**FOCUS**

**COMPARATIVE PERSPECTIVES ON EVIDENCE LAW: EAST AND WEST**

**THE FORM OF REFORM: REVISITING THE CHOICE AMONG A CREED, A CODE, AND A CATALOGUE**

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**Abstract** In the past, international Evidence law reformers have focused primarily on substantive evidentiary doctrines. However, for reforms to be effective, the courts and legislatures must state the revised doctrines in a form that promotes the overall objectives of the legal system. The basic choice facing reformers is among a creed identifying broad goals, a code stating flexible principles, and a catalogue prescribing detailed rules. In the past, especially in the United States, there was a consensus among Evidence scholars that the code format is preferable. However, if a key objective of a national legal system is to encourage pretrial disposition of cases, the courts and legislatures should give serious thought to utilizing a catalogue format. That format is especially attractive in the doctrinal areas such as privilege in which evidentiary rules are intended to affect primary behavior outside the courtroom.

**Keywords** evidence reform, evidence legislation, evidence rules, creed, code, catalogue

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INTRODUCTION

The International Conference on Evidence Law and Forensic Science (ICELFS), co-sponsored by China University of Political Science and Law, is an organization committed to reform. Its members are not mere academic theoreticians. Rather, they are engaged scholars who devote a significant percentage of their energy to effecting change in evidentiary rules. The keynote speakers at its sixth meeting in 2017 in the United States were illustrative:

- Professor Ronald Allen, who has been at the forefront of drafting evidentiary reform proposals for the People’s Republic of China and Tanzania;
- Professor ZHANG Baosheng, who has led reform efforts in the People’s Republic of China and has been a driving force behind the International Association of Evidence Science;
- Professor Paul Roberts, who has coauthored and helped, publicize a series of authoritative papers for the Royal Statistical Society;
- Professor Daniel Capra, the longterm Reporter for the Advisory Committee for the Federal Rules of Evidence in the United States; and
- Professor Victor Weednis, the President of the American Academy of Forensic Sciences during one of the most tumultuous periods of forensic science when the federal and state governments were intervening in multiple ways to influence the evolution of forensic science in the United States.

These are people who not only talk about change; they devote their efforts to bring about change.

The prior five meetings of the conference largely focused on issues of substantive evidentiary change. It is now time for both the conference and the global legal community to follow the example of these reformers and give serious thought to the practical question of the form that reform should take in our respective countries. Assuming that we have settled on the substantive evidentiary reforms that we want to implement in our country, what drafting model should we use to implement those reforms? This is a timely question for the People’s Republic of China, since leading Chinese legal scholars are at work on a draft set of Uniform Provisions of Evidence of the People’s Court.

I. THE GENERAL CHOICE

Edmund Morgan, the greatest American evidentiary reformer of the 20th century, once famously remarked that the basic choice facing the drafters of a set of evidentiary regulations is among a creed, a code, and a catalogue. A creed is a statement of general

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aspirational goals such as accurate fact determination and expeditious case disposition. A creed places minimal constraints on the judge’s discretion to make evidentiary decisions. In contrast, a code is a statement of flexible principles or guidelines. Although a code limits judicial discretion to a greater extent than a creed, the code accords judges a significant measure of flexibility to adapt to unforeseen developments such as the authentication problems posed by the advent of new forms of communication including emails, text messages, and social media postings. The final choice is a catalogue. A catalogue consists of detailed regulations dictating the judge’s evidentiary ruling in as many specific situations as the drafters can anticipate.

Especially in the United States, the long held assumption has been that a code format is preferable. There can be significant downsides to a detailed catalogue. As Professor Allen has written,

> Complex rules of any sort give strategic and tactical advantages to certain groups in society, in particular those with the resources to master and employ those rules. This includes the wealthy and repeat players in the legal system, whereas simpler rules largely benefit those with lesser financial means.\(^3\)

In part, the drafters’ choice as between a catalogue and a code depends on the predominant means of disposing of lawsuits in the drafters’ jurisdiction. The conventional wisdom has been that if the drafters’ primary concern is the efficient disposition of cases by trial, the code model is preferable. The California Law Revision Commission, which drafted the 1967 California Evidence Code, voiced that view. The commission criticized many provisions of the preceding Code of Civil Procedure for the stated reason that the provisions were “long and complex… difficult to read and more difficult to understand” under the time constraints at trial.\(^4\) Likewise, the commission faulted the proposed Uniform Rules of Evidence because that model statute “contain[ed] several rules of extreme length…”\(^5\) The commission favored a code, a relatively short “handbook of the law of evidence — a kind of evidence bible for busy trial judges and lawyers.”\(^6\)

A code has obvious advantages at trial. With a code format, if an evidentiary issue arises at trial, the judges and attorneys can:

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\(^2\) Federal Rule of Evidence 102 states such goals: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” However, the drafters of the Federal Rules were not content to state such goals. Rather, they also crafted more specific provisions. Rule 102 directs courts to consider those goals in the process of interpreting the meaning of the more specific provisions.


\(^4\) California Law Revision Commission 30 (1965).

\(^5\) Id. at 33.

\(^6\) Id. at 34.
usually locate an authoritative principle;
-find that principle quickly; and
-readily understand the principle.

Most of the provisions in the original California Evidence Code and the Federal Rules of Evidence are cast in the code model. Many of the provisions consist of a single, short sentence — ideal for use by “busy trial judges and lawyers.”

A. Reliance on Trial as the Primary Method of Resolving Lawsuits

The case for a code format is strong if certain assumptions hold true. More specifically, a code is generally preferable if a jurisdiction relies on trial as the primary means of resolving lawsuits and the drafters want that reliance to continue. The problem is that in many jurisdictions, one assumption is false and the other is highly debatable.

Consider the first assumption. In the United States, trial has long ceased being the primary method of disposing of lawsuits. In 1962, 11.5% of the cases filed in federal court culminated in a trial.\(^7\) Today, that figure has declined to 1.8%.\(^8\) In some states, the figure is 0.6%.\(^9\) Some commentators have termed the phenomenon “the Vanishing Trial,”\(^10\) while others have gone so far as to proclaim “the death” of the American trial.\(^11\)

The litigation phases preceding trial have undeniably become the center of gravity of American litigation.\(^12\) It takes so long to reach the late trial stage and it is so expensive to conduct a trial that modern American litigants rarely resort to trial. In most instances, they dispose of cases by compromise, either civil settlement negotiation or criminal plea bargaining.\(^13\) Similarly, litigants increasingly turn to alternative dispute resolution (ADR) mechanisms such as mediation and arbitration.

B. Desirability of Relying on Trial as the Primary Method of Resolving Lawsuits

Now consider the second assumption that it is desirable to rely on trials as the primary means of disposing of lawsuits. The United States makes a huge investment of resources in legal facilities such as courthouses, judges, and auxiliary personnel such as court

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\(^8\) Id.

\(^9\) Patricia L. Refo, The Vanishing Trial, 30 Litigation 1, 1–2 (Winter 2004).

\(^10\) Id.; See Galanter, fn. 7 at 459.


\(^13\) Approximately 96% of the arrestees who are booked plead guilty, and in most instances the plea is negotiated. George Beall, Negotiating the Disposition of Criminal Charges, Trial, October 1980, at 46.
reporters. However, in an era of tight state budgets in the United States, some state legal systems may be reaching the breaking point. For instance, unless there is a drastic change in the 2018 California state budget, in the future the state government may no longer provide court reporters at public expense in civil trials. To be sure, trials can serve important symbolic social functions. Fair public trials can contribute to the perception of the legitimacy and transparency of the justice system and therefore the government. If the justice system in a particular country is struggling to earn or maintain that perception, reformers might conclude that enhancing that perception warrants the expenditure of additional resources. However, another nation, especially a developing nation, could well decide to avoid the heavy investment that the United States has had to make and conclude that there are better uses for its limited resources, such as health care, infrastructure, and national security.

If a nation wants to encourage pretrial disposition of cases, the catalogue model becomes more attractive. A country might decide that one of the hallmarks of a healthy legal system is the ability to dispose of the vast majority of cases without a trial. The very flexibility of the principles embodied in a code can reduce litigants’ ability to predict key trial evidentiary rulings in advance. In turn, before trial that inability makes it harder for the litigants to evaluate the relative strength of their and their opponent’s cases. That naturally makes it more difficult for them to agree on the comparative strength of the two cases. Lastly, that inability makes it less likely that they will settle. In contrast, if the nation has a catalogue of more specific evidentiary rules, it is easier for the litigants to forecast evidentiary rulings and assess the strength of the two cases. When the litigants are able to do so, it is more probable that they will settle, eliminating the need for a trial.

In short, it would be wrong-minded to generalize that evidence reformers in every nation should prefer a code over a catalogue. Before making a choice, the reformers in a given country should determine the primary means by which their legal system resolves legal disputes. Does their legal system rely primarily on trial? The reformers should not only consider the current state of their legal system; they also ought to address the policy question of whether, as a matter of policy, trial should be the preferred method of legal

14 James Douglas Welch, Settling Criminal Cases, 6 Litigation, Winter 1980, at 32 (“existing court calendar backlogs and prosecutors and public defenders’ case-loads make the social costs of an even larger number of trials unacceptable, especially in view of the longer delays in civil dockets that would... inevitably result”).

15 In California, private litigants in state court have to hire and pay for their own court reporters if they want a record of trial to be used in the event of an appeal.

16 See Allen, fn. 3 at 290.

17 In a given country, the issue might arise shortly after a national political power struggle in which there were charges of judicial corruption. In those circumstances, it could well be justifiable to rely more heavily on trials as a means of inspiring additional public confidence in the legal system.

18 If it is unclear what the primary mechanism is, the reformers should undertake an empirical investigation of that question before choosing a format.
dispute resolution. The answers to those questions should be weighty considerations in reformers’ choice between a code and a catalogue.

C. Judiciary’s Competence to Wield Considerable Discretion

Another weighty consideration relates to a third assumption underlying the current preference for codes: the degree of confidence that the reformers have in the judiciary that will be tasked to administer the evidentiary rules. Professor Morgan made his classic remark about the choice among a creed, code, and catalogue in the introduction to the American Law Institute’s 1942 Model Code of Evidence. No jurisdiction adopted that code in large part because there was a widespread belief that the Model Code granted too much discretion to trial judges. Again, a code includes flexible provisions according judges considerable discretion in administering evidentiary norms.

As previously stated, the Federal Rules of Evidence are written in the code mold. Shortly after the adoption of the Federal Rules of Evidence, at its annual meeting the Evidence Section of the American Association of Law Schools devoted a session to a discussion of the question of whether the states should adopt the Federal Rules of Evidence. With one notable exception, most commentators spoke in favor of the states doing so. The exception was one of the foremost American Evidence scholars, the late Professor John Kaplan of Stanford University. He cautioned that it might be a mistake for a given state to follow the federal lead. He agreed that it was justifiable to accord federal trial judges the amount of discretion granted them under the Federal Rules. He pointed out that in the United States, federal District Court judges are appointed for life and that for the most part, the appointees are exceptionally well educated, experienced attorneys. He cautioned that in many states, judges are elected and that a large percentage of state trial judges lack the legal training and experience of the typical federal appointee. He took the position that before deciding whether to adopt a code patterned after the Federal Rules, each state should take a long, honest look at its judiciary and make a realistic assessment whether their average trial judge can be trusted to wield the amount of discretion granted under a code model.

Just as Professor Kaplan’s remarks were sage advice for an American state, they are sound advice for any nation contemplating comprehensive evidence reform. If a nation’s judiciary warrants such confidence, a code may indeed be preferable. However, if the nation’s judiciary is inexperienced or less well trained, that consideration may cut strongly in favor of the catalogue model. Before deciding how much discretion to entrust to their judges, each nation’s evidence drafters should take a hard, candid look at the general competence level of their judiciary.

19 See fn. 1.
The bottom line is that it is not a foregone conclusion that a code format is generally preferable. There are several considerations that a nation should carefully weigh before embracing a code format rather than a catalogue.

II. SPECIFIC DOCTRINAL AREAS

Assume *arguendo* that the reformers in a given country decide that as a general proposition, a code is the optimal format for implementing an improved set of evidentiary rules. Although the general preference might be for a code, the catalogue approach might be more suitable for specific doctrinal areas.

A. Rules Intended Primarily to Regulate the Behavior of Witnesses

All laws regulate human conduct to some extent. However, it is critical to distinguish between citizens’ primary conduct outside court and secondary litigation behavior. Most evidentiary rules regulate the latter type of conduct. For instance, some evidentiary rules are intended to regulate the behavior of witnesses. The American legal system imposes restrictions on witnesses’ ability to testify to opinions. More specifically, the general rule is that a lay witness must refrain from offering opinions and must restrict the content of his or her testimony to recitations of fact. The restriction protects the independence of the trier of fact; the witness confines his or her testimony to factual content, and the trier of fact then decides for itself which inferences, if any, to draw from the facts.

B. Rules Intended Primarily to Regulate the Behavior of the Trier of Fact

Other evidentiary rules are calculated to control the behavior of the trier of fact. The character rules in the United States are illustrative. Those rules severely restrict the admissibility of evidence about a litigant’s character, especially when the proponent tenders testimony about the litigant’s character as circumstantial proof of the litigant’s conduct. The proponent offers evidence in that fashion when he or she argues that the litigant’s general character makes it likely that the litigant acted “in character” — consistently with their character — on a specified occasion. The proponent attempts to reason simplistically, “He or she did it once, therefore he or she did it again.” A substantial body of psychological literature indicates that a person’s character is a poor predictor of conduct on a specific occasion; situational factors tend to be more

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23 Id. at Federal Rule of Evidence 701.
influential.\textsuperscript{27} In part, the law limits the admissibility of character evidence to reduce the risk that the trier will reach an erroneous conclusion by ascribing excessive weight to the litigant’s character.

\textit{C. Rules Affecting Primary Behavior Outside Court}

However, still other evidentiary rules are designed to impact conduct outside the courtroom — his primary behavior of persons in the real world. The premier examples of such rules are the evidentiary privileges protecting confidential communications between persons standing in certain special relations. In the words of former Supreme Court Justice Arthur Goldberg during his testimony on the then proposed Federal Rules of Evidence,

\textit{[Privilege law] is the concern of the public at large. [For example, privileges] involve the relations between husband and wife. [T]he marital privilege constitutes the basis of the family relation...They involve the relations between lawyer and clients.}\textsuperscript{28}

In the final House report on the proposed Rules, Representative Elizabeth Holtzman echoed Justice Goldberg’s views. She stated that “unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom.”\textsuperscript{29}

That insight supplied the foundation of Dean Wigmore’s instrumental policy justification for recognizing communications privileges.\textsuperscript{30} Dean Wigmore argued that privileges should be conferred only on social relations that are so important that they ought to be “sedulously fostered.”\textsuperscript{31} Furthermore, in his view, the “element of confidentiality” had to be “essential to the full and satisfactory maintenance of the relation between the parties.”\textsuperscript{32} More specifically, Wigmore assumed that in these relations, the average layperson — the client or other spouse — is so fearful of later, judicially compelled disclosure of their communication that they will not consult or confide without the assurance of a formal evidentiary privilege.\textsuperscript{33} Dean Wigmore began


\textsuperscript{30} John H. Wigmore, Evidence § 2285, at 527–528 (McNaughton Rev. 1961).

\textsuperscript{31} Id.

\textsuperscript{32} Id.

his treatise writing by in effect taking over Greenleaf’s earlier treatise.\(^{34}\) In the predecessor to Wigmore’s treatise, Greenleaf had asserted that “[i]f such communications were not protected, no man... would dare to consult a professional adviser...”\(^ {35}\) On this assumption, the recognition of a privilege is a necessary instrument or means of promoting the relationship — hence, the instrumental theory.

On reflection, though, the world probably does not revolve around the courtroom to the extent that Dean Wigmore assumed. To begin with, there are common-sense doubts about the assumption that the typical layperson is so concerned about the risk of subsequent, judicially compelled disclosure of their private communications.\(^ {36}\) If a patient is in terrible pain or believes that he or she is in imminent risk of death, it is hard to believe that they will withhold symptoms from their physician unless the physician assures them that there is a legal privilege protecting the patient’s revelations.\(^ {37}\) Or if a theist truly believes that their eternal salvation depends on confessing a sin, it is silly to contend that they will not confess unless the religious functionary can assure them that there is an applicable privilege.\(^ {38}\) The average layperson is usually caught up in the “here and now” of the current problem rather than fixated on the prospect of compelled disclosure of their communication several years later in a lawsuit that may never be filed. Moreover, there have been numerous empirical studies on the willingness of clients and patients to confide with professionals, and the findings do not validate the assumption that the average layperson would not consult or confide but for formal evidentiary privileges.\(^ {39}\)

Yet, it remains clear that to a greater extent than the evidentiary rules regulating the behavior of witnesses or triers, doctrines such as privilege affect the conduct of persons outside court. On the spot at trial, the busy judge or lawyer may prefer working with a short code stating flexible principles. The flexibility may create some ambiguities and unpredictability; but in the trial setting, there is an immediacy that makes the ambiguity tolerable. However, outside court, a businessperson contemplating a multi-billion-dollar investment might find such ambiguity very unsettling. In that real world setting, they and their counsel would likely prefer the detail and definiteness that a catalogue of privilege rules can afford.

Consequently, it should come as no surprise that when the California drafters wrote


\(^ {36}\) See Imwinkelried, fn. 33.

\(^ {37}\) Id. at § 5.2.1.b, at 360.

\(^ {38}\) Id. at § 5.2.1.b, at 358.

\(^ {39}\) Id. at § 5.2.2. The findings tend to show that a small percentage of persons would refuse to consult or confide and that a significant minority might be more circumspect in their written communications with confidants. However, the findings do not bear out Dean Wigmore’s generalization about the state of mind of the average layperson.
their sections on privilege, they in effect adopted the catalogue model. The Evidence Code contains numerous opinion,\textsuperscript{40} character,\textsuperscript{41} hearsay,\textsuperscript{42} and authentication\textsuperscript{43} provisions that are a single, short sentence in length. Those provisions are phrased in the style of a code. However, the Code’s privilege provisions stand in marked contrast. Many of the privilege provisions are quite detailed.\textsuperscript{44} The wording of those provisions is characteristic of a catalogue, not a code.

The new Federal Rule of Evidence on privilege waiver, 502, is revealing. When the Federal Rules took effect in 1975, the entire article devoted to privileges consisted of a single rule, 501, including two short sentences. After 1975, in the real world more companies and entities shifted from paper records to electronic documents. When they became involved in litigation, they often found it necessary to produce huge volumes of electronically stored information (ESI).\textsuperscript{45} Some of these documents were protected by privileges. However, a number of courts held that if a party inadvertently produced the document during pretrial discovery, the party waived any applicable privilege.\textsuperscript{46} Worse still, there was authority that there was a broad subject matter waiver; that is, the waiver effected by the inadvertent disclosure of the privileged documents extended to the party’s other unproduced, privileged documents that were relevant to the same topic.\textsuperscript{47} Although there was a split of authority over both the existence and scope of any waiver, the unsettled nature of the law pressured parties into being ultra-cautious and spending

\textsuperscript{40} California Evidence Code § 800.
\textsuperscript{41} Id. at § 1100.
\textsuperscript{42} Id. at § 1220.
\textsuperscript{43} Id. at § 1415.
\textsuperscript{44} E.g., id. at § 954 (lawyer-client privilege), § 965 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1010 (psychotherapist privilege), 1035.4 (sexual assault counselor-victim privilege), 1037.1 (domestic violence counselor-victim privilege), and 1038.2 (human trafficking caseworker-victim privilege).
\textsuperscript{45} Judicial Conference Explanatory Note, Federal Rule of Evidence 502 (“See e.g., Hopson v City of Baltimore, 232 F.R.D. 228, 244 (D.Md.2005) (electronic discovery may encompass ‘millions of documents’); Dysart, The Trouble with Terabytes, 97 American Bar Association Journal, Apr. 2011, at 33 (Perhaps no case could be a more monumental example of the reality of modern... e-discovery than the... copyright infringement lawsuit against YouTube filed... in 2008. In that dispute, the judge ordered that 12 terabytes of data be turned over, according to Matthew Knouf. “People often say that one terabyte equals 50,000 trees, and 10 terabytes would be the equivalent of all the printed collections in the Library of Congress,” says Knouff,... general counsel of Complete Discovery Source, a New York City-based... discovery services provider. For the Viacom/YouTube case then, the demand was for the printed equivalent of the entire Library of Congress. And then some)."
\textsuperscript{46} In re Grand Jury, 475 F.3d 1229, 1305 (D.C.Cir. 2007) (“the privilege is lost even if the disclosure is inadvertent”); In re Sealed Case, 877 F.2d 976, 980 (D.C.Cir. 1989); Jamine Networks, Inc. v Marvell Semiconductor, Inc., 117 Cal.App.4th 794, 12 Cal. Rptr. 3d 123, 128 (2004) (“There is no requirement in the statute itself, nor in the cases interpreting the statute that the privilege holder intend to disclose the information when... the holder makes an uncoerced disclosure”); Jacob P. Hart & Anna Marie Plum, \textit{Litigating the Production of Electronic Data}, 12 Practical Litigator, July 2001, at 31, 39–40 (“the strict responsibility standard”).
\textsuperscript{47} In re Sealed Case, 877 F.2d 976 (D. C. Cir. 1989).
inordinate sums of money on pre-production privilege reviews. 48 Verizon “spent $13.5 million on one privilege review relating to a U.S. Department of Justice antitrust investigation.” 49 To remedy this problem, Rule 502 was added in 2008. Rule 502(b) limits the number of situations in which inadvertent production effects a waiver, and Rule 502(a) similarly limits the number of situations in which there is a broad subject matter waiver. Like so many California Evidence Code provisions on privilege, Rule 502 is written in catalogue style. Rule 502 contains six subsections and is approximately five times the length of Rule 501.

This issue is certainly not confined to the United States. Many foreign countries have even more extensive privilege law than the United States. Germany is a case in point. In part as a backlash against the Nazi regime, 50 the German citizenry tends to be distrustful of government power. 51 The Nazi regime had even encouraged attorneys to inform on their clients. 52 The more recent Communist experience has made the German populace even more insistent on vigorous respect for civil rights, including privacy safeguards, enforceable against the government. 53 That insistence is reflected in the large number of privileges and disqualifications (Zeugnisverweigerungsrecht) recognized under German law. 54 Thus, under modern German law, there are privileges or similar doctrines protecting engaged persons, close relatives, dentists, midwives, insurance agents, and investment advisors. 55 There are similarly detailed privilege rules in France 56 and Italy. 57

When a nation’s privilege law reaches so many relationships outside the courtroom,
there is a strong case for setting out those privilege laws in catalogue format. Persons contemplating conduct outside the trial setting do not need to make the sort of quick ruling that a judge must make when he or she rules on a character or hearsay objection at trial. These persons usually have the luxury of having significantly more time to reach their decision, and they and their confidants would welcome the additional guidance furnished by a code. The protection of privacy is becoming a priority throughout the world.58

CONCLUSION

It would be premature to suggest that the time is ripe to draft a model set of evidentiary rules that all countries should considering incorporating into their domestic law. To be sure, there are some indications of convergence on some evidentiary doctrines59 such as the fundamental requirement that any evidence be logically relevant to a fact legitimately in dispute.60 However, it would be a mistake to overstate the extent of the developing consensus.61 Throughout the world many national legal systems remain committed to the civil law tradition of “free proof.”62 Those legal systems would certainly be reluctant to embrace any sizeable set of evidentiary exclusionary rules, especially hearsay. For that matter, even among countries in the same legal tradition, national cultural, economic, historical, and social differences will limit the extent of convergence. Although the European Convention on Human Rights announced some broad legal principles for all member states, the Convention granted member states a good deal of latitude in “the detailed working out” of the implementation of the principles.63

However, assume that in a given country such as the People’s Republic of China, a general consensus emerges on the substantive evidentiary doctrines that should be incorporated into the country’s domestic law. The drafters’ selection of the substantive doctrines is only half the task. If the drafters are serious about effecting meaningful reform and putting these changes into effect, they must also consider the form that these changes should take. Before the changes can take effect, they must be written down in a prescriptive form. Again, as Professor Morgan observed, the basic format choice for

60 James Bradley Thayer, A Preliminary Treatise on Evidence at Common Law 264–265 (1898) (the exclusion of irrelevant evidence is “a presupposition involved in the very conception of a rational system of evidence”).
62 Id. at § 3.2, § 3.4.
63 Id. at 79–81.
drafters is among a creed, a code, and a catalogue. Many commentators, particularly those in the United States, have long assumed that the preference should be for a relatively short code consisting of rules stated as flexible principles.

However, the optimal choice for a given nation may not be so clear. As a general proposition, a code ought to be preferred if trial is a legal system’s principal mechanism for resolving legal disputes and the nation wants to continue to rely primarily on that mechanism. However, in many jurisdictions trial has long ceased to be the primary mechanism; those nations now rely mainly on pretrial compromise negotiations and alternative dispute resolution. In such a country, it may make much more sense to adopt a catalogue approach.

Furthermore, even if a code should be the general preference in a country, there is a powerful argument that a catalogue approach is superior for doctrinal areas that impact primary behavior outside court rather than the behavior of witnesses and triers. When it initially undertook its study of California evidence law, the California Law Revision Commission was highly critical of the catalogue-style provisions of the California Code of Civil Procedure and the proposed Uniform Rules of Evidence. For the most part, the commission adhered to the code model in drafting the California Evidence Code. However, when the commission turned to the task of drafting the privilege provisions of the Code, the commission deviated from that model and shifted a catalogue style. In their recent amendment of the privilege article, the drafters of the Federal Rules of Evidence made the same decision. Any nation that is strongly committed to the legal protection of privacy and recognizes a large number of privileges should consider the same course of action.