70.

62. Morgan, *Law of Evidence* vii (cited in note 48).

63. *Id.* at viii.

64. Tolman, 22 *A.B.A.J.* at 784 (cited in note 52). See Burbank, 130 *U. Pa. L. Rev.* at 1069-70. Taft had personally supported the merger of law and equity as early as 1914, as president of the American Bar Association, and had urged procedural reforms on the model of the English legal system as early as 1909. See *id.* at 1048, 1051.

65. See Hull, 8 *Law & Hist. Rev.* at 76-80 (cited in note 13).

66. *Id.* at 85.

demics in the country, would attempt to eliminate uncertainty in the law by drafting a Restatement of the Law.⁶⁷

While the efforts to re-form and restate the law agency, contracts, restitution, and torts were begun by the institute in 1923 and partially concluded by 1934, and while the American Judicature Society had drafted a model code of state civil procedure in 1919,⁶⁸ "reform" of the federal rules of civil procedure in federal courts was blocked until 1934. The leading opponent of "reform" was Montana Senator Thomas J. Walsh, who feared that a revision of the rules would lead to a more complex procedural code like that in New York, rather than the simpler codes found in several states in the West.⁶⁹ After his election in 1932, Franklin Delano Roosevelt nominated Walsh as his attorney general. Shortly after the American Bar Association disbanded its committee on procedural reform, which had been guided and aided by Roscoe Pound,⁷⁰ Walsh died. Roosevelt then nominated Homer Cummings for the office of attorney general. Attorney General Cummings, noting the "consensus" of bench, bar, and academia, urged Congress to authorize the Supreme Court to make procedural rules. Less than a year later, after little discussion, the Rules Enabling Act of 1934 was passed unanimously.⁷¹

The Rules Enabling Act authorized the Supreme Court to unify common law and equity pleading. In January 1935, Yale Law School Dean Charles Clark, with James Wm. Moore,⁷² wrote an article predicting that

67. The American Law Institute eventually undertook the Restatement of the law in nine discrete areas of private law: agency, conflicts, contracts, judgments, property, restitution, security, torts, and trusts. The institute's executive secretary was William Draper Lewis. After listening to Roscoe Pound's St. Paul address to the ABA, Lewis joined with Wigmore in resolving to do something to reform the American administration of justice. Nearly 20 years later, Lewis wrote that the institute would also "promote those changes which will tend better to adapt the laws to the needs of life." Hull, 8 *Law & Hist. Rev.* at 83 (quoting "Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute," 1 *ALI Proc.* (1923)). In his article "Mechanical Jurisprudence" (8 *Colum. L. Rev.* at 622 (cited in note 26)), Pound suggested that legal scholars test the conceptions of the common law "to lay sure the foundations for the ultimate legislative restatement of the law."

68. See John Henry Wigmore, "A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration," 22 *A.B.A.J.* 811, 812 (1936).

69. William D. Mitchell, "Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on Which Discussion Is Invited," 22 *A.B.A.J.* 780, 780 (1936).

70. Tolman, 22 *A.B.A.J.* at 784 (cited in note 52) ("After years of study, during all which time Roscoe Pound continued as the mentor of the committee and its draftsman"). See also Burbank, 130 *U. Pa. L. Rev.* at 1045-48 (cited in note 56).

71. *Id.* at 1095. See also 4 Wright & Miller, *Federal Practice* at § 1003 (cited in note 13).

72. James William Moore, born in Condon, Ore., on 22 Sept. 1905, received his law degree from the University of Chicago in 1933. He received a J.S.D. from Yale in 1935 and from 1935 to 1943 was an instructor at Yale. He became a professor at Yale in 1943. Moore is the author of *Moore's Federal Practice*, first published as a three-volume work in 1938. 2 *Who's Who in America* (43d ed. 1984-85).

procedural reform would fail unless there was a merger of law and equity pleading.⁷³ In June of that year, Dean Clark was appointed Reporter to the Advisory Committee and Moore was named a member of the committee. The Federal Rules of Civil Procedure unified common law and equity procedure.⁷⁴ The committee published the third draft of the Rules in May 1936, and an amended version of that draft was adopted by the Supreme Court on 20 December 1937.⁷⁵ When Congress failed to act to reject the Federal Rules of Civil Procedure, the Rules became effective on 16 September 1938.

The Federal Rules of Civil Procedure revolutionized the theory of procedure. The rules were broadly written. Only general features of procedure were made rules. Specific issues were left to the judge to fashion as experience warranted. The supporters of the rules cited Pound,⁷⁶ among others, for the proposition that broad, flexible rules provided the best method to reform rules of civil procedure.⁷⁷

The successful adoption of Federal Rules of Civil Procedure, the growth and influence of reforming organizations like the American Judicature Society and the ALI, and the enormous success of ALI's project to restate the law convinced reformers that the rules of evidence should be reformed and codified.

D. Early Evidentiary Reform Efforts

In 1910, Wigmore wrote the first evidence code, which had little effect on evidence reform.⁷⁸ As noted above, in 1920, the Commonwealth Fund's Committee to Propose Specific Reforms in the Law of Evidence began working on reforming the law of evidence. The committee's report,

73. Charles E. Clark & James Wm. Moore, "A New Federal Civil Procedure—I. The Background," 44 *Yale L.J.* 387 (1935).

74. Fed. R. Civ. P. 2.

75. 4 Wright & Miller, *Federal Practice* at § 1003 (cited in note 13). Justice Brandeis disapproved of the adoption of the Rules. See West Publishing Company, *Federal Rules of Civil Procedure* 6 (1989–90).

76. See Tolman, 22 *A.B.A.J.* at 784 (cited in note 52) (quoting Pound on the efficacy of a general system of procedure).

77. One historian of the law of procedure has concluded that the Federal Rules of Civil Procedure is the story of the triumph of equity over common law. Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 *U. Pa. L. Rev.* 909 (1987). The 50th anniversary of the Federal Rules of Civil Procedure led to several ruminations on the impact of the rules on legal thought and the legal profession. See Stephen B. Burbank, "Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law," 63 *Notre Dame L. Rev.* 693 (1988); Stephen N. Subrin, "Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns," 137 *U. Pa. L. Rev.* 999 (1989); Martha Minow, "Some Realism about Rulemaking: A Parable for the Fiftieth Anniversary of the Federal Rules of Civil Procedure," 137 *U. Pa. L. Rev.* 2249 (1989).

78. John Henry Wigmore, *Code of Evidence* (1st ed. 1910).

published in 1927, contained five specific proposals.⁷⁹ The author of the Commonwealth Fund's report was Professor Edmund M. Morgan, who had moved from Yale Law School to Harvard Law School in 1925.⁸⁰ Morgan's writings on evidence and his ubiquitous presence in organized efforts to reform the rules of evidence make him as important in the development of the American law of evidence as is Wigmore. The Commonwealth Fund's Evidence Committee decided not to propose a model code of evidence for three related reasons. First, quoting Wigmore, the committee concluded that "[o]ur system of evidence is *sound on the whole*."⁸¹ Second, the preparation of a model code was beyond the scope of the committee.⁸² Third, the bar would not accede to evidentiary reform.⁸³

In its final chapter, entitled "The Outlook for Reform," the Evidence Committee stated: First, "[r]ules of evidence should be so devised as to facilitate the ascertainment of truth";⁸⁴ second, "[d]iscretionary power of the trial judge over the conduct of the trial is of the very heart of effective trial procedure,"⁸⁵ but trial judges were perceived as unworthy of the bar's trust, so reform was stymied; and third, for reform to occur, "the traditional conservatism of lawyers must yield to the need for a more efficient administration of justice."⁸⁶ Additionally, the committee based its specific reforms of the law of evidence on quantitative data compiled from questionnaires sent to practitioners. The committee believed that empirical support for proposed reforms was better than "relying on opinion and *a priori* argument."⁸⁷

Although this attempt to correlate the rules with the law in action was primitive, it marked a difference between the "old" formalist jurisprudence and the "new" sociological jurisprudence. The report of the Commonwealth Fund's Evidence Committee was thus thoroughly based on the ideals of legal progressivism: incremental reform, truth as the goal of the trial, efficiency in the administration of justice, a requirement that judges be disinterested experts who wisely used the discretion granted them, and empirical support for reform.⁸⁸

79. The proposals included giving the judge the discretion not to abide by rules of evidence concerning matters not in dispute, allowing the judge to comment on the weight of the evidence, abolishing Dead Man's statutes, admitting declarations of dead persons, and simplifying and modernizing the business records exception to hearsay.

80. See note 2.

81. Morgan, *Law of Evidence* xii n.1 (cited in note 48) (emphasis in original). See 1 Wigmore, *Treatise* § 8c (2d ed. 1923).

82. Morgan, *Law of Evidence* xiii.

83. *Id.* at 68.

84. *Id.* at 66.

85. *Id.* at 67.

86. *Id.* at 68.

87. *Id.* at viii.

88. Only one proposal suggested by the Commonwealth Fund's Evidence Committee eventually was adopted. See 21 Wright & Graham, *Federal Practice* at § 5005 (business

When the Federal Rules of Civil Procedure Advisory Committee to the Supreme Court was appointed eight years later in 1935, Morgan was named a member. Although Chief Justice Hughes apparently believed that the Advisory Committee would include rules of evidence, the committee decided to delay work on rules of evidence,⁸⁹ except for Federal Rule of Civil Procedure 43, which concerned the mode of proof.⁹⁰

In 1938, the ABA published a report of the Committee on Improvements in the Law of Evidence, a committee whose purpose was to suggest improvements in the law of evidence.⁹¹ The chairman of the committee was Wigmore, whose imprint is seen throughout the committee's report. (Wigmore was the only member of the five-man committee who assented to all the committee's general and specific proposals.) The committee made 12 general proposals and 20 specific proposals. The proposals consisted of two parts: first, general proposals to reform and improve the administration of the laws of evidence, and second, specific rules changes. The committee's report was based on three assumptions: (1) that there was "a probable lack of united professional support for any radical, or even any substantial changes";⁹² (2) that "[a]ll will agree that the body of the rules of evidence, in their skeleton framework, are wise and wholesome—in short, they are a valuable and unique contribution to the world's expedients in the investigation of truth";⁹³ and (3) that any reform of the rules of evidence should be undertaken through rules of court rather than through legislative enactment.⁹⁴ The most interesting of the general proposals were the suggestions that the ABA sponsor an attempt to draft "a short code" simplifying the law of evidence,⁹⁵ that "the terms

records exception to the hearsay rule). In 1936 the ABA embraced three of the five proposals.

89. See Wigmore, 22 *A.B.A.J.* at 813 (cited in note 68) (noting the infeasibility of offering a code of federal evidence rules when there was no existing state code of evidence). See also 4 *Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States* 974 (20–25 Feb. 1936), quoted in Burbank, 63 *Notre Dame L. Rev.* 718 n.187 (cited in note 77) ("In a discussion about the original Advisory Committee's power to recommend Federal Rules on matters of evidence, Professor Morgan observed: 'I think, if you put that up to the Court, they would say, as the servant girl said, "It is such a little baby." (Laughter)'").

90. See Burbank, 130 *U. Pa. L. Rev.* at 1137-43 (cited in note 56) (discussing the Advisory Committee's concerns about their power to draft federal rules of evidence and their distinguishing rules regarding the mode of taking evidence and rules regarding the admissibility of evidence).

91. "Report of the Committee on Improvements in the Law of Evidence," 63 *A.B.A. Rep.* 570 (1938) ("Report on Improvements").

92. *Id.* at 570.

93. *Id.* at 576.

94. *Id.* at 571. The final general proposal adopted by the committee urged that state legislatures "make no changes in the rules of evidence without due notice and opportunity of hearing to the state and local bar associations." *Id.* at 580. This was another tenet of progressivism, which distrusted the political nature of legislatures in favor of the "nonpolitical" impartiality of experts.

95. *Id.* at 576-77.

'discretion' and 'abuse of discretion' be *discarded*, as having false implications; and that the trial court's ruling be ordinarily treated as final, insofar as it involves the mere application of the rule to the facts; thus leaving to the reviewing court its proper function, *viz.*, the safeguarding of the tenor of the rule."⁹⁶

In addition to the 5-member committee, an Advisory Committee of 66 members was polled concerning its agreement with the proposals.⁹⁷ One of the members of the Advisory Committee was Morgan. While Morgan agreed with most of the proposals, he disagreed with the suggestion that the terms "discretion" and "abuse of discretion" be eliminated and with the proposal that an evidentiary ruling by a trial court be viewed as final if it simply applied the facts to the rules of evidence.

E. The Model Code of Evidence

According to the "Introduction" to the Model Rules of Evidence, written by ALI director William Draper Lewis, the ALI had carefully considered restating the law of evidence at some point shortly after the ALI was created. The governing council unanimously decided against restating the law of evidence because there "was the belief that however much that law needs clarification in order to produce reasonable certainty in its application, the rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it."⁹⁸ Having successfully completed most of the Restatement of the Law, the ALI approached the Carnegie Corporation in late 1938 (shortly after the Federal Rules of Civil Procedure had become effective and in the same year that the ABA committee called for the development of a short, simplified code of evidence) for a grant involving the "study of the Law of Evidence with a view not to its Restatement but to its revision."⁹⁹ After receiving a grant in 1939 from the Carnegie Foundation, the institute's Evidence Editorial group was named. The Reporter for the Evidence Editorial group was Professor Morgan. Named as chief consultant to the group was the 76-year-old Wigmore.

A Proposed Tentative Draft of the Model Code of Evidence was presented to the ALI Council in February 1940 and approved for discussion at the ALI's annual meeting in May 1940. The discussion at the annual meeting was about the divergence in evidence theory between Wigmore and Morgan. George Wharton Pepper, president of the ALI and

96. *Id.* at 576.

97. No more than 44 Advisory Committee members voted on any one proposal.

98. William Draper Lewis, "Introduction," in American Law Institute, *Model Code of Evidence* viii (Philadelphia: American Law Institute, 1942) ("Lewis, 'Introduction'").

99. *Id.* at ix.

member of the Advisory Committee on the Federal Rules of Civil Procedure, introduced the discussion of this draft of the Model Code:

We have not merely the usual series of questions respecting the content of particular paragraphs, but we have broad questions of policy to consider which I suppose may be expressed somewhat thus: That at one extreme of the field of opinion you find those who think that the subject of Evidence should be so flexible that the trial judge should be all but the final arbiter of what is admissible and inadmissible. At the other extreme you find the view of those who believe that as the law of Evidence is to be a working guide for those conducting the business of trial, it should be so specific, so detailed and so meticulous that scarcely any situation should fail of specific recognition in the system of rules. And in between is the view, which in a general way represents what I understand to be the view of the Reporter and his group, that a great measure of flexibility should be introduced into the law, but that there is a such a thing as too great particularization and that that should be avoided.¹⁰⁰

Appended to the Tentative Draft was Wigmore's dissent from the approach taken by Morgan and the rest of the Evidence Editorial group. Wigmore proposed six Postulates as guides for the preparation of the Model Code.¹⁰¹ In his view, none of the Postulates had been followed by the Evidence Editorial group. Therefore, according to Wigmore, any follower of Wigmore's *Code of Evidence*¹⁰² would reject the Model Code.¹⁰³ Morgan's response, in both the Tentative Draft and before the ALI at its annual meeting, was that all of Wigmore's Postulates except Postulate IV had been adopted by the Evidence Editorial group.¹⁰⁴

Wigmore believed that reform of the law of evidence required both a

100. 17 *ALI Proc.* 64-65 (1940).

101. These Postulates formed the basis of Wigmore's *Code of Evidence*, the second edition of which had been published in 1935 ("Wigmore, *Code 2d*").

102. *Id.* A third edition of the *Code of Evidence* was published in 1942, shortly before the ALI adopted the Model Code of Evidence.

103. See American Law Institute, *Code of Evidence Tentative Draft No. 1* (Appendix) 112 (1940) ("*ALI, Code*").

104. See *id.* at 115; see also 17 *ALI Proc.* 66-70 (1940). Postulate IV stated:

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

See *ALI, Code* (Appendix) 111-12 (emphasis in original).

great particularity in rules and limitations on appellate review of evidentiary rulings by the trial court. His disagreement with Morgan was linked to their differing approaches to judicial discretion. Wigmore believed that the phrase “abuse of discretion” was “mere palaver,” code words for an appellate court’s disagreement with the decision of the trial court.¹⁰⁵ Since the phrase was misleading, it should be abandoned. Instead, courts should adhere to a rigid distinction between law and fact. Application of the rules to the specific facts of the case should be solely within the trial court’s domain. The appellate court was only to decide issues of evidence law.¹⁰⁶ Therefore, although Wigmore was in favor of a detailed code of evidence rules, that code should be flexibly applied because the facts of each case varied. “The rules should be guides, not chains.”¹⁰⁷

Morgan supported a more general code of evidence rules. Broadly written rules both encouraged trial court discretion and permitted appellate court oversight based on the abuse of discretion standard.¹⁰⁸ Without referring to Wigmore, Morgan’s Foreword to the Model Code indicates another reason for his disagreement with Wigmore: “[T]he emotions of the persons involved—litigants, counsel, witnesses, judge and jurors—will play a part. A trial cannot be a purely intellectual performance.”¹⁰⁹

Ironically, Morgan’s structure was aided at the 1940 ALI annual meeting by the proposal of Judge (formerly Dean) Clark, who believed that Morgan’s draft was hampered by *too many* detailed rules for reform to result. During the discussion of the merits of the Wigmore and Morgan approaches, Clark took the podium (at ALI President Pepper’s request) and suggested that after a period of study of two or three years, “you would have very few [rules] that you would need to suggest. There would be probably one broad general rule of admissibility of relevant evidence and then certain subordinate rules that seem necessary for statement, but there would not be included these well understood generalities such as we have here.”¹¹⁰ While Clark protested that his proposal was not at the

105. 1 Wigmore, *Treatise* at § 8a (3d ed. 1940) (cited in note 13).

106. *Id.*

107. Wigmore, Preface, *Code* 2d at xiii (cited in note 101). See note 104.

108. 17 *ALI Proc.* 70 (1940).

109. Edmund M. Morgan, Foreword, in American Law Institute, *Model Code of Evidence* 4 (Philadelphia: American Law Institute, 1942) (“Morgan, Foreword”). Morgan believed that it was wishful thinking to expect the trial court to take an exclusively intellectual approach to matters of evidence, and to understand detailed rules as directory rather than mandatory, or to expect trial or appellate courts to clearly demarcate the line between issues of fact and issues of law in evidence. See also Edmund M. Morgan, “The Model Code of Evidence,” 39 *Proc. Vt. B. Ass’n* 94, 100 (1945) (“If a trial is to be a rational proceeding with a competent judge in charge, he must be given a large measure of discretion. A trial cannot be a purely mechanical performance”). In an earlier book review, Morgan stated, “To be sure, the jury is often swayed by sympathy and prejudice; but are trial judges motivated solely by intellectual impulses?” Edmund M. Morgan, Book Review, 46 *Harv. L. Rev.* 1203, 1203 (1933), reviewing Joseph N. Ulman, *A Judge Takes the Stand* (1933).

110. See 17 *ALI Proc.* 82 (1940). This was consistent with the structure of the Federal

other "extreme" from Wigmore's proposal, his suggestion that the Evidence Editorial group draft fewer rules of evidence was perceived just that way. After Clark's plea for greater reform, the annual meeting voted first to approve Morgan's approach rather than Wigmore's approach and later approved Morgan's approach over Clark's suggestion. When Morgan wrote the Foreword to the Model Code, he stated that the choice was "between a catalogue, a creed, and a Code. The Institute decided in favor of a Code."¹¹¹

A second draft of the Model Code of Evidence was presented at the 1941 annual meeting of the ALI. Later that year, Morgan wrote four articles about the proposed Model Code for the *ABA Journal*.¹¹² In the first, published in September 1941, Morgan discussed the theory of the Model Code. Without mentioning either Wigmore or Clark by name, Morgan suggested that any approach other than that utilized by the Model Code was flawed. Wigmore's approach was insufficient because it could never be complete. Additionally, "[e]ach generalization would have to serve as the base for an elaborate superstructure of specifications and qualifications."¹¹³ "To adopt such a method would be to produce a long, unwieldy enactment which would be in effect a restatement of the law of evidence similar to the restatements of the substantive subjects."¹¹⁴ On the other hand, the Clark approach would be valuable "only in case the decision of the trial judge is to be final and not subject to review. Otherwise each application of the general principle to a new situation would invite appeal."¹¹⁵ The only reasonable approach, then, was to "draw a series of rules in general terms covering the larger divisions and subdivisions of the subject without attempting to frame rules of thumb for specific situations and to make the trial judge's ruling reviewable for abuse of discretion."¹¹⁶

In the January 1942 issue of the *ABA Journal*, the first issue after the bombing of Pearl Harbor and the entry of the United States into World War II, Wigmore attacked the Model Code.¹¹⁷ He began by lamenting that he will be portrayed as "too conservative and unprogressive" but for-

Rules of Civil Procedure, which Clark, as Reporter to the Advisory Committee, had been instrumental in drafting. ABA members were made aware of this difference of opinion among Clark, Morgan, and Wigmore in the June 1940 issue of the *ABA Journal*, which reported the institute's discussion of *Tentative Draft No. 1 of the Model Code of Evidence*. See "American Law Institute Holds Eighteenth Annual Meeting," 26 *A.B.A.J.* 476 (1940).

111. See Morgan, Foreword at 13.

112. All had the same title. Edmund M. Morgan, "The Code of Evidence Proposed by the American Law Institute," 27 *A.B.A.J.* 539 (Sept. 1941); 27 *A.B.A.J.* 587 (Oct. 1941); 27 *A.B.A.J.* 694 (Nov. 1941); 27 *A.B.A.J.* 742 (Dec. 1941).

113. Morgan, 27 *A.B.A.J.* at 541.

114. *Id.* In his Foreword to the *Model Code of Evidence* (at 12), published in fall 1942, Morgan added: "It would give the restatement a legislative form, make it rigid and hamper the normal growth of the law."

115. Morgan, 27 *A.B.A.J.* at 541.

116. *Id.*

117. See Wigmore, 28 *A.B.A.J.* (cited in note 49).

merly had been "reproached" as "too radical, too advanced."¹¹⁸ He then noted that while he was the draftsman of a competing Code of Evidence, he had thought about the style of the Model Code for the three years of its drafting and had not changed his mind. Limiting himself "to the defects in *method and style of the Draft* as a legislative measure,"¹¹⁹ Wigmore then returned to the Evidence Editorial group's failure to follow his six Postulates. The battle Wigmore lost at the 1940 ALI annual meeting was renewed in his January 1942 *ABA Journal* article.

The ALI approved the Model Code of Evidence at its May 1942 annual meeting, and ABA members were informed of this in the June 1942 issue of the *ABA Journal*.¹²⁰ By this time, however, the *Journal* was more concerned with the ongoing war effort than with anything else, and the next mention of the ALI's Model Code of Evidence was a short report in the November 1942 issue of the *Journal*.

In mid-1943, the ABA's House of Delegates directed the Committee on Jurisprudence and Law Reform to study the Model Code, Wigmore's Code of Evidence, and other writings to aid in the reform of the law of evidence in federal courts.¹²¹ Later that year a Special Committee of the American Bar Association on Improving the Administration of Justice recommended to state committees that they study the Model Code of Evidence with a view toward adopting it.¹²² Both the Texas¹²³ and Alabama¹²⁴ bar associations discussed the Model Code during 1943. In late 1944 the ABA's Committee on Jurisprudence and Law Reform recommended the Model Code to the Supreme Court's Advisory Committee on Rules of Civil and Criminal Procedure in preference to Wigmore's Code. This recommendation was adopted by the ABA's House of Delegates.¹²⁵

In June 1944, however, a Committee on Administration of Justice on Model Code of Evidence of the State Bar of California excoriated the theory, assumptions, and form of the Model Code. Citing Wigmore's January 1942 *ABA Journal* article, the committee concluded that the Model Code "was designed, not to offer any improvement to existing statutes or ex-

118. *Id.* at 23.

119. *Id.* (emphasis in original).

120. "Sessions of American Law Institute," 28 *A.B.A.J.* 401 (1942).

121. 68 *A.B.A. Rep.* 146 (1943).

122. See "Spotlight on Evidence," 27 *J. Am. Jud. Soc'y* 113, 115 (1943). The ALI's official position was that it did not "urge the immediate recommendation of the Code as a whole by a bar association or its adoption by a legislature or a court. Rather, it submits the work to the legal profession of the country, on its merits, for such action as the bench and bar feel prepared to take after the work has become known." *Id.* at 113.

123. University of Texas Professor Charles T. McCormick, a member of the Evidence Editorial group, coordinated the discussion of the Model Code of Evidence at the 1943 Texas State Bar Association meeting. *Id.* at 114.

124. *Id.*

125. 69 *A.B.A. Rep.* 185 (1944). The report of the Committee on Jurisprudence and Law Reform is found at 69 *A.B.A. Rep.* 251.

isting codes of evidence, but to entirely revolutionize our present rules of evidence and to substitute for them the rules of evidence that are generally in force in continental Europe."¹²⁶ The California committee attacked the Model Code in a number of different ways. The most predictable move was to deny that any substantial problems existed with the California rules of evidence. The committee also claimed that the Model Code granted the trial judge too much power at the expense of lawyers. Third, the committee argued that the Model Code created, rather than alleviated, uncertainty in the law. Finally, and most curiously, it suggested that revising the rules of evidence during a time of war misdirected American energy. A small notice that the State Bar of California had rejected the Model Code appeared in the December 1944 issue of the *ABA Journal*.¹²⁷ After the rejection of the Model Code by the State Bar of California, there was little continued support from the organized bar for the adoption of the Model Code.¹²⁸

The reasons for the failure of the Model Code include Wigmore's preemptive strike, the California State Bar's reaction to the Model Code, and the perception that the institute and its Evidence Editorial group were part of an elitist Eastern establishment attempting to impose their theories on trial lawyers nationwide.¹²⁹

Just as important, in my view, were Morgan's explicit disavowal of truth as the goal of the American system of adjudication and his acknowledgment that the Model Code was an effort to "radically reform" the rules of evidence by giving the trial judge greater discretion to admit and exclude evidence.

In addition to their disagreement concerning the structure of the Model Code, Wigmore and Morgan disagreed about the goal of the trial and the need for reform. Wigmore remained a legal progressive, while Morgan, I believe, departed from legal progressivism in order to meet the challenge coming from scholars associated with American legal realism.

126. "Report of Committee on Administration of Justice on Model Code of Evidence," 19 *J. St. B. Calif.* 262 (1944). I assume that this rhetoric was an attempt to equate the Model Code with the evil of the civil law system. The Model Code's radical reformation of the law of evidence was not modeled on civil law, although, like civil law, it gave greater power to the trial judge and less to the attorneys.

127. 30 *A.B.A.J.* 700 (1944). A number of addresses were given and articles written for state bar associations from 1941 to 1944 by supporters of the Code and members of the Evidence Editorial group, but nothing was printed in the *ABA Journal*.

128. There is nothing in the 1945 or 1946 *ABA Journals* or *ABA Reports* on reform of the law of evidence. In 72 *A.B.A. Rep.* 253 (1947), there is the following from the ABA Committee on Improving the Administration of Justice: "The committee in Missouri is cooperating with a committee of the Missouri Bar in its work on a new code of Evidence." The State Bar of Missouri drafted a proposed Code based on reformation of Missouri rules of evidence rather than on the Model Code. See Symposium, "A Code of Evidence for Missouri," 17 *U.K.C.L. Rev.* 1 (1949). See also "Notes and Comments on the Code of Evidence Proposed by the Missouri Bar," 10 *J. Mo. B.* 177 (1954).

129. On the last point, see 21 *Wright & Graham, Federal Practice* at § 5005.

The notions that the discovery of truth was the goal of adjudication and that the trial judge needed discretionary power because he was the only disinterested expert in the courtroom were consonant with progressive thought.¹³⁰ While Wigmore later qualified his support for the second tenet,¹³¹ he believed that the goal of the trial was the discovery of truth.¹³² All previous reform efforts were premised on this belief. For example, the Commonwealth Fund's Evidence Committee, chaired by Morgan, expressly adopted this goal in 1927. Even in the Introduction to the Model Code, Institute Director Lewis stated that the Council had rejected a restatement of the Law of evidence because "the rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it."¹³³ Absent this goal, the "Anglo-American" system of adjudication was not rational. Less than 15 years after the Commonwealth Fund's report, Morgan's view, set forth in the *ABA Journal*, was, "A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants."¹³⁴ In his Foreword to the Model Code of Evidence, Morgan wrote,

The court is not a scientific body. It is composed of one or more persons skilled in the law, skilled in the general art of investigation, but not necessarily skilled in the field which the dispute concerns, acting either alone or with a body of men not necessarily trained in investigation of any kind. Its final determination is binding only between the parties and their privies. It does not pronounce upon the facts for any purpose other than the adjustment of the controversy before it. Consequently there must be a recognition at the outset that nicely accurate results cannot be expected; that society and the litigants must be content with a rather rough approximation of what a scientist might demand.¹³⁵

130. See Morgan, *Law of Evidence* 66-68 (cited in note 48).

131. See Wigmore, 22 *A.B.A.J.* at 24 (cited in note 49). Compare Wigmore, "Preface," in Wigmore, *Code 2d* at xiii (cited in note 101) (suggesting that particular rules would be guides, not chains, thus giving the trial court greater authority to decide evidentiary issues without fear of appellate reversal).

132. *Id.* "What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges and our lawyers shall firmly dispose themselves to get at the truth and the merits of the case before them."

133. Lewis, "Introduction" at viii (cited in note 98).

134. Morgan, 27 *A.B.A.J.* at 539 (cited in note 112). This is repeated in essence in Morgan, Foreword at 3 (cited in note 109). This view is foreshadowed in a 1936 book review, in which Morgan suggested that the book be read by no one interested in believing "that a law suit is a proceeding for the discovery of truth by rational processes." Edmund M. Morgan, Book Review, 49 *Harv. L. Rev.* 1387, 1389 (1936), reviewing Irving Goldstein, *Trial Technique* (1935). See also Edmund M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 *Harv. L. Rev.* 177, 184 (1948).

135. Morgan, Foreword at 3-4. A similar statement is made in Morgan, 27 *A.B.A.J.* at 539.

However, according to Morgan, this did not make the rules of evidence irrational. Indeed, acknowledging the "political"¹³⁶ nature of dispute resolution would assist in eliminating the artificial barriers which interfere with the ordinary, daily decision-making processes of persons. The dispute resolution function of the courts was a middle ground between the "truth" theory of Wigmore and those who concluded that the trial was irrational.¹³⁷ To Wigmore, of course, this was heresy. The committee of the California State Bar seemed unable to accept Morgan's statements at face value, for in "praising" the motives of the Evidence Editorial group, it stated, "We believe they feel, as we do, that . . . a trial should be conducted for the purpose of ascertaining the truth."¹³⁸ The predominant view remained that the adversary system of adjudication was designed to find the truth. In a 1948 book on the meaning of the Sacco and Vanzetti case, Morgan again disparaged the assumption that in the adversary system "the truth will emerge to the view of the impartial tribunal."¹³⁹ These arguments, however, remained unappealing both to legal progressives and the larger legal profession.

A third difference between Wigmore and Morgan was that Wigmore's conservatism in regard to the legal profession and in regard to the common law of evidence made anathema Morgan's statement that "[i]t is time, too, for radical reformation of the law of evidence."¹⁴⁰ Wigmore continued to believe, "[o]ur system of Evidence is *sound on the whole*."¹⁴¹ He further believed that reform efforts needed to be modest in order to succeed.¹⁴² Although his influence on the ALI's Evidence Editorial group was

136. 21 Wright & Graham, *Federal Practice* at § 5005 n.45. See also Leon Green, *Judge and Jury* 376 (Kansas City, Mo.: Vernon Law Book Co., 1930) (concluding that judicial approval of the jury trial was based on its "prime political function" of absorbing citizen discontent with verdicts). A similar statement by legal process scholars Henry Hart and John McNaughton is found in "Evidence and Inference in the Law," 87 *Daedalus* 40, 44 (1958) ("Hart & McNaughton, 'Evidence and Inference'"): "A contested lawsuit is society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts."

137. See text accompanying notes 162-64. See also Morgan, 27 *A.B.A.J.* at 541 (disparaging the view "that the trial is to be a battle between the great champions of the contending parties; a battle of wits between their lawyers with the judge as umpire and the jury making the decision without advice from the judge").

138. 19 *J. St. B. Calif.* at 281 (cited in note 126).

139. G. Louis Joughin & Edmund M. Morgan, *The Legacy of Sacco and Vanzetti* 184 (New York: Harcourt, Brace & Co., 1948) ("Joughin & Morgan, *Sacco and Vanzetti*"). According to the Preface, Morgan was the sole author of the chapters concerning the law of the Sacco and Vanzetti case. *Id.* at v-vi.

140. Morgan, 27 *A.B.A.J.* at 540; Morgan, Foreword at 6.

141. 1 Wigmore, *Treatise* at § 8c (3d ed. 1940) (cited in note 13). See also "Report on Improvements" at 576 (cited in note 91) ("All will agree that the body of the rules of evidence, in their skeleton framework, are wise and wholesome; in short, they are a valuable and unique contribution to the world's expedients in the investigation of truth").

142. "Report on Improvements" at 572 ("So in any proposed improvement of a rule of law, it is wise at the same time to take measures to insure a suitable environment and administration. Any proposed improvement in the rules of evidence must heed the same warn-

limited, to the legal profession Wigmore remained the preeminent authority on the law of evidence.

Professors Wright and Graham suggest that while Morgan was not a heretic, he rejected the more extreme views of legal progressivism.¹⁴³ My thesis is slightly different: Because of the intellectual conflagration caused by the rise of American legal realism in the 1920s and 1930s, Morgan believed it necessary to destroy legal progressivism in order to save it.

F. American Legal Realism and Attacks on Reform

American legal realism¹⁴⁴ styled itself as a methodology growing out of the insights of sociological jurisprudence.¹⁴⁵ It differed from legal progressivism in two ways. First, in crude, undifferentiated terms, the horrors of World War I led many intellectuals to disparage any proclaimed connection between morality and law, and the optimism of pre-World War I progressives became the cynicism of postwar realists. Second, realists were much more critical about the decision-making processes of judges.¹⁴⁶

The conflict became apparent in an exchange in the *Harvard Law Review* in 1931. In a *Harvard Law Review* tribute in honor of the 90th birthday of Justice Oliver Wendell Holmes, Jr., Pound wrote an article entitled "The Call for a Realistic Jurisprudence."¹⁴⁷ Columbia Law School

ing"); see also Twining, *Theories of Evidence* 161 (cited in note 4) ("Wigmore's assumption [was] that the law of evidence is par excellence 'lawyer's law.' Wigmore was only mildly critical of surviving evidence doctrine. A general simplification and the abolition of a few archaic survivals would be welcome, but on the whole there was no need for radical reform" (footnotes omitted)).

143. 21 Wright & Graham, *Federal Practice* at § 5005 n.45.

144. Some secondary studies about legal realism not elsewhere cited in this article include Grant Gilmore, "Legal Realism: Its Cause and Cure," 70 *Yale L.J.* 1037 (1961); *id.*, *The Death of Contract* (Columbus: Ohio State University Press, 1974); Wilfrid E. Rumble, Jr., *American Legal Realism* (Ithaca, N.Y.: Cornell University Press, 1968); Thomas W. Bechtler, ed., *American Legal Realism Reevaluated in Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller I* (Dordrecht, The Netherlands: Kluwer, 1978); and Robert Summers, *Instrumentalism and American Legal Theory* (Ithaca, N.Y.: Cornell University Press, 1982). See generally Joseph William Singer, "Legal Realism Now," 76 *Calif. L. Rev.* 465, 476 n. 40 (1988) (listing primary and secondary sources regarding American legal realism).

145. See Karl Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 *Colum. L. Rev.* 431 (1930).

146. In addition, through its reliance on the learning in psychology, sociology, as well as non-Euclidean geometry, see Purcell, *Crisis of Democratic Theory* 74–94 (cited in note 14), realism also suggested an empirical advance over the primitive empiricism of sociological jurisprudence. The empirical "advances" made by the realists are extremely well depicted by Professor John Henry Schlegel. See his "American Legal Realism and Empirical Social Science: From the Yale Experience," 28 *Buffalo L. Rev.* 459 (1979); *id.*, "American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore," 29 *Buffalo L. Rev.* 195 (1980).

147. Roscoe Pound, "The Call for a Realistic Jurisprudence," 44 *Harv. L. Rev.* 697 (1931).

Professor Karl Llewellyn¹⁴⁸ believed that Pound's article was directed at an article he had written the previous year in the *Columbia Law Review*.¹⁴⁹ Llewellyn responded to Pound by suggesting that one of the differences between realism and sociological jurisprudence was "[t]he temporary divorce of Is and Ought"¹⁵⁰ in the study of law in action. There were two strains of realist thought regarding the is/ought distinction, and two responses. Llewellyn years later argued that he was not necessarily suggesting that there were no absolute moral values;¹⁵¹ instead, he was simply concerned with empirically evaluating and understanding law in American society in light of his confession that such values did not inexorably lead to deductions which answered specific questions of law. Others denominated as realists, however, were convinced that values were simply subjective preferences. For example, in a 1933 review of a book by Felix Cohen, Yale Law School Professor Walter Nelles wrote, "I deny ethical right and ought without qualification."¹⁵² Yale Law School Professors Thurman Arnold and Edward Robinson wrote companion books published in 1935 which seemed premised on the belief that there were no moral absolutes.¹⁵³

The response was twofold. Pound and Felix Frankfurter at Harvard Law School responded to the realist charge by refusing to acknowledge or

148. Llewellyn graduated from Yale Law School in 1918 at the top of his class. He was the editor-in-chief of the *Yale Law Journal* and stayed a year after graduating to ensure the journal's continued publication. After working for National City Bank (the predecessor of Citicorp) and the law firm of Shearman & Sterling, he began teaching at Yale in 1922. Llewellyn became a professor at Columbia in 1925 and stayed there until 1951, when he began teaching at the University of Chicago law school. He died in 1962. Llewellyn was influenced by his teachers Arthur Corbin and Wesley Hohfeld, who were intellectual parents to legal realism. A biography of the work of Llewellyn is William Twining, *Karl Llewellyn and the Realist Movement* (Norman: University of Oklahoma Press, 1973; reprinted 1985) ("Twining, Karl Llewellyn").

149. Llewellyn, 30 *Colum. L. Rev.* For a revised history of the Pound-Llewellyn debate, see N. E. H. Hull, "Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence," 1987 *Wis. L. Rev.* 921.

150. Karl Llewellyn, "Some Realism about Realism—Responding to Dean Pound," 44 *Harv. L. Rev.* 1222, 1236 (1931) (emphasis in original).

151. Karl Llewellyn, "On the Good, the True, the Beautiful, in Law," 9 *U. Chi. L. Rev.* 224, 264 (1942). Twining, *Karl Llewellyn* 123–24, calls Llewellyn a moral relativist, albeit one who searched for absolute values. See also Elizabeth Mensch & Alan Freeman, "The Politics of Virtue: Animals, Theology and Abortion," 25 *Ga. L. Rev.* 923, 991–92 n.222 (1991) (quoting Llewellyn, *Position Re: Religion* (1943), in which Llewellyn discusses his emerging religiousness).

152. Walter Nelles, Book Review, 33 *Colum. L. Rev.* 763, 767 (1933), reviewing Felix Cohen, *Ethical Systems and Legal Ideals* (1933) (emphasis in original), quoted in Purcell, *Crisis of Democratic Theory* 91 (cited in note 14).

153. Thurman Arnold, *The Symbols of Government* 32–33 (New Haven, Conn.: Yale University Press, 1935) ("Arnold, *Symbols*"); Edward Robinson, *Law and the Lawyers* 38–43, 188–91 (New York: Macmillan Co., 1935) ("Robinson, *Law and Lawyers*"). These two books were the result of a seminar (locally nicknamed "The Cave of the Winds") Arnold and Robinson taught together at Yale Law School in the early 1930s. See Arnold, *Symbols* v; Robinson, *Law and Lawyers* vii. See generally Karl Llewellyn, Book Review, 5 *Brooklyn L. Rev.* 219 (1935), reviewing both books.

accept the postulates of realist thinking. Lon Fuller, then of Duke Law School (and later of Harvard Law School), denied in *The Law in Quest of Itself* "the possibility of a rigid separation of the is and the ought."¹⁵⁴ Morris Cohen, a philosopher and good friend of Felix Frankfurter, complained that the realists "do away altogether with the normative point of view in law."¹⁵⁵ The second response was that of Catholic legal academics, who argued for a return to Thomistic natural law.¹⁵⁶

The second attack by the realists on sociological jurisprudence concerned the nature of judicial decision making. In 1929, Federal District Judge Joseph Hutcheson wrote that he decided cases subjectively, "more or less offhand and by rule of thumb."¹⁵⁷ The next year, a practicing lawyer named Jerome Frank wrote *Law and the Modern Mind*, in which he explicitly followed in Judge Hutcheson's footsteps. Frank asserted: "If the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case."¹⁵⁸ Yale Law School Professor Thurman Arnold argued in *The Symbols of Government* that the notion of the rule of law was a myth.¹⁵⁹ If

154. Lon L. Fuller, *The Law in Quest of Itself* 5 (Chicago: Foundation Press, 1940). See also Lon L. Fuller, "American Legal Realism," 82 *U. Pa. L. Rev.* 429 (1934).

155. Morris R. Cohen, "Justice Holmes and the Nature of Law," 31 *Colum. L. Rev.* 352, 357 (1931). See also *id.*, *Reason and Nature* bk. III, ch. 4 (1931), excerpted in Morris R. Cohen & Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy* 615, 621 (1st ed. 1951):

The essence of all doctrines of natural law is the appeal from positive law to justice, from the law that is to the law which ought to be; and unless we are ready to assert that the concept of a law that ought to be is for some reason an inadmissible one, the roots of natural law remain untouched. Now, it is true that the issue has seldom been so sharply put, for to do so is to espouse an amount of dualism between the is and the ought which is shocking to the philosophically respectable. . . . There have not, of course, been wanting intellectual radicals who, in the interests of a strident monism have clearly and conscientiously attempted to eliminate the chasm between the ought and the is, either by denying the former, or by trying to reduce it to a species of the latter." (Notes omitted)

On Morris Cohen and legal thought, see David Hollinger, *Morris R. Cohen and the Scientific Ideal* 165-99 (Cambridge, Mass.: MIT Press, 1975).

156. See Purcell, *Crisis of Democratic Theory* 164-72 (cited in note 14). The Catholic response was more fully developed after World War II. See Mensch & Freeman, 25 *Ga. L. Rev.* at 963-85 (discussing the creation and development of the legal journal *Natural Law Forum* (now *American Journal of Jurisprudence*)).

157. Joseph Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 *Cornell L. Q.* 274 (1929). At the beginning of the decade, New York Court of Appeals Justice Benjamin Cardozo had shocked the legal establishment by confessing in *The Nature of the Judicial Process*, his Storrs lectures at Yale (published by Yale University Press in 1921), that judges exercised discretion in deciding cases.

158. Jerome Frank, *Law and the Modern Mind* 111 (New York: Brentano's, 1930) ("Frank, *Law and Modern Mind*"). On Frank, see Robert Jerome Glennon, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law* (Ithaca, N.Y.: Cornell University Press, 1985). See also Neil Duxbury, "Jerome Frank and the Legacy of Realism," 18 *J.L. & Soc'y* 175 (1991).

159. Arnold, *Symbols* 33-37, 216-19. See also Frank, *Law and Modern Mind* 100-101 (criticizing the notion of judging on which the ideal of the rule of law is based).

true, then the progressive notion of the disinterested judge would unravel, and placing authority in the “judge-as-expert” would not consequently lead to a more “scientific” administration of justice. It would mean the end of our system of government according to law, not the rule of men, something which Wigmore¹⁶⁰ and Pound¹⁶¹ could not countenance. More broadly, this attack struck at the foundation of the law itself, its rationality.

Both Arnold and Frank criticized the jury trial and the judicial process. Arnold, who taught evidence at Yale, scoffed at the belief in the efficacy of procedural reform in courts,¹⁶² and entitled a chapter of *The Symbols of Government* about the civil trial system, “Trial by Combat.” Frank concluded: “The jury makes the orderly administration of justice virtually impossible.”¹⁶³ Leon Green, who succeeded Wigmore as Dean of the Northwestern Law School, concluded in his 1930 book *Judge and Jury* that the jury trial should be abolished.¹⁶⁴

With the exception of Morgan’s review of Edward S. Robinson’s *Law and the Lawyers*,¹⁶⁵ Morgan’s response to this attack by realists was indirect.

160. See Wigmore, 28 *A.B.A.J.* at 24 (cited in note 49) (uncabined judicial discretion would return us to “that primal condition of chaos”).

161. See Purcell, *Crisis of Democratic Theory* 161–62 (cited in note 14) (discussing Pound’s reaction to the perceived excesses of realism).

162. Arnold, *Symbols* 129. See also *id.*, “Trial by Combat and the New Deal,” 47 *Harv. L. Rev.* 913 (1934) (presenting an earlier version of chapter 8 of *The Symbols of Government*); *id.*, “The Role of Substantive Law and Procedure in the Legal Process,” 45 *Harv. L. Rev.* 617 (1932) (discussing the idea of the courtroom as theater); *id.*, Book Review, 42 *Yale L.J.* 459 (1933), reviewing W. P. Barrett, *The Trial of Jeanne D’Arc* (1932); *id.*, Book Review, 40 *Yale L.J.* 833 (1931), reviewing Leon Green, *Judge and Jury* (1930). See also Thurman Arnold & Fleming James, *Cases on Trials Judgments and Appeals* (St. Paul, Minn.: West, 1936) (a collection of cases, the purpose of which is to convince the reader that the system of trial is better understood as concerned with rhetorical devices rather than the rational resolution of disputes). Arnold’s decision to part ways with Charles Clark in using data to reform the rules of procedure is discussed in Schlegel, 28 *Buffalo L. Rev.* at 511–12 (cited in note 146). A sensitive description of Arnold’s evolving views is Ayer, 23 *Stan. L. Rev.* (cited in note 46). See also Gene M. Gressley, “Introduction,” in Gressley, ed., *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder, Colo.: Colorado Associated Press, 1977). Robinson, *Law and Lawyers* 32, 115, wrote only in passing about the jury trial, but in the two asides indicated that it might be the case that the primary purpose of a jury trial was the “resolution of an emotional conflict—that it is only secondarily concerned with the fitting of the law to the facts.”

163. Frank, *Law and Modern Mind* 181. Frank also noted, “The decisions of many cases are products of irresponsible jury caprice and prejudice. . . . [T]hat the principal witness for one of the parties is a Mason or a Catholic . . . such facts often determine who will win or lose.” *Id.* at 177–78. See also Jerome Frank, *Courts on Trial* (Princeton, N.J.: Princeton University Press, 1949).

164. Leon Green, *Judge and Jury* 395–417 (1930). Green also complained that “[t]he trial judges’ power to deal decisively with questions of evidence has constantly dwindled.” *Id.* at 379. There is an elliptical suggestion in Roalfe, *Wigmore* 228 (cited in note 13), that Green supported Wigmore’s view regarding the ALI’s Model Code of Evidence, but the single sentence indicating support is terribly unclear.

165. Edmund M. Morgan, Book Review, 13 *N.Y.U.L.Q.* 322 (1936), reviewing Robinson’s *Law and the Lawyers* (cited in note 153). The review is written in the second person, in which the “you” Morgan refers to throughout the review is a reference to himself. In gen-

However, in his short two-and-a-half page review, Morgan attacked Robinson, a psychologist at Yale University, for his caricatured explication of law and lawyers in the first four chapters of the book. While Morgan believed the later chapters of some value, he concluded that Robinson's book only partially brought "the doctrines of the substantive and procedural law into harmony with the approved and tested doctrines of the social sciences."¹⁶⁶

By the mid-1930s, the American Law Institute had completed several of the Restatements of the law. While the response of the legal establishment was exceedingly favorable,¹⁶⁷ the Yale-based realists, who for the most part were not involved in the Restatements,¹⁶⁸ unceasingly criticized its purpose, assumptions, and methodology.¹⁶⁹ To some it likely seemed that the realists were striking at the very heart of the legal system. For example, Dean Herbert Goodrich of the University of Pennsylvania Law School (and later the second director of the institute) wrote an article¹⁷⁰ defending the Restatement project after taking umbrage at a comment made by Robinson in *Law and the Lawyers*.¹⁷¹ While the comment seems today to be a sharp but not unfair comment about the methodology of the Restatement, Goodrich considered it "fighting words, clearly passing the

eral, a search of the *Index to Legal Periodicals* indicates that professors at Harvard Law School ignored books by realists. Morgan's review is one of a very few by a Harvard Law School professor discussing a "realist" book. Since Robinson's book was the product of a seminar taught with Arnold, and since Robinson and Arnold viewed their books as collaborative efforts, it is curious that Morgan did not review Arnold's *Symbols of Government* and that he mentioned only in passing Robinson's collaboration with Arnold. Morgan's only public mention of Arnold is found in a speech given to the West Virginia Bar Association in 1941 concerning the Proposed Model Code of the ALI. The reference is simply a joke about Arnold leaving West Virginia for Yale. See Edmund M. Morgan, "The Proposed Code of Evidence," 57 *Proc. W. Va. B. Ass'n* 161 (1942).

166. Morgan, 13 *N.Y.U.L.Q.* at 324. Interestingly, Morgan took a swipe at Frank's *Law and Modern Mind* in this book review.

167. See Herbert Goodrich, "Institute Bards and Yale Reviewers," 48 *Yale L.J.* 449 (1936).

168. Yale Law School Dean Clark was a member of the Advisory Committee to the Restatement of Property, and Professor Arthur Corbin was the Assistant Reporter to Samuel Williston in the Restatement of Contracts. For a convincing explanation why Corbin agreed to act as Assistant Reporter in the Restatement of Contracts, see Daniel J. Klau, Note, "What Price Certainty? Corbin, Williston, and the Restatement of Contracts," 70 *B.U.L. Rev.* 511 (1990).

169. See, e.g., Thurman Arnold, "The Restatement of the Law of Trusts," 31 *Colum. L. Rev.* 800 (1931); Charles Clark, "The Restatement of the Law of Contracts," 42 *Yale L.J.* 643 (1933); Thurman Arnold, "Institute Priests and Yale Observers—A Reply to Dean Goodrich," 84 *U. Pa. L. Rev.* 811 (1936).

170. Goodrich, 48 *Yale L.J.*

171. Robinson wrote: "Our main interest, however, is in the general philosophy of the [Restatement] undertaking, which is plainly founded upon the belief that too much truth about the law is disastrously confusing and that the remedy may be found in an authoritative suppression of the facts rather than in better education of the public and the bar as to the actual psychological and sociological nature of the law." Robinson, *Law and Lawyers* 36 (cited in note 153). Goodrich, 48 *Yale L.J.* at 451–52.

limit of fair comment."¹⁷² Robinson's collaborator, Thurman Arnold, responded in defense of Robinson, and chastised his Harvard Law School classmate Goodrich.¹⁷³ Interestingly, in the course of his apologia, Arnold wrote,

The most important institution wherein such conflicts are reconciled, either by ceremony or logic, is the judicial system. It cannot, therefore, be a place where hard, cold truth is sought, yet it must be a place where everyone thinks that truth is searched for. For this paradoxical function the technique of trial by battle seems admirably fitted. Both sides state their positions with the utmost exaggeration possible, and the ordinary decision permits all the conflicting ideals to stand which may be reconciled with its decision.¹⁷⁴

The attack by the realists appeared to be an attack on both the legal profession (represented in part by the Harvard Law School professors who worked as Reporters for the Restatements) and the ideals of legal progressivism.

In a sense, then, as Reporter for the American Law Institute's Model Code of Evidence, Morgan was stepping into this fray. As a Harvard-trained lawyer and a Harvard Law School professor, Morgan was outside the immediate intellectual home of realism. However, he had taught at Yale from 1917 to 1925, and as an academic critical of the handling of the Sacco-Vanzetti case, he had used his interest in law in action to demolish the trial judge's handling of the evidence in that case.¹⁷⁵

Morgan was jurisprudentially and pedagogically different from the archetypal Harvard Law School formalist, like Samuel Williston or Joseph Beale. In directing the Commonwealth Fund Evidence Committee's report on the law of evidence, Morgan and the committee "engaged in a primitive form of empirical research so that they could claim that their proposals were based on 'factual material', rather than upon opinion and *a priori* judgments."¹⁷⁶ Jerome Frank characterized Morgan in late 1948 as "perhaps" a "fact skeptic,"¹⁷⁷ Frank's highest compliment for any legal

172. Goodrich, 48 *Yale L.J.* at 452.

173. Arnold, 84 *U. Pa. L. Rev.* 811 (1936).

174. *Id.* at 813.

175. See Joughin & Morgan, *Sacco and Vanzetti* (cited in note 139). Morgan's contributions had in part been written 20 years before publication of the book. *Id.* at v.

176. 21 Wright & Graham, *Federal Practice* at § 5005.

177. Jerome Frank, *Law and Modern Mind* xi (Preface to 6th printing 1948) (cited in note 158). Frank delineated two camps of "realists," a term he disparaged, rule skeptics and fact skeptics. The other persons categorized as fact skeptics were Leon Green, Max Radin, Thurman Arnold, and William O. Douglas, along with himself. *Id.* at xii. This preface was separately published in the *Syracuse Law Review*. See Jerome Frank, "Legal Thinking in Three Dimensions," 1 *Syracuse L. Rev.* 9, 11 (1949). See also Frank, *Courts on Trial* 74 (cited in note 163). Morgan critically responded to Frank's claims about "fact skepticism" in a review of *Courts on Trial*. See Morgan, Book Review, 2 *J. Legal Educ.* 385 (1950) ("It is

scholar. At Harvard during the 1930s, Morgan was one of a group of “five men who rebelled against formalism.”¹⁷⁸ Each tried to position himself, both in class and in writing, between the “anarchy” of legal realism and the “sterility” of legal formalism. Their successors, mostly trained at the Harvard Law School, would use some of those insights to form the jurisprudential thinking denominated reasoned elaboration, or legal process.

By 1939, when the ALI Evidence Editorial group began its work, legal realism was portrayed as the jurisprudential equivalent to Nazism. Realism’s relentless positivism caused a tremendous fear in jurisprudential circles; at the same time, its messages concerning the absence of absolute values and the subjectivity (read arbitrariness) of judicial decision making had penetrated much of American legal thought. However, it appears that the jurisprudential “crisis”¹⁷⁹ shortly before World War II was, in part, an intramural battle as far as the legal profession was concerned. The claims and counterclaims made largely by several professors at Harvard and Yale law schools had little immediate impact on the direction of the legal profession. After all, the Supreme Court had just retreated from formalism in 1937, and the American Bar Association, the only “national” association of lawyers, was largely a reactionary organization.¹⁸⁰ The efforts exerted by legal academics to attack or defend an autonomous legal order had little apparent effect on legal practice.

Morgan’s compromise between the “formalistic” catalogue suggested by Wigmore and the “realistic” creed suggested by former Yale Law School Dean Clark, was an attempt to find a middle way to restore law to its relatively autonomous place in the jurisprudential firmament. The choices made in the Model Code of Evidence reflected this middle way: judicial power to admit or exclude evidence was not only necessary (a progressive tenet)¹⁸¹ but inevitable (a realist tenet). This power required giving the trial judge a great deal of discretion (contrary to Wigmore’s view), but discretion was cabined (contrary to realism), albeit only within some

difficult for me to see how anyone can teach a course in Evidence or in Procedure without emphasizing the uncertainty not only in the framing and the application of the rules but also, and especially, in the ascertainment of the facts to which the rules are to be applied”).

178. Included in this group were Felix Frankfurter, James M. Landis, Thomas Reed Powell, and George Gardner. See Kalman, *Legal Realism* 49 (cited in note 1). I would add Professor Zechariah Chafee, an evidence, remedies, and constitutional law scholar, to that list.

179. See Purcell, *Crisis of Democratic Theory* 159 (cited in note 14). Cf. Robert Gordon, “Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography,” 10 *Law & Soc’y Rev.* 9, 38 n.85 (1975) (suggesting a revision of Purcell’s thesis).

180. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 216 (New York: Oxford University Press, 1976) (discussing the applications to ABA membership of three black lawyers in the early 1940s. The two who publicly challenged the discriminatory practices of the ABA were denied membership, while the third, who remained silent, was admitted).

181. See Morgan, Foreword at 13–16 (cited in note 109).

more general rule, with appeals available for the abuse of discretion.¹⁸² While the trial was not a scientific search for the truth¹⁸³ (contrary to progressive tenets), neither was it an irrational way of allocating rights and responsibilities (contrary to realist tenets). The rules governing adjudication of the dispute were rational as long as “artificial barriers to logically persuasive data be removed.”¹⁸⁴ This, of course, assumes that the jurors could be logically persuaded by receiving more “relevant” data, an assumption not shared by many realists. Related to this was Morgan’s statement, “A trial cannot be a purely intellectual performance.”¹⁸⁵ The realist-based insight that “the emotions of the persons involved—litigants, counsel, witnesses, *judge* and jurors—will play a part”¹⁸⁶ in decision making was used to counter the “formality” of Wigmore’s approach but was adopted only with the qualifier “purely.” That is, a trial was not purely an “emotional” performance either.¹⁸⁷ Finally, in drafting an evidence code, Morgan assumed the competency of a judge. He did not require, as the progressives did, an unusually expert judge, nor did he assume, as Jerome Frank did, that the competent judge needed to make himself aware of his “own prejudices, biases, antipathies, and the like”¹⁸⁸ to somehow free himself from those inevitable biases.

The published response in legal periodicals indicates that the legal profession perceived Morgan’s attempted reconstruction of the law of evidence as part of a truly “radical” reform. The Model Code was opposed by the legal profession for a number of reasons: (1) Wigmore’s opposition; (2) greater power accorded judges (and less to advocates); (3) the Code’s disinclination to treat a trial solely as a search for truth, particularly at a time when the United States was engaged in a war against the forces of evil in a fight for freedom and justice; and (4) the admission that a trial was not a purely intellectual (read rational) performance.¹⁸⁹ No state adopted the Model Code of Evidence. As Morgan wrote in 1951, “The reception which the Model Code of Evidence of the American Law Institute has met strongly indicates that the bar at any rate is not ready for

182. *Id.* at 12.

183. *Id.* at 3.

184. *Id.* at 4.

185. *Id.*

186. *Id.* (emphasis added). See Frank, *Law and Modern Mind*.

187. A contemporary use of Morgan’s distinction is found in the FRE Advisory Committee’s Notes. See Advisory Committee’s Note, *Federal Rule of Evidence* 403 (1975) (permitting exclusion of relevant evidence to counter the risk of “inducing decision on a purely emotional basis”).

188. Frank, *Law and Modern Mind* 147 n.* (cited in note 158).

189. Wright and Graham write that the heavy concentration of “Eastern Establishment” figures in the Evidence Editorial group also affected the reception of the Model Code of Evidence. 21 Wright & Graham, *Federal Practice* at § 5005 (“The Code doubtlessly suffered as well from the prejudice of many lawyers toward the Harvardians and Easterners who dominated the drafting Committee”).

codification.”¹⁹⁰ Harkening wistfully back to the progressive notion of expertise, Morgan continued,

It might have been supposed that a proposal sponsored by a body which is composed of representative judges, lawyers, and law teachers would meet with general approval, especially in view of the standing of the lawyers and judges who compose its Council, and who are responsible for proposals put to the Assembly, and whose work is subject to veto by the Assembly.¹⁹¹

It is likely that Morgan and many members of the legal profession differed regarding their understanding that either the Evidence Editorial group or the Assembly of the American Law Institute was “representative” of the legal profession.

Morgan continued to believe in the efficacy of reform. Following in Pound’s footsteps, Morgan implored the profession to abolish those rules “designed to make the lawsuit a contest of skill instead of a rational investigation.”¹⁹² Morgan made one final argument for granting more discretion to trial judges, calling the judge “[t]he only impartial official dealing with the jury.”¹⁹³ Morgan cautioned that resistance to reform would result in a continued increase in the power of nonexpert administrative agencies.¹⁹⁴ His concluding paragraph was a plea for the Advisory Committee to the Supreme Court to treat the law of evidence as it had treated the law of civil procedure.¹⁹⁵

G. Uniform Rules of Evidence

In 1948, the National Conference of Commissioners on Uniform State Laws (NCCUSL) decided that the law of evidence was a proper subject for uniformity among the states. The next year the ALI referred the Model Code of Evidence to the NCCUSL for study “and if deemed desirable for redrafting.”¹⁹⁶ The NCCUSL decided that the Model Code would provide the basis for their work. After some discussion with the ALI, the Uniform Rules were drafted independently.¹⁹⁷ A committee consisting of

190. Morgan, 29 *Tex. L. Rev.* 587, 598 (cited in note 47).

191. *Id.*

192. *Id.* at 599.

193. *Id.* at 604.

194. *Id.* at 607–9. This flipped the progressive notion of expert bureaucratic control and played well with lawyers, concerned as always about the extraordinary discretion given administrative judges and officials.

195. *Id.* at 610.

196. “Prefatory Note,” in National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence* 161 (1953) (“Prefatory Note”).

197. *Id.*

some of the same members of the Evidence Editorial group of the institute, as well as some practicing lawyers from southern and midwestern states, was chosen in 1949.¹⁹⁸ The NCCUSL unanimously passed the Uniform Rules of Evidence in 1953. Shortly thereafter, the ABA adopted the Uniform Rules of Evidence.¹⁹⁹ The goal of the NCCUSL was and is uniformity; therefore, compared with the Model Code of Evidence, efforts at reform were limited. "So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest."²⁰⁰ The NCCUSL evidence committee followed the general form of the Model Code²⁰¹ and, with the elimination of several "procedural" rules, succeeded in reducing the number of rules to 72. The complete edition of the Uniform Rules of Evidence had a mere 57 pages.

While legal academics largely supported adoption of the Uniform Rules of Evidence, Supreme Court inaction quickly dissipated any momentum for states to adopt the Rules.²⁰² Because the Rules were drafted less to reform the law of evidence than to make it uniform, the only argument in favor of adoption was that the law of evidence would be the same in all the states. Since most lawyers were limited by attorney licensure laws and the economics of practice to one state, and since any change meant learning new and different rules of evidence, this argument was unpersuasive. While a few states did adopt the Uniform Rules of Evidence,²⁰³ commenta-

198. By the end of the drafting of the Uniform Rules, the committee was composed of Spencer A. Gard, a judge from Kansas; Mason Ladd, a professor at the University of Iowa who had been a member of the committee which prepared the Model Code; Charles T. McCormick of the University of Texas, also a member of the Model Code Committee; Lucian Morehead, a practitioner from Texas; Maynard Pirsig, a professor at the University of Minnesota; John Pryor, a practitioner in Iowa; Robert Woodside, Pennsylvania Attorney General; and Joe Estes, a Dallas, Texas, lawyer. Earlier in the drafting process, practitioners from New Jersey, Delaware, and Florida had been members of the committee.

199. "Prefatory Note" at 162. The ALI approved the Uniform Rules of Evidence at its 1954 annual meeting. 31 *ALI Proc.* 44 (1954). Morgan supported approval by the ALI. 31 *ALI Proc.* 36, 41.

200. "Prefatory Note" at 161. See also Spencer A. Gard, "The Uniform Rules of Evidence," 31 *Tulane L. Rev.* 19, 23 (1956) ("Sensible change without shock is an underlying policy of the Rules. That is the reason why the Rules take a somewhat conservative approach to the problem of hearsay").

201. "Also, the general policy of the draftsmen for the Model Code in covering the matter in the form of rather broad general rules has been adopted, in preference to a policy of voluminous detail." "Prefatory Note" at 162.

202. In 1957, Charles Joiner sketched the history of the Federal Rules Advisory Committee's treatment or rather, lack of treatment, of the law of evidence, from the 1930s to 1956. He noted that the Advisory Committee evinced no interest in drafting rules of evidence, and that the Supreme Court had discharged the Advisory Committee in 1956. Joiner suggested to the Judicial Conference the study and adoption of uniform rules of evidence in the federal courts. Charles Joiner, "Uniform Rules of Evidence for the Federal Courts," 20 *F.R.D.* 429, 429-31 (1957).

203. Kansas, New Jersey, and Utah adopted versions of the Uniform Rules of Evidence, as did the Virgin Islands. The relationship between California's evidence code and

tors suggested that true reform required the passage of uniform rules of evidence in the federal courts.²⁰⁴

The theory of the Uniform Rules of Evidence was similar to the Model Code of Evidence: more authority should be placed in the hands of the trial judge and less in the hands of opposing counsel; a judge must be given discretion to make “judgment calls”; this discretion is subject to appellate reversal for abuse; and the rules of evidence must be rewritten to make the investigation of the events at issue more rational. But, unlike Morgan, the Conference Committee downplayed any suggestions that the trial was not a search for truth, and, as mentioned above, claimed that the Uniform Rules were a modest reform, not a radical reformation of the law of evidence.

H. Reasoned Elaboration

The theory granting the trial court discretion to make evidentiary rulings, viewed as “radical” only a decade before, fit snugly within the dominant form of legal thought in the post-World War II era: reasoned elaboration.²⁰⁵ According to Harvard Law School Professors Henry Hart and Albert Sacks, “the power of reasoned elaboration” meant “two principal things.”²⁰⁶ “It means, first of all, that the magistrate is obliged to resolve the issue before him on the assumption that the answer will be the same in all like cases.”²⁰⁷ “Secondly, the magistrate is obliged to relate his decision in some reasoned fashion to the . . . statute out of which the issue arises.”²⁰⁸ Of course, Hart and Sacks acknowledged, this involved the ex-

the Uniform Rules is quite confused. See Kenneth W. Graham, Jr., “California’s ‘Restatement’ of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco,” 4 *Loy. L.A.L. Rev.* 279, 279 (1971) (“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”).

204. See Joiner, 20 *F.R.D.* at 439.

205. See Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 161 (tent. ed. Cambridge, Mass.: private printing, 1958) (“Hart & Sacks, *The Legal Process*”). Two studies of reasoned elaboration are White, 59 *Va. L. Rev.* (cited in note 14), and Gary Peller, “Neutral Principles in the 1950s,” 21 *U. Mich. J.L. Reform* 556 (1989).

206. Hart & Sacks, *The Legal Process* 161.

207. *Id.*

208. *Id.* See Morgan, 13 *N.Y.U.L.Q.* at 323. In reviewing Robinson’s book, Morgan noted, “He does not disguise the fact that a court must not only be able to come to what it regards as a righteous decision but must also be able to produce a respectable opinion in support of it.” This fits within reasoned elaboration in two respects: First, passive language that a court must “come to what it regards as a righteous decision” implicitly assumes that an inquiry whether the decision was “right” is either unanswerable or unimportant. Second, the center of reasoned elaboration was whether the court supported its decision by principled reasoning in its opinion. See also Hart & McNaughton, “Evidence and Inference” at 45 (cited in note 136) (“While it is of course important that the court be right in its determinations of fact, it is also important that the court decide the case when the parties

ercise of discretion, but the constraints of reasoned elaboration permitted a middle way between “the rigors of a perfected rule, on the one hand, and the looseness of unbuttoned discretion, on the other.”²⁰⁹

Reasoned elaboration grew out of the response to American legal realism. As earlier suggested, the two most alarming conclusions of the realists were, first, the subjectivity of moral values and, second, the political or nonlegal nature of judging. The rise in the 1930s of the Nazis in Germany and the Fascists in Italy, as well as the continued aggression of Japan in East Asia, led some academics to equate legal realism with totalitarianism. The first effort in jurisprudence, then, was to attempt to repair the notion of a “fit” between law and morality. The second effort, begun in part by Morgan in the Model Code of Evidence, was to re-separate law from politics.

The pre-World War II “anti-formalists”²¹⁰ at Harvard Law School, in particular Frankfurter, T. R. Powell, James Landis, and Morgan, wrote and taught that judicial behavior influenced law. However, that behavior did not necessarily lead to the conclusion that law was politics by another name. Instead, this simply meant that a closer examination of judicial decision making, particularly in public law, was necessary. This view was best stated by Powell, discussing the teaching of constitutional law: “My emphasis is on process, process, process, on particularities, particularities, on cases, cases, cases, on the contemporary court, on resolving competing considerations, on watching for practicalities not likely to be expressed in opinions in which the court pretends that the case is being decided by its predecessor rather than by itself.”²¹¹

The emphasis on process by Powell, among others at Harvard Law School, was an attempt to reinvigorate the autonomy of law. Frankfurter and Landis’s landmark study, *The Business of the Supreme Court*, while concluding that the issues of federal procedure often involved political and cultural battles, suggested that the Court be granted the authority to control procedure because it was “technical and non-partisan.”²¹² The realist conclusion that political battles recurred throughout all of law was never adopted by the Harvard antiformalists. Instead, a better understanding of and appreciation for the institutional and doctrinal constraints in the judicial process was needed. Academics were doctrinal experts who could provide that appreciation to judges who had strayed. Therefore, law

ask for the decision and on the basis of the evidence presented. A decision must be made now, one way or the other”).

209. Hart & Sacks, *The Legal Process* 162.

210. See Kalman, *Legal Realism* 49 (cited in note 1). See note 178.

211. *Id.* at 51 (quoting an undated memorandum from Powell).

212. Felix Frankfurter & James Landis, *The Business of the Supreme Court* 243 (New York: Macmillan Co., 1928). “The story of these momentous political and economic issues lies concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts.” *Id.* at vii.

professors were in the best position to assist judges to better shape the legal system and the legal profession.²¹³

Frankfurter left Harvard to become an Associate Justice of the Supreme Court in 1939. Landis spent several years in the 1930s in Washington as a New Deal administrator.²¹⁴ Their departures, however, did not markedly affect the development of reasoned elaboration at Harvard Law School after World War II. The dean at Harvard from 1946 to 1947, Erwin Griswold, received his legal education at Harvard in the late 1920s. Lon Fuller, a trenchant critic of realism and later exponent of legal process theory,²¹⁵ was named to the Harvard Law School faculty in 1940. Henry Hart, a 1930 Harvard Law School graduate and president of the *Harvard Law Review*, was appointed to the faculty in 1932. Albert Sacks graduated from Harvard in 1948, and in 1952, after practicing law and working as a judicial clerk for Justice Frankfurter, was appointed to the Harvard Law School faculty.

Reasoned elaboration attempted to demonstrate that institutional structures and procedural constraints could reintegrate the “is/ought” distinction;²¹⁶ it also attempted to return the judge to the status of competent, impartial magistrate.²¹⁷ Supporters of reasoned elaboration “solved” the “is/ought” problem by resort to process. This avoided dealing with notions of moral “right” or the problem of the subjectivity of values. Whether the substantive law was right was not the focus of reasoned elaboration.²¹⁸

At the same time that reasoned elaboration became the dominant mode of legal thought, the American Law Institute began the Second Restatement. In its *Annual Report* for 1953, the institute indicated a need for a Second Restatement of the law, to ensure that the Restatements continued accurately to reflect the law.²¹⁹ In 1958, ALI director Goodrich asserted that little had changed in the rules or principles since the First Restatement.²²⁰ Drafting a Second Restatement to keep up with the law

213. See Alexander Bickel, *The Least Dangerous Branch* 25–26 (paper; 2d ed. New Haven, Conn.: Yale University Press, 1986) (“Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government”).

214. Sutherland, *The Law at Harvard* 302 (cited in note 55). On Landis, see Donald R. Ritchie, *James M. Landis: Dean of the Regulators* (Cambridge, Mass.: Harvard University Press, 1980).

215. See Lon L. Fuller, *The Morality of Law* (2d ed. New Haven, Conn.: Yale University Press, 1969).

216. See Hart & Sacks, *The Legal Process* 4–5 (cited in note 205).

217. *Id.* at 161–79.

218. See Amar, 102 *Harv. L. Rev.* at 691 (cited in note 14). See also Philip Bobbitt, *Constitutional Fate* 43 (New Haven, Conn.: Yale University Press, 1982) (“It’s not *what* judges do, Hart told us, it’s *how* they do it”; emphasis in original). Hart & McNaughton, “Evidence and Inference” at 145 (cited in note 136).

219. American Law Institute, *Annual Report* 7 (1953).

220. Herbert Goodrich, Introduction, *Restatement (Second) of Agency* vii (St. Paul,

contradicted Goodrich's statement, for the conclusion that the law could vary from the principles of the Restatements was contrary to the assumption of the First Restatement that they were needed to create certainty and uniformity. The Second Restatement was necessary in part because the law could never be certain nor uniform. It was also necessary because a Second Restatement could be used as a bridge between "formalists" unwilling to alter the law and "realists" interested in "radical" reformation of the law. The Second Restatement would moderate any reforms, given the instrumental assumption that law changed as society changed.²²¹ From Judge Goodrich the directorship of the institute passed in 1962 to Herbert Wechsler.

The two most important texts of reasoned elaboration were Hart and Sacks's *The Legal Process: Basic Problems in the Making and Application of Law*²²² and Hart and Wechsler's *The Federal Courts and the Federal System*.²²³ Henry Hart and Herbert Wechsler were the dominant forces in reasoned elaboration. Wechsler, who had no formal connection with Harvard Law School (he received his law degree from and taught at Columbia Law School), also wrote the most important law review article exploring the compatibility of reasoned elaboration and issues of social justice.²²⁴ After Wechsler became director of the institute, the Second Restatements were used explicitly as part of reasoned elaboration to show changes in policy. In discussing the differences between the First and Second Restatement of Conflicts, Wechsler stated:

It is a treatment that takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. Its solution lies in candid recognition that black-letter formulation must often consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application there or in the notes of the Reporter. That technique is not unique to Conflicts but

Minn.: American Law Institute Pubs., 1959) ("Few of the rules laid down in the first edition have been changed"). The Introduction itself was dated 11 April 1958.

221. See also Grant Gilmore, *The Ages of American Law* 83-86 (New Haven, Conn.: Yale University Press, 1977) ("*Gilmore, Ages of American Law*") (discussing the joint work of the ALI and the National Conference of Commissioners on Uniform State Laws supporting the drafting of the Uniform Commercial Code and its "conservative" nature).

222. Hart & Sacks, *The Legal Process*.

223. Henry M. Hart & Herbert Wechsler, *The Federal Courts and the Federal System* (Westbury, Conn.: Foundation Press, 1953).

224. See Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev.* 1 (1959).

the situation here has called for its employment quite pervasively throughout these volumes. The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined.²²⁵

Reasoned elaboration was the heir to progressive proceduralism. With the notable exception of Wechsler, it was largely Harvard law professors and Harvard-trained lawyers who used the jurisprudential insights of reasoned elaboration to ward off (Yale-based) realism. This successor to progressive proceduralism permitted them to do so without retreating either to formalism or to natural law. Reasoned elaboration returned the judge to a position of impartiality and defended the rationality of law. The training and shaping of judges by expert academics, as well as informed critique of judges by academics, would ensure the competence of judges. The judge remained a (the only) disinterested person at the trial, and the acknowledgment of judicial discretion did not invite the judge to substitute his personal views as “legal” views, for the institutional and profession constraints imposed on the judge by the structure of the legal system limited his discretion. Additionally, advocates of reasoned elaboration affirmed the need for judicial discretion: “Discretion is a vehicle of good far more than of evil. It is the only means by which the intelligence and good will of a society can be brought to bear directly upon the solution of hitherto unsolved problems.”²²⁶ Explicit balancing of individual and state interests by a competent, disinterested judge was in the best tradition of common law (and constitutional law) adjudication.

Part of the difficulty of categorizing jurisprudential “movements” and accounting for their effects is the lag of time.²²⁷ While it may be true that reasoned elaboration ran aground as a jurisprudential theory when its proponents decided that *Brown v. Board of Education*²²⁸ was an “unprincipled” decision,²²⁹ reasoned elaboration continued to be taught and was the dom-

225. Herbert Wechsler, Introduction, *Restatement (Second) of Conflicts* vii (St. Paul, Minn.: American Law Institute Pubs., 1971).

226. Hart & Sacks, *The Legal Process* 179 (cited in note 205).

227. For example, former Harvard University history professor Alan Brinkley, now at Columbia University, wrote a review of the 1988 Presidential campaign. Alan Brinkley, “A Savage and Demeaning Ritual,” *N.Y. Times Bk. Rev.*, 14 Oct. 1990, at 1, col. 1, reviewing Sidney Blumenthal, *Pledging Allegiance* (1990). In the review, Brinkley suggests that Michael Dukakis’s “image of public life reflected the value-neutral credo of Harvard University’s Kennedy School of Government, where he taught for several years between his first and second terms as Governor of Massachusetts.” *Id.* at 28. Since Dukakis was a 1960 graduate of the Harvard Law School, he instead may have reflected the process-based credo of reasoned elaboration. My point is that jurisprudential movements often are implemented after some delay. For example, since the Supreme Court presently consists of three 1960s graduates of the Harvard Law School, the Court eventually may attempt to revive reasoned elaboration.

228. 374 U.S. 483 (1954).

229. See Wechsler, 73 *Harv. L. Rev.*

inant theory of jurisprudential discourse until the 1970s.²³⁰ Reasoned elaboration was the jurisprudential basis for the structure of the Federal Rules of Evidence.

I. Federal Rules of Evidence

In March 1961, Chief Justice Earl Warren appointed a Special Advisory Committee on Rules of Evidence "to study and report on the advisability of adopting a system of uniform rules of evidence in the Federal courts."²³¹ The Special Committee concluded that rules of evidence were procedural, that a study of federal judges and some practitioners showed a desire for uniform rules, and that the Uniform Rules of Evidence could be used as a model.²³² Adoption of the Special Committee's report occurred in 1963,²³³ and an Advisory Committee was appointed in 1965, with Professor Edward Cleary appointed as Reporter.²³⁴

The Advisory Committee submitted a Preliminary Draft in 1969, and in 1970 and in 1971, further Revised Drafts were submitted. Amendments to the third draft were made in 1972, and in 1973 a bill was passed in Congress delaying the implementation of the Rules until after the adjournment of the first session of the 93d Congress, unless Congress first approved them. Congressional approval finally occurred in December 1974, and the bill was signed into law by President Ford on 2 January 1975. The Federal Rules of Evidence were implemented on 1 July 1975.²³⁵

The overarching structure of the Federal Rules of Evidence, following the path of the Model Code of Evidence, avoids the "extremes" of particularity or undue generality. "Style would strike a middle course between

230. See White, 59 *Va. L. Rev.* at 291-94 (cited in note 14). The Hart/Sacks Legal Process teaching materials, although never published in final form, were used by many law schools in teaching courses entitled Legal Process in the 1960s and 1970s. Further, the Hart/Wechsler casebook on federal courts dominated that field for many years.

231. Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, "A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts," 30 *F.R.D.* 73, 76 (1962).

232. Thomas F. Green, Jr., "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts," 30 *F.R.D.* 79, 99-105, 110-13 (1962). The report mentioned the Model Code of Evidence as "a starting point" for the Committee which wrote the Uniform Rules of Evidence. *Id.* at 111. At the end of the report, the Special Advisory Committee reprinted the ABA resolution in favor of uniform federal rules of evidence. Notably absent from the ABA resolution was any mention of the Model Code of Evidence. Instead, there was an explicit statement that a drafting committee "adapt the Uniform Rules of Evidence." *Id.* at 113.

233. 21 Wright & Graham, *Federal Practice* at § 5006.

234. Professor Cleary graduated from the University of Illinois Law School in 1932 and received his J.S.D. in 1933 from Yale Law School. He taught at the University of Illinois from 1946 to 1967 and at Arizona State University from 1967 to 1977, when he retired. "Biography of Edward W. Cleary," 1977 *Ariz. St. L.J.* 245. See also "Tribute to Edward W. Cleary," 1991 *U. Ill. L. Rev.* 250. Cleary died in January 1990.

235. Rules of Evidence, Pub. L. 93-595, 88 *Stats.* 1296 (1974).

vague generalities and constricting particularity, except as individual situations might require a variation in treatment.”²³⁶ It was as if the Advisory Committee had heard Morgan explain why neither the Wigmore nor the Clark approach was acceptable and then followed the path created by Morgan. Thus, the Federal Rules were designed to rely heavily on judicial discretion.²³⁷ Clearly, reasoned elaboration pointed the drafters of the Federal Rules in the direction of using judicial discretion to resolve most evidentiary disputes. Giving the trial judge the discretion to admit or exclude evidence with limited appellate review was believed to comport better with our notions of the imperfectability of trials. Even more pragmatically (and efficiently), the theory of discretion in the Federal Rules permits the trial judge some confidence that her decision, if appealed, will be upheld and permits the appellate courts to focus their attention on issues other than evidentiary claims. Finally, drafting a uniform body of rules applicable to all disputes revived the claim that the Federal Rules created a greater efficiency in the administration of justice, a claim traceable to legal progressivism.

But the rationale for granting the trial court discretion to make evidentiary rulings, as articulated by Morgan, was not only to account for the imperfectibility of trials (and to avoid the sporting theory of justice) but also to acknowledge that the goal of the trial was not to ascertain truth but to provide an orderly resolution for disputes. Prominently placed at the beginning of the Federal Rules of Evidence was Rule 102, which assumed that the justification for the rules of evidence remained the discovery of truth.²³⁸ Jurisprudentially, then, the Federal Rules allow the legal profession to speak of the goals of justice and truth while creating an evidentiary code which avoids facing the problem of truth.²³⁹

236. *Proposed Federal Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong. 1st Sess. 91 (1973) (statement of Professor Cleary).

237. See Fed. R. Evid. 403 (giving the trial court the discretion to exclude relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice”). See generally Thomas M. Mengler, “The Theory of Discretion in the Federal Rules of Evidence,” 74 *Iowa L. Rev.* 413 (1989); Jon R. Waltz, “Judicial Discretion in the Admission of Evidence under the Federal Rules of Evidence,” 79 *Nw. L. Rev.* 1097 (1984–85).

238. Fed. R. Evid. 102. This rule was in the preliminary draft of the FRE and remained unchanged throughout the drafting process. The drafters chose not to attempt to split the difference, as attempted by Hart & McNaughton in a 1958 article. Hart & McNaughton, “Evidence and Inference” at 45 (cited in note 136). (In a lawsuit “something more is at stake than the truth only of the specific matter in contest. There is at stake also that confidence of the public generally in the impartiality and fairness of public settlement of disputes”).

239. Thus, I think it wrong to assume that the procedural reformers of the 1930s and 1940s were naive in their reliance on the good faith of judges and government. Instead, they seemed well aware of the limitations of trial courts, as indicated by one of Morgan’s last essays on evidentiary reform. See Edmund M. Morgan, “Practical Difficulties Impeding Reform in the Law of Evidence,” 14 *Vand. L. Rev.* 725, 734–35 (1961) (criticizing Professor David Louisell’s suggestion that real reform lay in selecting and securing good trial judges as

III. CONCLUSION

The search for an autonomy of law from politics and the search for a rationality in judicial decision making led to reforms predicated on judicial discretion. In codifying the law of evidence, the drafters of the Model Code pinned their belief in progress on the rationality of the rules and the actors applying the rules. This became necessary after realists showed that truth was no longer a defensible goal of the rules of evidence.

The Federal Rules of Evidence is the latest attempt to rationalize a particular branch of the law. It is both a restatement of the law and a desperate attempt to reconstruct law as Law as autonomous. I mean simply this: The history of American legal thought since World War II is the effort to find a solution to the “twinned” problems of the relationship of law and morality and of idiosyncratic judging. Both problems present issues testing our commitment to notions of impartiality and neutrality, justice and fairness, and the guiding ideal of the rationality and progress of law. These notions make up much of the “core” of a belief in the Rule of Law. While there are still clarion calls for a return to a formalism and Law that probably never existed—particularly in the statements of those who want judges to “interpret the law, not make it”²⁴⁰—the jurisprudential response to realism, in the form of reasoned elaboration, was an attempt to limit judges to making *good law*.²⁴¹ The project of reasoned elaboration was not to search for a nonexistent objectivity but to constrain the subjectivity of judges and judicial decision making through requirements including professional craft, critique by scholars, abnegation of power or deference to other branches, and a reasoned articulation of decisions.²⁴² Constraints on judicial subjectivity would return law from the abyss (or abuse) of politics. While those affiliated with reasoned elaboration directed most of their concerns to decision making in the Supreme Court,²⁴³ the project of the (First) Restatement was an earlier attempt to curb the discretion of state courts by creating certainty and uniformity in compiling “black letter” rules on various doctrinal subjects.²⁴⁴ By 1953, the (Second)

“opposing a proposal for a reform which lies in the sphere of present probability by shifting to a proposal for a more far-reaching change that is beyond the range of adoption in the foreseeable future”).

240. See, e.g., *Luther v. Borden*, 7 How. (48 U.S.) 1, 41 (1852) (“It is the province of the court to expound the law, not to make it”).

241. Hart & Sacks, *The Legal Process* (cited in note 205).

242. This short and biased summary is more thoroughly stated in White, 59 *Va. L. Rev.* at 286-91 (cited in note 14). See also Bobbitt, *Constitutional Fate* 42-58 (cited in note 218). One example in the law of evidence is Cleary’s essay, “Preliminary Notes on Reading the Rules of Evidence,” 57 *Neb. L. Rev.* 908 (1978), in which he suggests which materials ought to be used in interpreting the FRE.

243. See especially Wechsler, 73 *Harv. L. Rev.* (cited in note 224). See also Bobbitt, *Constitutional Fate* 44-47.

244. See Gilmore, *Ages of American Law* 72-74 (cited in note 221).

Restatement was being readied.²⁴⁵ The original Restatement was an attempt to ensure an objectivity in law; the Second Restatement was an attempt to domesticate the inherent subjectivity of law.²⁴⁶

The Model Code of Evidence was the first organized response to the challenge to Law presented by legal realists. The Model Code explicitly reconstructed the bases for the law of evidence in part to more broadly protect Rule of Law beliefs. In reconstructing the law of evidence to provide a foundation for a renewed belief in the rule of law, however, the Model Code failed to persuade the legal profession of the value of "radical reform." Instead, the Model Code became a shell in which to place a more comforting, less demanding code of evidence.

The Federal Rules of Evidence, although not enacted until 1975, are structured within the framework of the legal thought of reasoned elaboration, which in turn tried to resurrect legal progressive thought. To effectively counter the problems posed by legal realism, reasoned elaboration, unlike legal progressivism, downplayed both the goal of a trial as a search for truth, and the general search for substantive justice apart from procedural justice. The irony is twofold: first, the Federal Rules are structured to deny the goal proclaimed in the Federal Rules, ascertaining the truth; second, in an effort to "rationalize" the law of evidence, the Federal Rules are justified as ends, not means. This required the subversion of the progressive claim that evidence was an instrument and an embrace of Thurman Arnold's claim of the inseparability of procedure and substance. The very attempt to overcome the realist threat resulted in submission to realist insights.

245. W. Noel Keyes, "The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration," 13 *Pepperdine L. Rev.* 23, 28 (1985).

246. There is a very complex interaction regarding the relationship of the development of the legal profession and legal education and their impact upon the American Law Institute's Restatement projects. My tentative thoughts are that the elite within the bar and legal academia wanted to use the (First) Restatements both to create greater certainty and uniformity in the law of various states and to ensure a form of control over the legal systems of the various states. By the time of the (Second) Restatements, the main purpose was to create opportunities for graduated doctrinal change, like § 402A of the *Restatement (Second) of Torts*, given the assumption of the subjectivity of legal decision making. See Herbert Wechsler, "Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute," 13 *Saint Louis U.L.J.* 185 (1969); compare W. Noel Keyes, 13 *Pepperdine L. Rev.*, with John W. Wade, "The Restatement (Second): A Tribute to Its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend," 13 *Pepperdine L. Rev.* 59 (1985). Cf. Hull, 8 *Law & Hist. Rev.* (cited in note 13) (concluding that the creation of the ALI was a product of "progressive-pragmatists," whose interest in the reform of law was antithetical to the conservative interests of formalists interested in freezing law). See generally G. Edward White, *Tort Law in America: An Intellectual History* 139-79 (paper ed. New York: Oxford University Press, 1985).

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