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La lettre d'Amérique

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Vive la différence ? Why No Codification of Private Law in the United States?

David GRUNING*

"The Common Law of England: May wholesome statutes soon root out this engine of oppression from America!"[1]

American law does not want for topics of which foreign readers should be aware both because they are representative of American legal culture and because they are often misunderstood. Candidates for this dubious honor would include the impeachment of President Clinton and the presidential elections of 2000 and 2004. While such topics certainly should not be ignored, they may in fact have suffered from too much attention of the wrong kind, partisan or sensationalist, generating more heat than light.

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1 Bernard SCHWARTZ, *Main Currents in American Legal Thought* 129, n. 133 (1993), citing Charles WARREN, *A History of the American Bar* (1913), at p. 227, who in turn quotes Francis Xavier Martin (1792). Martin was at first a printer in North Carolina, who undertook translations of Pothier. Peter STEIN, "The Attraction of the Civil Law in Post-Revolutionary America", 52 *Va. L. Rev.* 403, 412 (1966), citing HOWE, *Studies in the Civil Law* 348 and 349 (1896). He may have done so primarily in order to have something to print and sell. He later moved to Louisiana and became a justice of the territorial court and then the state supreme court, for which he also published reports.

Instead of presenting such a contemporary issue in American law, I thought instead to examine a topic that preoccupied American legal thought for a large part of the 19th century. And although it is now largely forgotten, nevertheless it is an issue that promises to show a significant feature of American law today. That issue was whether the law could or should be codified. For a time, the argument over whether to codify American law produced reams of pamphlets and articles and numerous speeches pro and con. The result of the debate is not in doubt: apart from a few exceptions, American states do not have codes of private law. But they very nearly did. It is hoped that understanding the 19th codification debate will help one understand contemporary American law also.

Before going further, a basic fact of American law should be kept in mind. For Americans, deciding whether to codify was made more difficult because of the tension between written and unwritten law. In the American legal system, this tension plays out in two very different contexts: in public law and in non-public or private law. By public law, I mean simply those legal transactions – litigated, negotiated, or even accidental – to which the state is a party. By private law, I mean legal transactions in which both parties are individuals and hence the term also includes commercial law[2]. The tension between written and unwritten law is well known in constitutional law, which is fundamental public law. The tension between unwritten and written private law has also been extremely significant[3].

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2 The state may sometimes act "as" a private individual, for example, in an otherwise ordinary contract of sale, which is conceptually distinct from the state's decision to tax, to regulate a market, to use military force, or to conclude a treaty. That the state may undertake otherwise ordinary transactions for reasons of policy is an interesting complication that need not detain us here.

3 The distinction between private and commercial law is much less significant for the American legal system than it is in continental civil-law jurisdictions. For example, American law never formalized the legal status of the merchant as France did. In the contemporary context, moreover, American lawyers are not taught that there is a hard and fast distinction between private and commercial contract law. This is for the simple reason that a substantial part of their contract law is adapted in Article 2 of the Uniform Commercial Code on Sales, and this material often appears in basic first-year contracts courses. And while the UCC only applies to movables, the contract rules within the UCC are often taken up in the Restatements of American Law written and published by the American Law Institute, particularly the current Restatement (Second) of Contracts.

For convenience, the development of codification may be presented chronologically: the colonial era, the formative era, the climactic debate, and its aftermath[4].

I. The Colonial Period (1607-1776)

Many factors during the colonial stage of American legal history were favorable toward written articulations of the law adopted by authoritative bodies within society. Today we would be inclined to label these efforts codes of a sort, just as we would be inclined to label the bodies that adopted them legislatures. At the time, however, those involved in the process would not have used the term code in anything like a modern sense; nor would they have seen the bodies that adopted such documents functioning as legislatures in a modern representative sense.

First, during this period the colonies were separate, so much so that they had to overcome significant mistrust in order to work together on issues of common concern, even during the Revolution. They were separate juridically, formed by distinct groups to whom the Crown had delegated the power of administration. They were separate religiously, the Puritans in Massachusetts, Quakers in Pennsylvania, Catholics in Maryland (who attempted a cautious tolerance). Indeed, some colonies were formed largely because of dissent with an existing colony (Connecticut and Rhode Island in opposition to Massachusetts). In addition, there were cultural differences that went beyond religion. The plantation owners in the South had a culture distinct from that of the Northern small farmers and merchants, even before slavery had been abolished in the North.

The colonies were conscious of their distinct identities, and expressed them through written documents, even if the drafters of these documents borrowed freely from the examples provided in the other colonies when these were available. The earliest was the Mayflower Compact of 1620, but it was soon followed by the theocratic Laws and Liberties of Massachusetts (1641), the Fundamental Order of New Haven (1642) (a copy of the Massachusetts text), and the

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4 This is a standard chronological division. See, e.g.: Francis R. AUMANN, *The Changing American Legal System: Some Selected Phases* (1940) (table of contents).

more democratic Code of Civil and Criminal Law (1647) of Rhode Island[5]. To us, such documents appear to contain elements of public law and individual rights we would expect to see in constitutions as well as elements of private law we would expect to see in a civil or commercial code. The point is that the colonists were much more comfortable relying on such novel written expressions than on a shared sense of unwritten common law alone. Instead, the codes seem quite close to direct democratic expressions of the consensus of the family heads within the community who in the main composed the bodies adopting them.

This separateness indeed continued through the colonial period and well beyond. During the time that the Articles of Confederation were in effect, namely, during the Revolution and during the first five years of nationhood, and under the Constitution of 1787[6], the former colonies remained separate when they became independent states. And as new states were formed from territories, far from being subservient to the federal power that recognized them they also formed truly separate identities, adding to the sectional characters of North and South that of the West (or Wests, since the westernmost portion of the country was always moving farther west until it largely stopped at the Pacific Ocean). Thus, the distinct identities of the colonies favored a code-like treatment of law. The separate legal existence of each new constituent state limited the growth of a shared, unwritten legal culture.

Distance also favored codification. Each colony was distant from the English governmental institutions that held ultimate legal authority over it. That distance meant that as a practical matter, England could only exercise that authority through delegation to colonial agents and by permitting the colonists a degree of self-government sufficient to react to local needs and exigencies. Acts of lawmaking

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5 Paul Samuel REINSCH, *English Common Law in the Early American Colonies* 11-13, 25, 26, 28-30 (1899; reprinted 1977).

6 The first federal administration under this Constitution was formed in 1789, with the election of the first president, George Washington, and of the first Congress of the United States. Washington's inauguration occurred on April 30, 1789. The first Congress was gaveled into session on March 4, 1789. The Constitution drafted in 1787 was ratified effectively, under its own terms, when the ninth state convention ratified it, namely, New Hampshire, on June 21, 1788. But as a practical matter, the ratifications of Virginia and New York were essential, and they occurred on June 25 and 26, 1788, respectively.

within the colony were always subject to review in England, but only after months and sometimes years had passed. The alternative of creating a true colonial administration on the ground was too expensive to entertain. Thus, English authorities had to enable the colonists to set up institutions and life in the new world, and acknowledged that they must be able to act on their own behalf, including acting through the establishment of rules and government organs as they saw fit[7]. If England corrected colonial legal initiatives, those corrections would take a significant period of time to reach the colony at issue. Once the corrections reached the colony, the changes demanded would be interpreted and implemented typically by the same individuals who had crafted the original, offending provision.

Early colonial administrations, then, could never simply apply the common law as such. For one thing, there were too few people in the colonies in the seventeenth century who had mastered its complexities. Not many trained practicing lawyers, let alone judges, were among the first colonists. In addition, the common law was ill-adapted to much of colonial life. In many colonies, the colonists thought they were entering a new world and leaving an old world behind. In such circumstances, the attraction of codified expression of the law is predictable, if not "natural", in order to signal the start of a new legal system and to provide a firm foundation for it. A true continuation of English common law, then, was not desired.

In addition, social contract ideology was very much in the air at the time. At this stage, that ideology was avowedly religious in character, though later it was to take a more secular cast. One has only to read the Mayflower Compact to get a strong sense of this religious impulse[8]. Here one can see a religious group binding itself in writing to advance the greater law embodied in a more sacred writing.

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7 B. SCHWARTZ, *op. cit.*, note 1, at 4.

8 The substance of the compact occupies a single sentence:

We whose names are underwritten, the loyal subject of our dread sovereigne Lord, King James, by the grace of God, of Great Britaine, France and ireland, King, defender of the faith, etc., haveing undertaken for the glory of God and advancement the the Christian faith, and honour of our King and countrie, a voyage to plant the first Colonie in the Northerne parts of Virginia, doe by these presents solemnly and mutualy, in the presence of God, and of one another, covenant and combine ourselves togeather into a civil body politik for our better ordering and preservation and furtherance of the end aforesaid; And by Virtue hereof do enact, constitute and frame such just and equal lawes, ordinances,

Even without the religious impulse, however, the urge to legislate might have caught on in the colonies. The distinguished legal historian, Julius Goebel, notes, a bit wryly:

> *The seventeenth century is significant here in the first place because the whole habit of enactment as it prevailed in England manifests itself in every grubby outpost on the Atlantic seaboard. The records of city, town or province whether in New York, Massachusetts or Virginia show a zest for ordinance making that still abides in the breast of our impatient citizenry.*

Beyond the "zest" for legislation as such, Goebel also indicates the style. He writes, "In the second place a noteworthy feature of this century is an obsession for codes. ... [I]n New England this employment of the code was due in part to imitation of local English usage, and in part to certain ideas growing out of the reformation"[9]. With deference to Professor Goebel, enactment in the American context played a different role than in England. In the colonial setting, enactment occurred at both the higher and lower levels of the legal system, whereas in England, as Goebel emphasizes, enactment occurred primarily at the local level. Thus, the peculiar geographical, religious, and political status in the colonies seems to account for the codification impulse more than imitation of an example very far removed from their situation.

Several factors, however, checked the urge to codify the law. As the eighteenth century progressed, England sought tighter legal and economic control of activities in the American colonies. This tightening became strongest after the end of the Seven Years War in 1763, fought in part to defend the American colonists from French intrusions from the North and West. The end of the war meant it was time for England to seek to replenish its depleted treasury, and

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> *actes, constitutions and offices from time to time, as shall be thought most meete and convenient for the generall good of the Colony; unto which we promise all due submission and obedience.*

November 11, 1620, at Cape Cod. Reprinted in Henry Steele COMMAGER, I *Documents of American History* 15 and 16 (8th ed. 1968) (which reproduces the spelling of the original).

9 Julius GOEBEL, Jr., *Cases and Materials on the Development of Legal Institutions* 759 (1937). The last topic considered in this book, which was the text for Goebel's first-semester introduction to the common law legal system, is entitled "Enactment", predominantly legislative enactment, and in its final section he treats enactment in America.

the funds were sought from the American colonies. This the colonists resisted, and that resistance and English intransigence led eventually to the Revolution. But the assertion of more control predated this final phase. One way in which England exercised control was through its review of colonial legislation. The easiest way, some of the colonial powers learned, to avoid being reversed or inconvenienced by the Privy Council or the London Board of Trade was *not* to legislate, not to commit practices or understandings to writing, or only to do so slowly, or having done so only in the fullness of time to communicate the results to England. This strategy, while it is a small factor, did tend to check the impulse and thus the habit of legislating or codifying[10].

In addition, colonial charters affirmed that the colonists carried with them the rights of Englishmen[11]. These rights became identified with the common law. Common law meant independence and liberty to the colonists. They made this identification emphatically when England sought to recover through taxation the costs of having defended colonial and imperial interests during the Seven Years' War[12]. As noted above, while the colonies were empowered to enact legislation, such enactments had to be "not contrairie to the Laws of this our Realme of England"[13]. To identify with the common law was to identify with unwritten, perforce uncodified law.

The primary factor unfavorable to codification during this prerevolutionary phase was the arrival of English legal professionals better trained in the common law. Their influence was felt mostly in the urban centers of the American colonies, but this influence was sufficiently strong to alter the conception of law within them. Instead of a rough and ready sense of what "common law" meant, the Anglicization of American law during the 18th century brought a more sophisticated and technical understanding when compared to the previous century. Moreover, the leading colonists became

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10 Robert Gerard SMITH, *Toward a System of Law: Law Revision and Codification in Colonial America* 169 (1977).

11 B. SCHWARTZ, *op. cit.*, note 1, at 4.

12 See, e.g.: *Declaration and Resolves of the First Continental Congress* (October 14, 1774). The fifth resolution reads: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law". H.S. COMMAGER, *op. cit.*, note 8, at 82 and 83.

13 B. SCHWARTZ, *op. cit.*, note 1, at 4.

avid students of the law, notably including the common law. As Edmund Burke noted to the Parliament in the run up to the Revolution, as many copies of Blackstone's *Commentaries on the Laws of England* were sold in the American colonies as in England itself[14].

Thus, by the eve of the Revolution, at the very least it can be said that there was no fundamental demand for a uniform code of private laws, such as appears in the contemporaneous French Constitution of 1791[15]. The American Revolution was assuredly not about *that*. And but for the Revolution, the absorption of the common law and its style of law-making would have continued unchecked. The Revolution disrupted this process.

II. The Formative Era (1783-1865)

In 1783, the signing of the Treaty of Paris signaled the end of the Revolutionary War. The United States were assured a chance to begin life as a confederation of independent states, still governed as a whole (and only loosely) by the Articles of Confederation. By 1865, with the end of the Civil War, the character of the United States as a nation was in place, if somewhat ambivalently, given the continuing cleavage between North and South and the enormous expenditure of life and wealth in the war. By the end of this period, however, the concept of law, both public and private, has become quite stable. Its future direction is not absolutely clear; that future direction is the topic of the third section of this article.

With independence, each of the original thirteen colonies and each successive new state that entered the federation subsequently enacted its own written constitution. Each state constitution provided for a reception of the common law of England, to the extent that law was not inconsistent with the constitution itself or with rights established by the constitution[16]. Sometimes it was explicitly

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14 See generally: F.R. AUMANN, *op. cit.*, note 4, at 26-31.

15 Jean-Louis HALPÉRIN, *Le Code civil* 10 (1996).

16 Louisiana, of course, was the exception. It prohibited the adoption of a system of law by general reference. La. Const. Art. IV, sec. 11 (1812). This was and is understood to block the introduction of the common law system, as the other states had done. George DARGO, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 132, n. 17 at 225, n. 33 at 226 (1975). David GRUNING, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, n. 17 and accompanying text, 81 *U. Detroit Mercy L. Rev.* (forthcoming 2005).

provided that the common law might be adapted or altered according to local circumstances, much as the colonial charters had stated. The choice of the effective date of reception presented a slight problem that masked a deeper one. The minor problem was *which* date to choose. Some state constitutions chose to adopt the common law as of the year of the Declaration of Independence, 1776. Massachusetts chose April 19, 1775, the date of the Battle of Lexington and Concord. Others chose "the date of the founding of the first permanent English colony in North America"[17]. That date makes sense for the colony in fact founded in 1607, but not for subsequently created colonies or states – such as a western state like Colorado – which nevertheless adopted the same effective date. Thus, while 1776 was often used, there was no uniformity. This small problem points up a deeper one, namely, that there was not a well thought out view on just what were the sources of American law at the time. The ambivalence on that issue will continue through the formative phase of American legal development.

Just as in the Colonial Era, there were factors that favored and factors that opposed codification during this second period also. There were two factors that ought to have favored codification that appear to have misfired. The first is the role of Louisiana as a possible influential model. Its 1825 Civil Code enjoyed some notoriety after its enactment and being in English it could have served the purpose. Indeed, Henry Sumner Maine in 1857 believed that Louisiana civil law would serve as a model for rest of the country, and had already in part succeeded[18]. But this was simply not the case. Later observers were puzzled at how he could have been so wrong[19].

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17 Max RADIN, *Handbook of Anglo-American Legal History* 341 and 342 (1936).

18 Henry Sumner MAINE, "Roman Law and Legal Education", in *Village-Communities in the East and West* 330, 359 and 360 (3d ed. 1876), first published in *Cambridge Essays* (1856), as cited by P. STEIN, *loc. cit.*, note 1, 403 and 404, n. 3 and 4.

19 "As late as 1856 Sir Henry Maine believed that a reception of French or of Roman-French law was taking place in America. In 1871, he reprinted a lecture containing the containing the statement that the French code, as adopted in Louisiana, and not the common law, was becoming the substratum of the law in the newest States. I have never been sure what he had in mind. Possibly the adoption of the Field Code in California and the Territory of Dakota may have misled him. At any rate, all danger of a reception of French law was over some time before 1856; but at one time it was a real danger": Roscoe POUND, "The Place of Judge Story in the Making of American Law", 48 *Amer. L. Rev.* 676, 684 (1914). Where Pound sees a danger avoided, others might see an opportunity lost.

Modern students of the antebellum era have thought that Edward Livingston had the potential to influence the course of codified law in other states, but again this did not happen either[20].

A second influence that did not succeed was the existence and even the tradition a written constitution both within each state and at the federal level. This also ought to have predisposed not only lawyers but citizens generally toward a similar written articulation of law generally. The short response to this hypothesis is that it does not play out as expected. It is not that there was no consciousness of the potential influence of constitutional law, for of course there was. But it simply did not generally persuade those who wielded power within the legal system that an analogous codification of private law was advisable. What occurred was a partial codification, a codification of at least a significant portion of the law, on grounds that were more pragmatic than ideological, and only in a few states[21].

There was also a factor that could have weighed in favor of maintenance of the common law, but appears not to have done so, namely, the common law tradition of liberty. The common law was still definitely seen as a bastion of protection against state oppression at the beginning of this period. Thus, the Northwest Ordinance of 1787 provided that "The inhabitants of the said territory shall always be entitled to the benefit of … judicial proceedings according to the course of the common law"[22]. By the end of this period of American legal development, however, reliance on the common law for such protection gradually gives ground to reliance upon the written protection embodied in the Bill of Rights annexed to the federal Constitution and to similar statements in state constitutions.

While it is difficult to state confidently what favored codification the most, certainly early in the Formative Era the hostility to all

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20 Peter J. King perhaps goes furthest in this vein. Peter J. KING, *Utilitarian jurisprudence in America: the Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* 295 (1986). King seems to overestimate Bentham's influence on Livingston. Livingston did draft a concise scheme of civil procedure in 1805, but as Livingston did not draft the Digest of 1808, as King asserts. Livingston did participate in the drafting of the Civil Code of 1825.

21 This occurred most notably in New York in 1828, as will be discussed *infra* in this section.

22 H.S. COMMAGER, *op. cit.*, note 8, at 130.

things English would have to stand high. It is this attitude that largely explains the fire in the epigraph quoted at the beginning of this piece. This anti-English and anti-common law attitude can be attributed to natural feelings following a bloody conflict, but there were other elements in play. For example, those lawyers who had prospered in the period immediately preceding the Revolution tended to be conservative and to identify with the interests of Crown and property. Indeed, during the Revolution many were forced to flee, and their property was confiscated. New York state's revolutionary fervor brought into existence a statute that penalized not only those who supported the Crown during the Revolution but even those who strived to maintain neutrality[23].

Now, the effect of the departure of the more conservative elements of the bar meant first that the lawyers who remained were less conservative and less attached to traditional common-law

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23 C. WARREN, *op. cit.*, note 1, at 505: "the old underlying antagonism of the American public toward the Common Law, as being of English origin". Roscoe POUND, *The Formative Era of American Law* 7 (1938), writes that the generation following the Revolution suffered an economic depression, which made "law and lawyers" unpopular, and which linked to "political conditions [that] gave rise to a general distrust of English law … The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century" (citations omitted).

Not all agree that the flight was a general one. Dennis Nolan, for example, concluded it was not the case in Maryland. Dennis R. NOLAN, "The Effect of the Revolution on the Bar: the Maryland Experience", 62 *Va. L. Rev.* 969, 971 (1976). He also cites research supporting "gentle demurrers" from Warren's point of view as to South Carolina and even as to Massachusetts, especially the broader claim that the legal profession suffered due to a departure of loyalist lawyers. *Id.*, 971 at n. 19. *Accord*, Robert GORDON, "Book Review of Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform*", (1981) 36 *Vand. L. Rev.* 431 (1983). In addition, several of the most influential lawyers who remained possessed legal skills that today seem nothing short of extraordinary. John Adams, Alexander Hamilton, and Thomas Jefferson are examples of lawyers, who, though (or perhaps because) substantially self-taught, were extremely capable. But one is tempted still to follow the view that generally average lawyers who shared neither their capacities nor their ambition, lost something by the wholesale departure of the loyalists. In addition, the average preparation and legal "culture" of new lawyers in newer states was most likely more modest. There is a well-known tale of an ill-trained lawyer whom a Maryland judge admitted to practice on the explicit condition that he not practice in that judge's court or county but go west to the territories to pursue his career – and he did.

thinking. Moreover, the younger members of the bar who became lawyers in the years immediately following the Revolution had less instruction in the old ways: there were fewer established conservative lawyers in whose offices aspiring younger lawyers might read law. Likewise, there was less study of law abroad in England than before the Revolution. And just as things English were suspect, things continental or French – such as the civil law – were appreciated. In part, this appreciation for continental law, particularly the law merchant, was also occurring in England. One need simply recall Justice Mansfield's importation of large swaths of the law merchant into the common law of England[24]. The same attraction occurred in the United States[25].

At this stage, our attention necessarily shifts to several advocates and opponents of codification, leaving social, political, or similar factors somewhat in the background. Among the supporters of codification, who categorically deprecated lawmaking through judicial decision, William Sampson is without doubt the most colorful. Sampson began life in Ireland in 1764, as the child of the English landed class, but as a lawyer he used his talents as a vocal advocate for reform. Forced to flee Ireland by boat, he donned a woman's dress as a disguise but was discovered shaving and arrested. By a circuitous route of deportation and exile, he was in France during the discussion and review of the new draft French Civil Code, and he was in communication with several individuals involved in the process. The French Code made a very favorable impression on him, and encouraged him to imagine a "total reconstruction" of the common law. Although permitted briefly to return to England in 1806, he quickly made himself obnoxious to the authorities, who happily deported him to the United States. He arrived on in New York July 4, 1806, during the thirtieth anniversary celebration of the Declaration of Independence[26].

Sampson immediately had difficulties with the bar. Only on the strength of a very recent precedent was he able, as a foreign lawyer,

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24 Dennis J. CALLAHAN, "Medieval Church Norms and Fiduciary Duties in Partnership" (Comment), 26 *Cardozo L. Rev.* 215, 249 and 250 (2004).

25 See generally: P. STEIN, *loc. cit.*, note 1.

26 Maxwell BLOOMFIELD, *American Lawyers in a Changing Society* 69, and Chapter 3, *passim* (1976).

to gain permission to practice in the New York courts, which thereupon instituted a rule requiring that all practicing attorneys be either native-born or naturalized American citizens[27]. He achieved some notoriety, taking on politically-charged cases, for example, one in which he challenged (without success) the common-law rule that labor unions were unlawful combinations or conspiracies[28]. During this time, he also advocated a national code of law. Several years later, in 1823, he gave a Discourse on the Common Law the published version of which hit the mark, was widely disseminated, and stirred debate in newspapers and periodicals[29]. The performance was anything but subtle. In essence, it was a diatribe against the common law. Sampson's efforts do not appear to contain any concrete proposal at all. Indeed, Sampson does not refer to the French Code as a model in the discourse itself, although he does mention it later, but without any attention to detail[30]. He plainly desired a new code, a clean break with the past and a banishment of it – but he provided no model.

At this point it is necessary to introduce the figure of Jeremy Bentham, who hovers over the American codification debates without ever coming to rest and gaining a true foothold. A few years after Sampson's arrival in the United States, Bentham attempted to move them toward codification, a word he is credited with having coined. Bentham, after castigating Blackstone in an early piece of writing, had become a relentless advocate for legal reform through legislation and a vociferous – sometimes scatological – critic of the common law and the judges and lawyers who maintained it, to their benefit[31]. Bentham, who never travelled to the United States, penned

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27 *Id.*, at 71.

28 *Id.*, at 75. It was the case of the Journeymen Cordwainers of the City of New York in 1809.

29 The full title of Sampson's speech was "An Anniversary Discourse delivered before the Historical Society of New York on Saturday, December 6, 1823, Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law". It was published by one Pishey Thompson in Washington, D.C., in 1826, with a dedication to the nineteenth congress of the United States, along with several letters and documents under the title: *Sampson's Discourse, and Correspondence with Various Learned Jurists, upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents Relating to the Subject.*

30 M. BLOOMFIELD, *op. cit.*, note 26, at 66.

31 Charles M. COOK, *The American Codification Movement: A Study of Antebellum Legal Reform* 76 and 77 (1981) ("syphilis", "dunghill", "excrement").

a famous letter that did, one he sent to President Madison in 1811. In it, he identified the problem to be corrected:

> *Of unwritten (for such is the term in use), but much more properly of uncomposed and unenacted law (for of writing there is, beyond comparison, more belonging to the spurious than to the genuine sort), of this impostrous law, the fruits, the perpetual fruits, are – in the civil or non-penal branch, as above; uncertainty, uncognoscibility, particular disappointments, without end, general sense of insecurity against similar disappointment and loss; – in the penal branch, uncertainty and uncognoscibility, as before; and, instead of compliance and obedience, the evil of transgression, mixed with the evil of punishment: – in both branches, in the breast and in the hands of the Judge, power every where arbitrary, with the semblance of a set of rules to serve as a screen to it.*
>
> *Such are the fruits of this species of mock law, even in the country which gave it birth; how much more pregnant with insecurity – with unexpected and useless hardship – as well in the shape of civil loss, as in the shape of penal infliction, and non-prevention of crimes, must it not necessarily be, in a country into which the matter of it is continually imported: imported from a foreign country, whose yoke the American nation has, to all other purposes, so happily for both nations, shaken off.*[32]

The remedy Bentham offered to prepare without compensation. He termed it a Pannomion, composed of a General Code, applicable to all, with several Particular Codes (more than two hundred), applicable to particular types of persons, such as husband and wife or master and servant[33]. Madison replied in 1816, declining the offer, on the grounds that "compliance with your proposals would not be within the scope of my proper function"[34]. Soon thereafter, Bentham had Albert Gallatin, one of his sympathizers, communicate his offer to codify to the governors of the various states. Again, the offer was not seriously pursued[35].

Thus, Bentham put his ideas before several powerful Americans, some of whom were advocates for his position, but he achieved no direct effect on the codification of American private law. As a final

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32 Philip SCHOFIELD and Jonathan HARRIS (eds.), *The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law and Education* 20 and 21 (1998).

33 *Id.*, at 8.

34 *Id.*, at 36, James Madison to Jeremy Bentham, May 8, 1816.

35 P.J. KING, *op. cit.*, note 20, at 109-111.

example, his views did affect the work of Edward Livingston, especially for his draft penal code. Yet the Louisiana legislature did not enact it; and Bentham appears to have had little demonstrable effect on the Civil Code of 1825[36].

Other voices were more measured in their approach, and more influential. The most important among these was that of Joseph Story. And indeed, Story must be seen as embodying factors that both favor and undercut codification simultaneously. Born in Massachusetts, the son of the sole doctor in the port city of Marblehead, Story was graduated from Harvard and then read law for three years before becoming a member of the bar himself. He began his law practice in Salem, which was at the time dominated by Federalists. He, though, followed both his own inclinations and his father's politics and joined the party of Jefferson, the Republicans. Story advanced his legal and political career simultaneously, going to the state legislature in 1805 and then to the federal Congress in 1811. The timing was providential. There was a vacancy on the Supreme Court. The first nominee declined because of poor eyesight, the second was rejected by the Senate, and the third declined hopes of winning the presidency (which the third nominee – John Quincy Adams – eventually did win). Story was fourth on the list, perhaps because Jefferson, who had influence with President Madison, did not consider Story sufficiently true to Republican principle. Story pretended not to desire the office, which probably fooled no one. He accepted immediately. He was thirty-two years old[37]. Once a member of the court, he gradually shed his Republican politics. He was frank about the freedom that life tenure gave him from party politics; he used it.

Story continued to maintain an interest in state law. His circuit riding duties (his circuit of course included his home state of Massachusetts) would have naturally inclined him in this direction, if

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36 King states that "Article 8 of the Civil Code of 1808, under Livingston's influence, forbade the judges to make constructive offenses": *id.*, at 274. I have not been able to verify the reference. In any case, the claimed influence is quite minor.

37 See generally: R. Kent NEWMEYER, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 70-72 (1985). M.H. HOEFLICH, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer", 29 *Am. J. Legal Hist.* 36, 56 (1985).

his scholarly ambitions had not provided an even greater impetus[38]. He participated in the preparation of a revision of the Massachusetts statutes in 1817[39]. Thus, as the controversy over codification of the law gained currency, Story mentioned it in his speeches and occasional writings, but always in a balanced fashion. Indeed, he participated on a special commission for the Massachusetts legislature on the subject, and penned its concluding report, appropriately entitled, "Codification of the Common Law", available to the legislature in 1836 and published in 1837[40].

In structuring the final recommendation, Story analyzed the common law of Massachusetts in four categories. In the first category Story placed the common law that existed "potentially", but that was "obsolete", "rare" in practice, or "doubtful" of application. This first category, Story's commission recommended, did not need to be codified. In the second, he put the common law that the legislature had "modified or altered", so as to make the relevant parts of the common law itself "of limited use in practice". No need, Story thought, for the second category to be codified. In the third he placed the common law "of daily occurrence in the common business of life, and furnish[ing] the rules for the rights of persons ... and property ... in civil cases". This area the commission did recommend be codified. Here, Story analyzed the category into subcategories. They were persons and family; real and personal property; and contracts and contract remedies. In this third subcategory, Story noted, "the benefits of a code will be most extensively felt, and in which the task may be performed with the greatest certainty of success". Under this heading, the commission intended that both private and commercial contracts would be handled, the latter group to include agency, bailments, guaranty, suretyship, bills of exchange,

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38 Until the end of the 19th century, under the Judiciary Act of 1789 the justices of the Supreme Court participated along with District Court judges in federal trials. Initially, they traveled on horseback, and literally "rode" circuit. Joshua GLICK, "On the Road: The Supreme Court and the History of Circuit Riding", 24 *Cardozo L. Rev.* 1753, 1756 (2003).

39 R.K. NEWMEYER, *op. cit.*, note 37, at 273.

40 Joseph STORY, "Codification of the Common Law: A Report of the Commissioners Appointed to Consider and Report upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof; Made to His Excellency the Governor, January, 1837", in William W. STORY (ed.), *The Miscellaneous Writings of Joseph Story* 698 (1852) (reprinted 2000).

promissory notes, insurance, partnership, as well as the full panoply of maritime contracts[41].

The fourth major category was criminal law. This also the commissioners believed ought to be codified, though for different concerns stemming from the need for public dissemination of the acts to which the state would assign penal sanctions. This, Story allowed, "will not be found a very difficult task, to reduce most of the important doctrines and rules to a positive text"[42].

Whether Story truly intended that Massachusetts codify the common law, especially the third category above of private and commercial law, along demonstrably civilian lines, is unknown. Some are inclined to doubt it[43]. Story wrote privately to a friend, as if to reassure him, that he was no "votary" of Bentham. He was recommending only moderate reform, closely tied not only to existing practice but also to common law history and gradual development – a very un-Benthamite tendency. As one scholar put it, "In fact, in all the debates over codification in the United States, none argued as logically, comprehensively, and trenchantly for codes as Story did in this special report"[44]. It was without immediate effect. Massachusetts did not undertake a code of private law, and after it had a report on criminal law in hand it rejected it[45].

Thus, whether Story intended to assist or to prevent codification must remain an open question. But what he did as a scholar in fact most certainly did help to prevent codification. For the effect of his scholarly writings, along with those of Chancellor James Kent of New York, was to eliminate one of the reasons for codification, namely, to provide an orderly conception of the law within which new developments could be assimilated[46].

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41 *Id.*, 729-732.

42 *Id.*, 732.

43 R.K. NEWMEYER, *op. cit.*, note 37, at 280.

44 C.M. COOK, *op. cit.*, note 31, at 176. In such passages, Story seems to approach the balanced view of codification of a writer and participant such as Portalis. There appears to be little response to his works and views in the American literature of the period.

45 R.K. NEWMEYER, *op. cit.*, note 37, at 280.

46 Kent is discussed below at notes 51 and 52 and accompanying text.

Story had already begun the doctrinal writing that would supply the necessary coherence and order he believed the American common law required. It seems plain that Story believed he could achieve through doctrinal writings much of the benefit he saw in partial codification. He arranged those writings in an order that appeared to him the most logical exposition of American law, given the importance of commercial law at the time. He began with bailments, followed by agency, partnership, promissory notes, equity jurisprudence and equity pleading, and finally conflicts of law. These doctrinal writings canvassed both English and American caselaw; they also delved deeply into doctrinal authorities in the respective areas, English when there were any, and always the authorities from France, the Netherlands, and in Roman law[47]. The influence of the civil law on Story's work is also evident, as it was in the summary noted above, in these doctrinal writings[48].

Before leaving Story, it is worth mentioning his place in the debate over the existence of a federal common law, particularly of crimes. The Federalists during John Adams's presidency insisted upon the existence of a federal unwritten criminal law. During Adams's administration, there were practical reasons for this insistence, usually having to do with criminal indictments of troublesome partisans on Jefferson's side. In addition, the Federalists connected unwritten criminal law with English common law, with which the Federalists identified. By the time Story joined the Supreme Court, however, the battle lines on the issue had blurred.

One reason for this was that during the Jefferson presidency, his party itself invoked an unwritten criminal common law *against* the Federalists. In the key case, *United States* v. *Hudson and Goodwin* (1812), the defendants had claimed that during the Louisiana Purchase negotiations the Jeffersonians had accepted a two-million dollar bribe from the French. Jefferson was not amused, and his administration obtained an indictment for criminal libel, in reliance on the common-law crime of libel, because there was no federal criminal statute on that point. When the case arrived in the Supreme Court, the justices (including the Federalists) ruled that there was no federal common law of crimes. Story, however, considered this position ill-advised. He was already well on his way to developing

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47 R.K. NEWMEYER, *op. cit.*, note 37, at 290-295.

48 M.H. HOEFLICH, *loc. cit.*, note 37, 62.

his nationalist position that would culminate in *Swift* v. *Tyson* (1842), in which his opinion did finally pronounce the existence of a federal common law. At the same time, Story saw a federal criminal code as part of the solution to the problem; the difficulty was that Congress would not move on the issue. When Congress finally did adopt a full amendment of the federal criminal code in 1825, Story drafted it[49]. This shows that Story was neither rigidly for nor against codification as such. Indeed, he seems to have been more sympathetic to codification of criminal law than private law[50].

Story was not alone in writing treatises that made codification unnecessary. Chancellor Kent of New York also did so. Kent, however, was a different sort of treatise writer from Story. Whereas Story produced a connected set of individual works, Kent was the last American scholar to produce a treatise that aimed at presenting a commentary on the entirety of American law. He was also the first. Like Story's works, his four-volume *Commentaries on American Law* helped fill a need that codification otherwise might have filled. Nevertheless, the existence of Kent's Commentaries provided a sensible structure for the law student trying to understand the evolving American common law, much as Blackstone's Commentaries did for English law study. In the United States, treatises seemed to fulfill the function of codification satisfactorily, effectively blocking it. Legal periodical literature tended to favor codification but, like treatise writing, inadvertently supplied sources and teachings that made codes as such less necessary in the American context[51]. Thus Story and Kent, through their doctrinal writings played a similar role with respect to codification. Also like Story, Kent was invited to assist in preparing a revision of the statutes of his home state, New York. Here, however, Kent declined the opportunity[52], unlike Story.

An additional factor weighing against thorough codification was the spreading practice of state-published revised statutes. During the colonial era, legislatures only sporadically maintained records of acts passed and private providers were little better. The chaotic

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49 R.K. NEWMEYER, *op. cit.*, note 37, at 97-106, 105.

50 This tendency is shared by James C. Carter, Field's opponent, discussed *infra* in III.

51 In France, as is well known, the treatise tradition nourished codification.

52 C.M. COOK, *op. cit.*, note 31, at 137.

status of South Carolina legislation was perhaps an extreme example[53], but other states shared the problem. Legislatures appear to have been rather unconcerned about this, perhaps due to the fact that most legislatures met only a limited time during the year. In addition, American state legislators' concept of their own role was a loose, informal one. Hence, attempts to deal with the problem were often private. This is the case in North Carolina, the source of Martin's epigraph above, where he published statutes and translated Pothier in order to support his publishing business.

By the early nineteenth century, however, states were beginning to publish good usable collections of their revised statutes. In general, these were not systematic digests or re-castings of statutes and caselaw. New York, however, was the first state to produce a systematic revision of the growing body of statutes. In addition, the New York Revised Statutes of 1828 also changed more than a little of the substantive law. To explain how this came to pass and to analyze the Revision itself would require more space than is available here. But a sketch of the personae and events may provide a useful background of the politics and personalities that made this signal advance possible.

The man most responsible for the 1828 Revision was Benjamin Franklin Butler (1795-1858)[54]. Born in a small town on the Hudson, his father was a good friend of Martin Van Buren. Both were Jeffersonian Republicans, opposed to the Clinton family, a locus of Federalist or Whig power and influence in New York. Butler read law in Van Buren's office in Albany, New York, and became quite successful at the art of persuasion. He was a successful advocate in court, in the legislature, and in print, though he claimed to find politics as such distasteful and low, or at least so he protested to his wife[55]. Whatever reluctance Butler may have had, as Van Buren's legal and political star rose, so did Butler's. He became Van Buren's law partner, and advanced in New York politics under his tute-

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53 *Id.*, at 121-132.

54 He may be easily confused with the civil war general of the same name, but no relation, nicknamed "Beast" Butler during his occupation of New Orleans. The general is also sometimes known as "Spoons" Butler.

55 William D. DRISCOLL, *Benjamin F. Butler: Lawyer and Regency Politician* 10-19 (1987). This Butler was known for his religious seriousness, hence his nickname, "Bible". Butler considered law superior to politics, Van Buren just the contrary: *id.*, at 53 and 54.

lage[56]. When Van Buren rose in national politics in the administration of President Jackson and in his own presidency, Butler also went to Washington, as attorney general for Jackson (1833-38)[57].

In 1820, Van Buren's organization won the New York legislature handily, but could not wrest the governorship from their political enemy, Clinton. Van Buren's plan was to use the organs of government now in his control so as to create such hostility to them that there would be a general demand for a new constitution, and in that new constitution he would work the demise of the Clinton party. And this occurred, in no small part due to the stream of articles and letters written by Butler, which appealed to the farmers and small businessmen antagonistic to the interests of the landowners. An 1821 Convention produced a new constitution, ratified through referendum in 1822[58]. It rendered a large portion of the statutes enacted under the prior 1777 constitution obsolete, as Governor Yates noted in 1823[59]. In 1824, a political blunder, in which Butler had a part, essentially returned the Clinton adherents to power in both the governorship and the legislature[60].

Notwithstanding the shift in power, the legislature was persuaded to go forward with a plan of statutory revision in November 1824. First, the legislature named former Chancellor Kent as a member of the commission charged to undertake the revision. As his politics were decidedly conservative, a Republican was also

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56 He was District Attorney (or Attorney General) for Albany County from 1821 to 1824: *id.,* at 31, 50.

57 Edward Livingston also served in Jackson's cabinet, as Secretary of State from 1831-1833. His and Butler's paths, however, do not appear not to have crossed, though Butler as Attorney General issued a legal opinion favorable to the government's position in part the batture litigation with Livingston. William B. HATCHER, *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat* 187 and 188 (1940). Hatcher gives the date of the letter as April 3, 1825, but this must be an error, as Butler only became attorney general in November 1833. Ronald L. BROWN, *The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s* 7 (1987). Livingston had already left the cabinet in May: W.B. HATCHER, *id.*, at 418.

58 W.D. DRISCOLL, *op. cit.*, note 55, at 41-47.

59 *Id.*, at 91. Governor Clinton had noted the problem in 1822, and Yates repeated his concern in 1824: *id.*, at 91 and 92.

60 *Id.*, at 76-78. This also had repercussions for the presidential election of that year, in which through machinations too complex to recount here, John Quincy Adams became president: *id.*, at 78-86.

appointed to the commission, Erastus Root. In an unanticipated move, the legislature also appointed Butler to the commission, a position he had not sought[61]. Kent resigned the commission immediately[62]. He was replaced by John Duer, with whom Butler got along well[63]. In the process, the new legislature in fact expanded the mandate to the Revisers in early 1825[64]. The Revisers presented a "General Arrangement" of New York law, in five parts:

I. Those laws which relate to the general policy, and to the internal police of the state.

II. The laws which relate to the domestic relations, to property, to contracts and to other matters connected therewith.

III. The laws which relate to the judiciary establishments, & to the mode of procedure in civil cases.

IV. Those relating to crimes & punishments, and to the mode of prosecution of punishment.

V. Local laws[65].

The plan elicited a hostile response from those favoring a much more limited revision of the statutes. "Of all wild and visionary notions that ever entered into the imagination of man, that which Mr. Jeremy Bentham of England calls ' codifications' is one of the wildest and most impracticable." And this, Butler's opponents claimed, was what Butler and the commission were engaged in[66]. In addition to published responses, the Revisers sought support from eminent judges, from Justice Story (his response, if he made one, has not been found) and from Justice Marshall (whose helpful

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61 *Id.*, at 94 and 95.

62 The reasons are not clear. He stated that he had no objection to working with Butler: *id.*, at 99 and 100. He may not have believed in the revision project. Perhaps he preferred to spend his retirement working on his Commentaries.

63 *Id.*, at 100. Root was paid for his services and left the commission. His replacement was first Henry Wheaton: *id.*, at 111. Wheaton labored two years on the project, and was appointed U.S. Chargé d'Affaires to Denmark. He was replaced by John C. Spencer, a Clintonian, who nevertheless also worked diligently with Butler: *id.*, at 137.

64 *Id.*, at 111 and 112.

65 *Id.*, at 115.

66 *Id.*, at 116, citing The New York *Advertiser* of March 19, 1825. This seems a typical use of Bentham as an accusation merely, which betrays no familiarity with his writings.

response survives)[67]. In addition, to quell doubts as much as possible, the Revisers in their written report to the legislature took care to distance themselves even from the word "codification", from which their work had to be "distinguished". They were able to continue their work, which included recommending substantive changes in the law more than a *codification à droit constant*[68]. For the second part of the work, the Revisers were able to make use of a recent treatise on real property, which itself contained the "outlines of a code" of real property. The notes to the revision candidly disclosed the borrowings, especially for future interests and trusts. The Revisers took pragmatic steps in defining possession of immovables and in simplifying real actions. As for the old remedy of fine and recovery, they offered the legislature a more conservative adaptation that preserved it with modifications. The legislature, in a sign of the mood for reform, instructed the Revisers to abolish that remedy[69]. Thus, the Revisers seem to have deliberately steered a middle course, neither too radical nor too conservative. As proof of the success of their efforts, the New York legislature made them law, on December 10, 1828, after a ninety-one day extra session that examined the whole of the revision[70]. In addition, portions of the work had immediate success outside New York. For example, parts of the section on property were enacted in fifteen states[71].

III. Codification of Private Law: Proposal and Defeat

It was in this environment that one of the main protagonists of the codification debate in the United States began his legal career. David Dudley Field was born in 1805 to a Congregationalist minister (of the same name) and a mother whose name, Submit Dickinson, makes clear her Puritan heritage[72]. He grew up in Stockbridge, in western Massachusetts. After college study, in order to prepare

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67 *Id.*, at 118.

68 *Id.*, at 119 and 120.

69 *Id.*, at 155-160.

70 *Id.*, at 165. Any portion not already in effect would take effect as of January 1, 1830.

71 *Id.*, at 149 and 150.

72 Henry M. FIELD, *The Life of David Dudley Field* 15 (1898); Daun van EE, *David Dudley Field and the reconstruction of the law* 1 (1986).

for marriage himself he began to work at the law, first reading law in Albany in April 1825, then moved to New York City, a vibrant commercial center, where he continued to read law. He mastered the intricacies of pleading under New York practice. He and others in the office believed New York procedure compared poorly with the practice in Massachusetts, which had been reformed and "simplified" somewhat[73].

His law practice grew, as did his family. His third child was born, but after his first wife died a few months later in early 1836, that child followed her. Grief stricken, Field suspended his law practice and traveled to Europe. He used the year not only to absorb his personal loss but also to explore the law as practiced in England and on the continent. A phrase from his journal reveals his impression: "This visit and what I then saw of the English courts, the civil law, and the French Codes, did not tend to increase, but very much to lessen, my respect for that technical system of our own which I already disliked"[74]. He returned in July 1837 and resumed his law practice.

In the 1840s, Field associated with a literary group that favored an American literature, freed from the cultural dominance of England. The group, which called itself "Young America", included William Cullen Bryant, who remained a good friend of Field's , as well as Herman Melville (briefly). In a note sympathetic to the interests of the group, Field wrote that to reach an American reader, a writer "must have studied much that the schools of Europe do not teach.... Why should we disregard the obvious and necessary consequence of this new state of things in the economy of the world? Why persist in applying here the customs and maxims which belong to Europe"[75]? The common law was, he continued:

> *a most artificial system of procedure, conceived in the midnight of the dark ages, established in those scholastic times when chancellors were ecclesiastics and logic was taught by monks, and perfected in a later and more venal period, with a view to the multiplication of offices and the*

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73 D. van EE, *op. cit.*, note 72, at 13.

74 *Id.*, at 19.

75 Perry MILLER, *The Life of the Mind in America from the Revolution to the Civil War* 262 (1965), citing a note by Field in the *New York Review* of April 1841.

increase of fees, was imposed upon the banks of the Hudson and the quiet valley of the Mohawk.[76]

Thus, Field saw legal codification in distinctively American terms, not as an imitation of a French style or even in imitation of a Benthamite style, but as an independent production and in opposition to the English law[77].

For Field, what were the attractions of codifying the law? Sometimes for him the benefits of codification were that it would cure the defects of the common law, small or large, and thus these benefits reflected the ills the codes sought to cure. I used the plural, "codes", because the ills Field sought to cure were not only in the substantive, private law, but also in the common law generally, including criminal law, criminal procedure, and civil procedure. In fact, Field's first and most influential foray into codification was civil procedure.

In 1846, as the result of another wave of reform in New York politics, including court reform, the New York Constitution was revised for several purposes, including the merger of the two separate court systems of law and equity. An idea of why New York was again attracted to reform can be gleaned from a pamphlet Field had published called *What Should Be Done with the Practice of the Courts?* In it, he sketched out his concept of a unified, simplified procedure once the forms of action and the separate courts for law and equity had been done away with. Why this was so important is difficult for us to understand, as just about every lawyer alive today has had no experience of such a system[78]. New York at the time had a cumbersome system of pleading in the common law courts. If plaintiff's

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76 *Id.*, at 263. Miller does not give a page reference (Miller's manuscript was incomplete at his death), and this language does not appear to be in the essay just cited, and I have yet to locate it. Miller does not unequivocally link Field's American literary interests with his zeal for codification. And other readers of Field do not accept that the point is proven: D. van EE, *op. cit.*, note 72, at 23, note 42.

77 For a connection of Field with the democratic, anti-English literary sentiments of the time, see also Edward L. WIDMER, *Young America: the Flowering of Democracy in New York City* (1999).

78 Delaware maintains separate equity or chancery courts today. The distinction also survives in Mississippi. Arkansas eliminated the split system in 2001. Arkansas Constitutional Amendment 80, effective July 1, 2001: [http://courts.state.ar.us/courts/cir.html] (last visited 2004 Dec. 16). The federal bankruptcy courts operate as courts of equity. Hence with rare exceptions, they operate without juries.

counsel chose the wrong form of action, it could be fatal to his client's case. Equity pleading Field considered generally superior to law pleading, because it was simpler. But with equity the problem was less with the equity courts themselves and more with knowing when a case belonged there. Field summed up the confusion – and the injustice – with an example:

> *Here is one, for example, which has just occurred: An assignment was made by a debtor, engaged in printing for a corporation, of all sums of money that might become due to him for his work. So far as it embraced work already done, the assignment was held to be good at law, and therefore that a court of equity had no jurisdiction to enforce it; but, so far as it embraced work to be done, it was good only in equity, and a court of law could give no remedy.*
>
> *All this would be done away with by adopting a uniform course of procedure in all cases; and nothing short of that will do it.*[79]

As a result of such advocacy by Field and others, the New York Constitution called upon the legislature to appoint three commissioners to recommend thorough changes in court practice to accompany the merger of law and equity:

> *The Legislature at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time.*[80]

Special legislation was then enacted, appointing three "commissioners of practice and pleadings" who would do the revising, reforming, simplifying, and abridging[81]. One of them, who did not endorse

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79 D.D. FIELD, "What Shall Be Done with the Practice of the Courts?" 226 (January 1, 1847), reprinted in A.P. SPRAGUE (ed.), I *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884).

80 Mildred V. COE and Lewis W. MORSE, "Chronology of the Development of the David Dudley Field Code", 27 *Cornell L.G.* 238 (1942), quoting Constitution of New York (1846), Article VI, §24.

81 They were to draft legislation to accomplish "the abolition of the forms of actions and pleadings in cases at common law", a "uniform" procedure at law and in equity; to excise "Latin and other foreign tongues" from their work to the extent "practicable", and generally to remove any mechanisms not "necessary to ascertain or preserve the rights" of litigants: *id.*, 239.

the project wholeheartedly, resigned; Field was appointed to replace him.

The commissioners within a few months had completed the first portion of the project, which they presented to the legislature. Field also drafted a "memorial to the legislature", signed by fifty members of the New York City bar, encouraging enactment of the commissioners' work product. The signers stated

> [T]*hat a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people; that a uniform course of proceeding in all cases legal and equitable is entirely practicable and no less expedient; and that a radical reform should aim at such uniformity, and at the abolition of all useless forms and proceedings.*[82]

The memorial apparently had the desired effect, and what became known as the Field Code of Civil Procedure was enacted on April 12, 1848[83]. This Code consisted of 391 individual articles or "sections", going into effect on July 1, 1848. It replaced the complex pleading of legal issues with a simplified pleading of facts, known ever since as fact or code pleading[84]. As to its style,

> *no greater affront to the common-law tradition can be imagined than the 1848 code. It was couched in brief, gnomic, Napoleonic sections, tightly worded and skeletal; there was no trace of the elaborate redundancy, the voluptuous heaping on of synonyms, so characteristic of Anglo-American statutes.*[85]

The following January, the Field Commissioners recommended corrections and additions that the legislature adopted, and the document grew to 473 sections. This was still only a part of the projected work on civil procedure, and Field's plan was to return to the legislature with the remaining two parts of his procedural code. In the meantime, the common and statutory law not changed by the Code remained in effect. In fact the Commissioners produced codes

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82 Memorial to the Legislature, February 1847, in A.P. SPRAGUE, *op. cit.*, note 79, at 261. See also: D.D. FIELD, *loc. cit.*, note 79.

83 M.V. COE and L.W. MORSE, *loc. cit.*, note 80, 241. Whether it truly effected a revolution in procedure is doubted by at least one authority. See letter of Oliver McCaskill: *id.*, at 239-241.

84 D. van EE, *op. cit.*, note 72, at 192.

85 Lawrence M. FRIEDMAN, *A History of American Law* 391 and 392 (2d ed. 1985).

both of civil and of criminal procedure, submitting them both on December 31, 1849[86]. But when Field did return to the legislature with the remainder of the Commissioners' work, he was rebuffed. The balance of the effort was never enacted as such[87].

On the other hand, this Field procedural code was enacted in substantial part by several other states: Missouri in 1849[88], California in 1851, eight other states of the Midwest and West before the civil war, and eleven other states by the end of the nineteenth century. The civil procedure code went into effect in twenty-four states and territories, eleven states took up the code of criminal procedure. The reasons differed from state to state. Some states were influenced by individuals friendly to Field himself (such as his brother Stephen Field in California)[89]. Others had lawyers who had been urging the merger of law and equity and leapt at the Field Code because it did just that. All, however, shared the common trait of being new states with comparatively few experienced lawyers and even less law in any form: the codes filled a yawning gap[90].

Field permitted himself a break after the exertion of completing the codes of civil and criminal procedure, but soon he turned his energies to codification of the substantive law. The 1846 Constitution required that the legislature also appoint three Commissioners of the Code "whose duty it shall be to reduce into a written and systematic code the whole body of the law of the state", or as much of it as the commissioners thought "practicable and expedient"[91]. The first three Commissioners served concurrent two-year terms, but made little progress. In 1849, the legislature appointed three replace-

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86 THE COMMISSIONERS ON PRACTICE AND PLEADINGS, *The Code of Civil Procedure of the State of New York* viii (1850) and *The Code of Criminal Procedure of the State of New York* ix (1850). These were originally published separately, and were reprinted as Volumes I and II respectively of *New York Field Codes 1850-1865* (reprint 1998).

87 Alison REPPY, "The Field Codification Concept", in *David Dudley Field Centenary Essays* 17, 34 and 35 (1949).

88 Missouri "borrowed heavily" from the New York Code: D. van EE, *op. cit.*, note 72, at 44.

89 Not long after his arrival in California, Stephen Field "bullied the first governor and state legislature into enacting them in 1850": *id.*, at 44.

90 L.M. FRIEDMAN, *op. cit.*, note 85, at 394 and 395.

91 M.V. COE and L.W. MORSE, *loc. cit.*, note 80, quoting Constitution of New York (1846), Article I, §17.

ments[92]. Little came of that crop of Commissioners either, as the legislature in its next session essentially withdrew its authorization for the code commission[93]. After this setback, Field again wrote and politicked to revive the effort, succeeding in 1857. This time, he again was named one of the commissioners: he drafted his own act of appointment[94].

Field and the two other commissioners worked a total of eight years on the balance of the New York Codes. The Political Code was completed in October 1859 and published in 1860[95], and the Penal Code was reported to the legislature in 1864 and published the following year[96]. The Civil Code was the last, and was completed in 1865[97]. But the Codes aroused little interest. The landscape had changed; the legal issues that animated popular sentiment were different than those of the 1840s.

Field's Civil Code arrived just as the Civil War was ending and Reconstruction beginning: a host of new legal issues – from race relations to industrial regulation – crowded the public square. Lawyers in general took no interest either[98]. Field dutifully went to Albany and attempted to persuade the legislature year after year to enact the Codes. These efforts were without success, until in 1879 Field struck a bargain with those who wished to enact further amendments and additions to the procedural code, which Field was

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92 One was John C. Spencer, a member of the commission that had drafted the 1828 Revised Statutes: *id.*, 244. According to one source found, Benjamin F. Butler was also appointed to this new commission, but declined to serve: William Allen BUTLER, *The Revision and the Revisers* 90 (1889). It is possible that Spencer was appointed after Butler's resignation, which would indicate an interest in continuity with the earlier effort.

93 M.V. COE and L.W. MORSE, *loc. cit.*, note 79, 244. Reppy notes that the final report of this second commission was pessimistic on the prospects for success and all but invited its own dissolution: A. REPPY, *loc. cit.*, note 87, 38 and 39.

94 A. REPPY, *loc. cit.*, note 87, 38 ("second period of agitation"). See also: D. van EE, *op. cit.*, note 72, at 46-48.

95 THE COMMISSIONERS OF THE CODE, *The Political Code of the State of New York 1860*, Volume V of *New York Field Codes 1850-1865* (reprint 1998).

96 THE COMMISSIONERS OF THE CODE, *The Penal Code of the State of New York 1860*, Volume IV of *New York Field Codes* 1850-1865 (reprint 1998).

97 THE COMMISSIONERS OF THE CODE, *The Civil Code of the State of New York 1860*, Volume III of *New York Field Codes 1850-1865* (reprint 1998). It was completed on February 13, 1865, Field's sixtieth birthday.

98 D. van EE, *op. cit.*, note 72, at 333.

opposing: he would cease opposition to their changes if they would drop their opposition to his codes. Unfortunately for Field, the governor vetoed the Civil Code[99]. Finally, in 1881, the Penal Code and the Code of Criminal Procedure were enacted. And in 1882, the legislature again passed the Civil Code – but the governor again vetoed it[100].

The two main reasons that Field's Civil Code was not enacted are very different in kind. The first reason had to do with the man himself. Field was a difficult man and an extremely contentious one. He was vain, and he was especially vain about his skills as a legislative draftsman. He frankly, publicly, and repeatedly attached the survival of his fame to the quality of his work (and to the poor quality of other legislative drafters). When addressing the Joint Judiciary Committee of the New York State Assembly and Senate, he characterized the state's judicial system as the "worst ... an enlightened community ever established"[101].

In addition, Field made powerful enemies. He ran an aggressive law practice, in which he showed time after time an extraordinary ambition for fame and glory, as well as money. To take only one example, when the web of corruption woven by William M. "Boss" Tweed and his Tammany Hall organization was finally to be brought down, a team of lawyers was enlisted for the litigation. Field sought to be included among them but the reform "Committee of 70" rejected his services. Within Field's law firm, his young partners, Thomas G. Shearman and John S. Sterling, having consulted ministers and others, favored representing Tweed, who had already sought Field's representation in the case. Field's son, also a member of the firm, opposed doing so, largely because his own wife opposed it (she had a place in society and she feared it would be threatened by any association with the Tweed Ring). Field consulted his brothers. Stephen, now a justice on the United States Supreme Court, thought he should take the case. Cyrus, the engineer, thought he should not. Field, having interviewed one of the

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99 *Id.*, at 332 and 333.

100 *Id.*, at 332.

101 Stephen B. PRESSER and Jamil S. ZAINALDIN, *Law and American History* 420 (1980). The editors' question to the student is "Why would he say such a thing?" In context, Field is talking about the past, and also explains why he says it. Still, his "we have now a little improved, perhaps" could not have removed the sting for all of his listeners: A.P. SPRAGUE, *op. cit.*, note 79, at 361, 364.

defendants, decided that a solid defense existed and took the case[102].

For many, the Tweed case was simply another example of Field taking on morally questionable business for unquestionable fees. It did not enhance his reputation generally; it particularly did not enhance his reputation with James Coolidge Carter. Carter was one of the chief lawyers working with the prosecution of Tweed in 1871. Carter would become the chief spokesman for the New York Bar Association, when it led the opposition to Field's codes, and most particularly the Civil Code. Thus, the first reason the Field Civil Code failed to become law was the personal opposition that Field himself generated.

The second reason the Field Civil Code failed was a deeper one that had to do with the basic understanding of the nature of law. And this reason also was linked to Field's personal adversary, Carter. Carter, like Field, was born in Massachusetts, but was a generation younger[103]. He completed his undergraduate education at Harvard and, after a year studying law in New York City[104], he attended law school, also at Harvard. A connection significant for later developments, Carter attended Luther Cushing's lectures in Roman law. Cushing himself had studied under Savigny, the best known member of the German historical school, and antagonist of Anton Thibaut, who in 1814 had proposed a German codification modeled on the French Civil Code[105]. Carter was an apt student with a long memory.

Thus Carter began the practice of law not long after the 1848 Field Code of Procedure had been enacted and when the practice of

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102 D. van EE, *op. cit.*, note 72, at 294.

103 On October 14, 1827: George Alfred MILLER, "James Coolidge Carter 1827-1905", 8 *Great American Lawyers* 1 (1909).

104 He was "in tutoring" and a "student" in the law office of Kent & Davies. The Kent was William Kent, son of Chancellor James Kent. *Id.*, 4 and 5. This suggests that Carter's associations were at the opposite end of the political spectrum from those of Field or, for that matter, of Butler.

105 *Id.*, 5. Edwin W. PATTERSON, *Jurisprudence: Men and Ideas of the Law* 421-425 (1953). Roscoe POUND, *The Spirit of the Common Law* 154 (1921). Pound notes here that the broader influence of the German historical school was not felt until "American students" went "to Germany in increasing numbers", well after 1870, and that the German influence had to compete with Maine's "political interpretation of legal history".

the courts was still adapting to the merger of law and equity. The new code was "his constant companion"[106]. Carter's practice grew and his reputation likewise, so much so, that during the multifarious litigation of New York City against the Tweed interests, Carter was a leader among those working to cause the defendants to disgorge their ill-gotten gains. The litigation began in 1875, the trial in 1876. Also in 1876 Carter was instrumental in the founding of the New York Bar Association, an organization that helped mobilize the bar against the Tweed interests. This anti-corruption effort Carter's law partner compared to his anti-codification work – an extraordinary comparison[107].

With even this brief background, it seems plain that if Field and Carter had agreed on the codification of the common law, that would have been the surprise. They seem to have been predestined antagonists who would have argued over anything, even whey they in fact did not differ. Yet their divergence over the roles of judicial decisions and legislation in lawmaking was a fundamental one at the level of first principles. It was at bottom a disagreement over the nature of law.

Carter, good student of Cushing and indirectly of Savigny, asserted repeatedly and with all apparent sincerity that legislatures could not "make" law. More precisely, they could not make the law that most truly governed men in their relations with each other – private law. That law could only come from custom. He admitted that most of public law and criminal law, though, were fit matter on which the legislature might speak. But one's sense in reading Carter is that this is more a matter of practicality: how else protect the individual from the state other than by requiring the state to articulate precisely on what conditions and in what situations it will invade the individual's freedom? Private law when it changes grows organically – these are the words Carter uses repeatedly – and judges are in the best position to discover this growth as it occurs in the details of each decided case. For Field, this argument can only have been nonsense.

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106 G.A. MILLER, *loc. cit.*, note 103, 6.

107 *Id.*, 17 (the New York Bar Association's "next great public service"). Note that Field was seventy years old for the Tweed contest, close to eighty for the second one over the Civil Code.

An odd aspect of Carter's argument is his view of legitimacy. For him, customary law alone is truly legitimate since custom alone truly comes from the people. In this way, Carter silently matches Savigny's historicism with the American founding document, the Constitution that begins "We, the people of the United States, in order to establish a more perfect union"[108]. Yet Carter allows for only one mechanism by which custom moves from the people, where it is inchoate and unwritten, to public expression, where it is articulate and written: the judicial decision. He does not accord the same legitimacy to legislation, which certainly had a claim to equal status, and in fact to superior status, at the founding. That part of American history Carter puts to one side. From a logical point of view, also, if the people can express themselves by transmuting custom through the courts, by a problematically mysterious process, it seems that the people should by a deliberate process be able to name representatives who might accomplish the same end. As a matter of experience, though, Carter was on stronger ground. American state legislatures had a mixed record (at best) for legislation on private law matters in the nineteenth century. When a judge erred, the effect could be limited by succeeding decisions. When a legislature erred, however, the harm caused much more "mischief". Indeed, Field's own 1848 Code, according to Carter, was riddled with such mischievous errors, productive of much doubt and needless litigation[109].

Apart from this foundational difference, the other arguments can be more easily summarized. Field's arguments resembled those of Story, Sampson, Bentham, and other pro-code writers:

1. Judges should not be lawmakers, as under the common law system, and a Code will limit this function.
2. Codified law will be more easily understood by non-lawyers than caselaw.
3. The systematic arrangement of codified law will facilitate prediction of results in new cases.

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[108] *Accord*, Mathias REIMANN, "The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code", 37 *Am. J. Comp. L.* 95, 114 (1989) ("no logical reason why legislation ... not ... as appropriate an expression of legal custom as ... court decisions").

[109] Carter asserted that the Field Code and its progeny had caused at least 6,000 litigated cases: G.A. MILLER, *loc. cit.*, note 103, 7.

4. Codes allow flexible interpretation.
5. All law is imperfect and codes are no exception. But they allow ease of amendment and organized improvement. An imperfect Code is superior to caselaw: the proof – no system that has codified its law has ever returned to the old system.
6. As time passes, a Code can be amended to reflect new societal conditions.

Carter's answers can likewise be easily listed:

1. Judges always work at the level of caselaw and to interpret a Code "of" the common law, meaning caselaw, they will recur inevitably to the caselaw that the Code claims to enact, not to the Code. And in using the prior caselaw in preference to the statute, they will stretch the Code out of shape to reach a result that they believe just.
2. Laymen will understand a Code no better than they understand caselaw.
3. Codes, when vague and general, are no more predictable than caselaw.
4. If the Code's rule is specific, judges will have to stretch it out of shape to reach a just result.
5. Codes do not make the mastery of law easier. Unlike public law and procedure, private law has not been and cannot be successfully codified.
6. Codes hamper the organic growth of the law. Amendments of the Code can only be accomplished after some injustice is done. Amendments themselves eventually render a Code incoherent.
7. Code writers presume to do the impossible: predict all significant future events[110].

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[110] This summary is based on E.W. PATTERSON, *op. cit.*, note 105, at 422 and 423, and on Jerome HALL, *Readings in Jurisprudence* 119 and 120 (1938). Hall tracks more closely the arguments of Carter's pamphlet, *The Proposed Codification of Our Common Law* (1884), Field's response in *A Short Response to a Long Discourse: An Answer to Mr. James C. Carter's Pamphlet on the Proposed Codification of Our Common Law* (1884), and of other publications of theirs. They both continued to write on the question after codification had been defeated in New York. After retiring from practice, Carter prepared a set of lectures he was to give at Harvard Law School. He died before he could give them. They were published posthumously as *Law: Its Origin, Growth And Function* in 1907.

Carter also attacked particular weaknesses of the Field Civil Code, which Field answered[111]. But Field's chief response to such criticisms was that even if the Code contained errors, they were easier to remedy *in* the Code than in the caselaw without a Code. Carter never gave ground on that point.

It is difficult to gauge at this distance whether the arguments themselves had any telling force for most of the intended audience. Were Carter's arguments received with understanding by his readers? Presumably very few of them had even the indirect connection with German historicism that he did, the source of his argument that the common law grew organically and was the custom of the people. On the other hand, one may easily adopt provisionally the hypothesis that the segment of the bar that represented business interests would look with suspicion on an effort to expand the involvement of legislatures in the fundamentals of the law that most affected business. But this hypothesis seems thin: legislation about business had already begun the process through which it would become the principal legal battleground for the next five decades, well into the 1930s. If Carter and his allies had truly wanted to stem the tide of such progressive legislation, private law codification was the wrong battle. It seems, therefore, that the defeat of codification in the 1880s in New York occurred not for such easily identifiable political reasons, but because of a combination of the two main factors mentioned: a true difference as to the nature of private law, and a true loathing of the chief proponent of codification. We are unlikely ever to know which predominated[112].

It is sometimes said that the Field Codes, including the Civil Code, enjoyed greater success outside New York. And it is indeed the case that they were formally enacted in several of the Western

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111 In *The Proposed Codification of Our Common Law*, at 99 et seq., he focuses on the Code's handling of general average in maritime law. Field rebuts him in his *Short Response to a Long Discourse* at 10 and 11, where Field points out that the topic has come out of the proposed Code in the wake of changes in the law made in 1883.

112 One of the strangest facts about their dispute is that both of them served as president of the fledgling American Bar Association. Field was president in 1889: H.M. FIELD, *op. cit.*, note 72, at 307. Carter was president in 1895: James C. CARTER, "Address of the President of the Association at the 18th Annual Meeting", August 27, 1895. M. REIMANN, *loc. cit.*, note 108, 113, 114 and 119.

states. But enacting the Field Civil Code did not make the jurisdiction a civilian or even a mixed one. Take California as the paradigmatic case. During its first legislative session, the California Senate debated whether to continue to follow the Spanish law that had been in place before statehood or to adopt the common law. California opted for the common law[113]. Later, as noted above, Stephen Field was able to engineer the passage of all the Field Codes in California. Not long after his arrival in California, he saw to the passage of the early codes of civil and criminal procedure. For these efforts, he received the praise of his contemporary, John Norton Pomeroy, an influential law professor and writer[114]. Pomeroy, however, had no praise to give the Civil Code, enacted in California in 1872, even though Stephen Field again had a hand in its enactment[115]. Here, in fact, Pomeroy articulated an interpretation stratagem that gutted the Code. It appeared in an article in 1884 entitled "The 'Civil Code' in California"[116]. After forty-four pages of describing the defects of the Code[117], and having concluded that the legislature simply will not take up the revision necessary to cure them and other defects, he finds that the courts are left with a choice. They may apply the Civil Code literally, without reference to the common law it aimed to codify. Or they may treat the Code as generally declaratory of the common law, unless the text of the Code clearly departs from it.

> *No provision of the code should be interpreted by itself alone; its meaning and effect should be discovered by a comparison with all the other pro-*

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113 *Report on Civil and Common Law*, Senate of California, February 27, 1850, 1 Cal. 588 (1850).

114 John Norton POMEROY, "Introductory Sketch" in *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Judge of the Supreme Court of the United States* 20 and 21 (1881). Pomeroy is careful to state here that Stephen Field did not simply copy the New York legislation but changed three hundred and added one hundred sections. In this form, Pomeroy notes, they were adopted by "the other States and Territories west of the Rockies". In 1872, he adds that they were amended "more in name than in substance".

115 Van ALSTYNE, *The California Civil Code*, excerpted by Spencer L. KIMBALL, *Historical Introduction to the Legal System* 382 (1966).

116 John Norton POMEROY, *The 'Civil Code' in California* (1885). This work was published first in two parts in Volumes 3 and 4 of the West Coast Reporter (1884). The New York Bar Association republished it in 1885 as a single pamphlet (cited here) and as part of the battle over codification in that state.

117 "[I]t is not at all my main purpose to criticise the civil code as a work of legislation": *id.*, at 44.

visions relating to the same subject-matter, and especially by a reference to the pre-existing and still existing common law rules.[118]

The second solution was adopted from him, with credit, by the California Supreme Court soon thereafter.

His conclusion is that the only method by which any certain, consistent, and just results can be attained through an interpretation of the provisions of the Code, is by adopting and following the principle that they are, ' in general,' declaratory of common-law and equity rules.[119]

This earned Pomeroy the distinction, perhaps unduly, of having "killed" the Civil Code[120]. The consensus is that in the few states where the Field Civil Code was enacted, it shared the same fate: it did not take. The courts threw the door wide open toward decisional authority extrinsic to the civil codes, and the force of codification was lost.

IV. Aftermath

The shelf life of the argument for codification was short. Even those who might have been sympathetic to it politically did not use it. For example, Henry Steele Commager, the noted progressive historian, could in condemning James C. Carter as "now universally unread" omit to state what Carter was fighting against, namely, the democratic expression of the legislature in codified form[121]. On the other hand, Commager is right to emphasize the success of the historicist argument, not original with him, that Carter advanced against the codifiers. That anti-code point of view even reached to the White House. Commager quotes Calvin Coolidge (a lawyer) as saying:

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118 *Id.*, at 48-50 and 52.

119 *Sharon* v. *Sharon*, 16 P. 345, 354 (Cal. 1888). Maurice HARRISON, "The First Half-Century of the California Civil Code: The Movement Leading to Codes in the West", 10 *Cal. L. Rev.* 185 (1922), reprinted in John HONNOLD (ed.), *The Life of the Law: Readings on the Growth of Legal Institutions* (1964).

120 See: Lewis GROSSMAN, "Codification and the California Mentality", 45 *Hastings L.J.* 617, 619 (1994). As Grossman points out, Pomeroy initially wrote in favor of codification of the common law generally and of the California Code in particular in 1872, and was still speaking in its favor in 1878: *id.*, at n. 6.

121 Henry Steele COMMAGER, *The American Mind* 370 (1951).

"Men do not make laws. They do but discover them"[122]. By the time Commager is writing, his main target is the wielding of substantive due process by the Supreme Court as a tool against social legislation, particularly that of the depression era New Deal. Thus, Commager saw "dynamic progressivism" in legislative and administrative form dislodge the court-based "mechanical jurisprudence" of Coolidge and others as well as Carter's view that law – true law – exists apart from human affairs though human interpreters might scientifically discover it[123].

Looking today at Carter's lectures published as *Law: Its Origins, Growth and Function*, as well as his polemical pieces, one is not surprised that his views have faded to obscurity. But his views were not without influence. As late as 1909, Harvard law students still heard the dispute between written and unwritten law, between the common law and codification, presented in Carter's terms. Harvard professor Joseph Henry Beale's lectures on jurisprudence did so[124]. And Beale himself was influential not only as a professor (for 47 years), but also as an organizer of the American Law Institute, for which he served as Reporter on the Restatement of the Conflict of Laws, and as organizer of the American Legal History Society. Indeed, when the legal realists, such as Jerome Frank, looked for dominant legal icons to critique, Beale was a logical target[125]. A typical statement, from a student's notes: "Beale (contrary to Bentham) thinks that it is impossible to express ideas accurately in words; and law is largely ideas"[126]. And the "Common law cannot be effectively changed by legislation", Beale lectured his students, "unless the change is in the line of the common law". The statement could have come from Carter.

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122 *Id.*, at 371. In fact, Coolidge made this remark in 1919, several years before he became president, but it is probably a safe assumption that he did not alter his views in the meantime.

123 *Id.*, at 371 and 372.

124 Warren J. SAMUELS, "Joseph Henry Beale's Lectures on Jurisprudence, 1909", 29 *U. Miami L. Rev.* 260, 299 et seq. (1975).

125 *Id.*, 260 and 261.

126 *Id.*, 301, 304. He went so far as to make unsupported and unverifiable empirical claims that codes produced more litigation than the common law, by comparing Massachusetts to California and France: *id.*, 304.

The story of the Field-Carter dispute thereafter migrates principally to legal history, where it is characterized as a "movement"[127]. It is also common to see the codification dispute discussed in comparative law[128]. The codification controversy, however, fades from the jurisprudence literature. Two references occur in the 1950s. One in a student jurisprudence textbook[129], the other in a Canadian law journal[130]. In later texts on jurisprudence, it seems to drop out entirely[131].

Nevertheless, one of the holders of the Carter Chair in Jurisprudence at Harvard, which Carter himself funded, wrote, in sentences that would have suited the donor:

> *The common law has the virtue that it inevitably mirrors the variety of human experience; it offers an honest reflection of the complexities and perplexities of life itself, instead of offering the specious geometry of a code. In reality, codified law commonly offers a simplified pattern remote from the actual affairs of men. It deals with the diagrammatically conceived situations which seldom correspond to actual cases. The result is that courts which "apply" codified law build up an extensive "common law" of their own, which suffers seriously from the fact that it pretends to be something it is not. It does not carry with it the burdens and doubts of its origins, and it cannot therefore – in the famous of Lord Mansfield – "work itself pure" by the process of comparison, reexamination, and rearticulation that characterizes the common law.*[132]

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127 Mark DeWolfe HOWE, *Readings in American Legal History* 433 et seq. (1949). He entitles chapter 5 "The Nineteenth Century Movement for Codification".

128 M. REIMANN, *loc. cit.*, note 108, is especially interesting on this point.

129 Harold Gill REUSCHLEIN, *Jurisprudence: Its American Prophets* 63-73 (1951) (treating Livingston, Field, and Carter).

130 Moses J. ARONSON, "The Juridical Evolutionism of James Coolidge Carter", 10 *U. Toronto L.J.* 1 (1953).

131 See, e.g.: Brian BIX, *Jurisprudence: Theory and Context* (3d ed. 2004) (mentions neither Field nor Carter nor the codification debate).

132 Lon L. FULLER, *The Anatomy of Law* 166 (1968). Ironically, Fuller does not appear to mention Carter or Field in his *The Problems of Jurisprudence* (1949; reprinted 1991); *Legal Fictions* (1967) (though he mentions Pound's *Interpretations of Legal History* (1923) at 56, n. 16, SAVIGNY's *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (2d ed., 1828) at 59, n. 22, and the latter's notions of legal science and *Volk* and *Volksgeist* as source of law at 126 and 127); *The Law in Quest of Itself* (1949); or *The Morality of Law* (rev'd ed. 1969).

There is today a much greater belief in the efficacy of legislation to change behavior and to influence habits and practices, if not custom in the legal sense. And there is an acceptance (and plenty of evidence, too) that courts can also do "mischief". For us, we accept that legislation as a source of law can be constitutive, if anything in law can be. And yet, in American law a bias against codified private law persists. If a satisfactory code of American private law were proposed today, one would have to predict that it would be rejected: a very troubling and peculiar situation. This is despite the proliferation of legislative projects that have the word "code" on the cover, including but certainly not limited to the Uniform Commercial Code. Here I have attempted to show how this negative view entered American legal culture, but have only hinted at why it has persisted. A full explanation must await another occasion.