A HISTORY OF AMERICAN LAW

Second Edition

Lawrence M. Friedman

(1985)

(1st ed. 1973?)

A Touchstone Book
Published by Simon & Schuster, Inc.
New York

CONTENTS

to Michigan and Illinois territories (1809); Michigan Territory was the source of the earliest laws of Wisconsin Territory (1836), which in turn gave them to Iowa (1838) and Minnesota (1849). In the Southwest the line went from Louisiana to Missouri Territory (1812), from there to Arkansas (1819), and from Mississippi to Alabama (1817).

In most cases the basic process was simple: the old territory divided, like an amoeba, into two pieces; and the laws of the original territory now governed in both parts.[24] Without particular thought or debate, a bundle of well-worn statutes was handed on to new jurisdictions. The statute of frauds and the statute of limitations traveled cross-country without major change. In 1799, Northwest Territory enacted a statute "making Promissory Notes and Inland Bills of Exchange negotiable"—another standard American law. These statutes became part of the basic legal framework. Town laws, election laws, laws about the militia, tax laws, laws on court process: all were freely borrowed and passed along from jurisdiction to jurisdiction.

In time, some of the new states repaid their legal debt. They trained new legal and political leaders. Henry Clay (born and educated in Virginia), Thomas Hart Benton, and Abraham Lincoln were all Western lawyers. The West was mobile, fluid; like the colonies in comparison to Britain, it was freer from the dead hand of the past, freer from the friction and inertia of tradition. Out of the West, then, came legal innovations that became enduring features of the law. The homestead exemption began in Texas; from there, it spread to the North and the East. The first Married Women's Property Act was passed in Mississippi. A number of important legal institutions began life in experimental milieus, on the outskirts of American society.

THE CIVIL LAW FRINGE

In the first generation of independence, the civil-law domain, vast but sparsely settled, encircled the domain of the common law. Civil law—French and Spanish—governed along the Mississippi and the river bottoms of its tributaries; in Kaskaskia, St. Louis, New Madrid, and St. Charles; in the bustling port of New Orleans;

[24] William W. Blume and Elizabeth G. Brown, "Territorial Courts and the Law," Part II, 61 Mich. L. Rev. 467, 474–75 (1963).

in the Floridas, and in Texas. When this empire became American property, it fell subject to American government and law.

A massive invasion of settlers doomed the civil law everywhere, except in Louisiana. The new judges and lawyers were trained in the common-law tradition. They supplanted judges of French and Spanish background. The United States did not disturb rights of property that had vested under civil law. American courts wrestled for years with civil-law problems of land law, family law, laws of descent and inheritance. Among Thomas Rodney's papers, from the Natchez district, are case records in which points at issue were resolved by reference to Spanish law or jurisprudence, translated for the benefit of jury and court.[25] The Northwest Ordinance, after prescribing its own rules about wills and inheritance, promised to preserve, for "the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages," the benefit of "their laws and customs now in force among them, relative to the descent and conveyance of property."

But American policy insisted, for the long haul, that the law must be thoroughly Americanized. Around the old river town of St. Louis, Spanish law was technically in force, supplemented by French customs. From the very first, however, American officials aimed "to assimilate by insensible means, the habits and customs of the American and French inhabitants; by interweaving some of the regulations of the latter into our Laws, we procure a ready obedience, without violence or complaint."[26] As the American population increased, more direct action was used in addition to these gentle and "insensible means." A statute of 1807, applicable to what later became Missouri Territory, repealed the civil law on wills and inheritance, and introduced American intestacy laws and laws about wills. American lawyers lobbied successfully for a law which made the common law of England the basis of law in Missouri Territory (1815–16). When it entered the Union, Missouri had little left of its civil-law past, except some tangled land titles, and a passion for procedural simplicity.

The French in Illinois were similarly doomed. The guarantee of the Ordinance applied only to laws of succession. The French were immediately subjected to an elaborate county and township

[25]E.g., Hamilton, *op. cit.*, p. 176.

[26]Judge John Coburn to Secretary of State James Madison, 1807, quoted in William F. English, *The Pioneer Lawyer and Jurist in Missouri* (1947), p. 56.

organization, on the model developed in the British colonies, despite the fact that they had "retained in their isolation... the political and economic traditions of the France of Louis XIV, of common fields and manorial organization."[27] American officials had no particular sympathy for the culture of French settlers. Judge John C. Symmes, who came to Vincennes in 1790, reacted to the French with chauvinistic disgust. They "will not relish a free government," he wrote. "They say our laws are too complex, not to be understood, and tedious in their operation—the command or order of the Military commandant is better law and speedier justice for them and what they prefer to all the legal systems found in Littleton and Blackstone. It is a language which they say they can understand, it is cheap and expeditious and they wish for no other."[28] It was natural for these settlers to resent the coming of Americans. The French lost their influence, and with it, their law. Traces of French *coutumes* lingered on briefly in family law. Gradually, French law and language disappeared.

An indigenous law, without prestige, and in a minority status, can hardly survive. The sheer mass of American settlers easily conquered Spanish law in Florida, where the original population was sparse. In 1821 Andrew Jackson imposed, by proclamation, common-law procedure in criminal cases, including the right to trial by jury. But Spanish law had gained only a temporary reprieve for civil cases. In 1829, a statute established the common law, and English statutes passed before 1776, as norms of decision in the territory. The Spanish period left behind, in the end, only a few archeological traces in Florida's law.

Spanish-Mexican law left a much greater imprint on Texas. Partly this was because Texas was rather fully formed, as a polity, before it passed into American hands. Here, too, however, trial by jury was an early import. The constitution of Coahuila and Texas (1827), during the Mexican period, exhorted the legislature, as one of its "principal subjects," to enact legislation "to establish, in criminal cases, the trial by jury, extending it gradually, and even adopting it in civil cases, in proportion as the advantages of this precious institution may be practically developed."[29] American settlers probably pressed for this enactment. The Texas government later enacted a form of trial by jury, but not exactly in

[27]Francis S. Philbrick, *The Laws of Indiana Territory, 1801–1809* (1930), ccxviii.

[28]Quoted in Philbrick, *op. cit.*, ccxvi–ccxvii.

[29]Coahuila and Texas const., 1827, sec. 192.

the American mold.[30] The constitution of the republic of Texas (1836), in its declaration of rights, affirmed the right of an accused "to a speedy and public trial, by an impartial jury.... And the right of trial by jury shall remain inviolate."

The Texas Constitution also contemplated wholesale adoption of the common law. "Congress," it said, "shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require" (art. IV, sec. 13). But Texas never really "received" English law, in any literal or classical sense. Rather, the republic adopted a Texas subdialect of the American dialect of law. There was thoroughgoing acceptance of trial by jury, "that ever-to-be prized system of jurisprudence," as the supreme court of Texas called it in 1840.[31] But from the very start, law and equity were merged in court organization and procedure. The constitution of 1845 specifically gave to the district courts jurisdiction "of all suits... without regard to any distinction between law and equity."[32] In 1840, the civil law was formally abolished; but even then Texas did not introduce the full rigors of common-law pleading. Rather, it preferred to retain "as heretofore" the civil-law system of "petition and answer." Procedure, then, conformed neither to common-law nor civil-law norms. It was a hybrid system. Judges and lawyers, in the early years, seemed genuinely ambivalent about the two rival systems. On the one hand, civil law was alien, and few lawmen could cope with it. The law of 1840, by keeping some parts of civil-law pleading, forced courts (as one judge said) to look for "principles and criteria in a language generally unknown to us." As a result, "Constant perplexities... annoy and delay us at each step."[33] But in a later case, another Texas judge condemned some aspects of common-law pleading as "Bold, crafty, and unscrupulous."[34] Still a third judge took a middle view:

> The object of our statutes on the subject of pleading is to simplify as much as possible that branch of the proceedings in courts, which by the ingenuity and learning of both common and civil law lawyers and judges had become so refined in its subtleties as to substitute in many instances the shadow for the substance.[35]

[30]Edward L. Markham, Jr., "The Reception of the Common Law of England in Texas and the Judicial Attitude Toward That Reception, 1840–1859," 29 Texas L. Rev. 904 (1951).

[31]*Edwards* v. *Peoples,* Dallam 359, 360 (Tex., 1840).

[32]Texas const., 1845, art. IV, sec. 10. On Texas procedure, see Joseph W. McKnight, "The Spanish Legacy to Texas Law," 3 Am. J. Legal Hist. 222, 299 (1959).

[33]*Whiting* v. *Turley,* Dallam 453, 454 (Tex., 1842).

[34]*Long* v. *Anderson,* 4 Tex. 422, 424 (1849).

In the long run, the civil-law tradition was too alien and inaccessible to survive. But it did undermine the inevitability—and therefore the legitimacy—of strict common-law pleading. What resulted was a procedure that used common-law terms and some common-law attitudes, but was considerably more streamlined and rational. Peripheral Texas was, in short, free to do what other states could do only by breaking with habit and tradition. But in Texas, divergences from the common law did not *look* like reforms; they looked like civil-law survivals. In a sense they were; what survived, however, survived because it suited the needs and wants of Texas jurists.

Chunks of civil law also remained imbedded in the substantive law of Texas. Texas recognizes the holographic will—an unwitnessed will in the dead person's handwriting. Texas has also kept the community-property system; indeed, Texas gave the system constitutional recognition.[36] Texas shares these "survivals" with Louisiana, and with a number of states carved out of Mexican territory, notably California. That these institutions lived on, despite the terrific pressure for common law, indicates either that they were toughly sewn into the social fabric, or that they fulfilled some unique social function. The holographic will invited ordinary people to make wills by themselves, without consulting lawyers. The community-property system suited the facts of family life as well as or better than common-law rules of marital property; the common-law rules were themselves in process of change.

Louisiana was the only solid, durable enclave of civil law. Here American expansion collided with an entrenched civil-law population. Louisiana's brand of civil law had no particular intrinsic merits. At the time of the Louisiana Purchase it was an arcane, bewildering hodgepodge of French and Spanish law, a melange of codes, customs and doctrines of various ages. The French had settled Louisiana, but the Spanish had governed it from 1766 to 1803. Louisiana law was as baffling as the common law at its worst. Its "babel" of legislation, according to Edward Livingston, was only equaled by the "Dissonances" of the Court of Pleas, "where

[35]*Hamilton* v. *Black,* Dallam 586, 587 (Tex., 1844).

[36]Texas const., 1845, art. VII, sec. 19.

American Shop keepers, French planters and Spanish clerks sit on the same bench," listening to "American Attorneys, French procureurs and Castillian Abogados," each speaking his own language.[37]

In Louisiana, too, the usual conflict developed between the native population and incoming lawyers and judges.[38] Jefferson was anxious to Americanize the government and law. He controlled the governorship and the territorial judges. But the Creole population was a continuing problem. The territorial legislature, in 1806, under some pressure to move toward common law, was willing to accept trial by jury in criminal cases, along with the writ of *habeas corpus,* but otherwise declared the civil law in force, that is, the "Roman Civil code... which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law.... The Spanish law, consisting of the books of the *recopilación de Castilla* and *autos acordados* ...the seven parts or *partidas* of the King Don Alphonse the learned [and others]... the ordinances and royal orders and decrees [applicable to]... the colony of Louisiana"; and "in matters of commerce," the "ordinance of Bilbao," supplemented by "Roman laws," a number of named English and civil-law treatises, "the commentaries of Valin," and "the respectable authors consulted in the United States." Governor William Charles Claiborne vetoed the law. The legislature was under the control of the Creole population; and Claiborne looked on the law of 1806 as particularly dangerous.[39]

The matter, of course, did not end there. The leading Creole residents of Louisiana clamored for a code, to clarify the law, and to insure them against sudden, disruptive change in their social and economic status. They wanted familiar law in a workable form. The Digest of 1808, designed to bring order out of chaos, was influenced by drafts of the new French code, the Code Napoleon. This Louisiana code, then, was a civil-law code to the core; but in style it was new-French and not old-Spanish. Its political meaning was great. A careful student of the period in Louisiana feels that, from a long-term historical perspective, the civil code adopted in 1808 "was the political compromise on the basis of

[37]Quoted in George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (1975), p. 112.

[38]See, in general, Elizabeth G. Brown, "Legal Systems in Conflict: Orleans Territory, 1804–1812," 1 Am. J. Legal Hist. 35 (1957).

[39]Dargo, *op. cit.*, p. 136.

which the settled population of Lower Louisiana finally accepted permanent American rule." Essentially, the Jefferson administration accepted the code, and thereby gave up the possibility of total Americanization, in return for a speedier and less bumpy absorption of "what was essentially a colonial possession."[40] This compromise worked, and outlasted the fate of the code itself.

The supreme court of Louisiana later held (in 1817) that the code of 1808 had not driven out all of the old Spanish law. "Our civil code," said the court, "is a digest of the civil laws, which were in force in this country, when it was adopted"; those laws "must be considered as untouched," wherever the "alterations and amendments, introduced in the digest, do not reach them."[41] This unfortunate decision brought back the confusion of the days before the code, when the civil law of Louisiana was "an indigested mass of ancient edicts and Statutes... the whole rendered more obscure by the heavy attempts of commentators to explain them."[42] At legislative request, Louis Moreau Lislet and Henry Carleton translated and published "The Laws of Las Siete Partidas which are still in force in the State of Louisiana," in 1820. The legislature also moved to recodify the basic law of Louisiana. They appointed three commissioners for this purpose. These commissioners drafted what became the famous Civil Code of 1825.

The leading figure in drafting this code was Edward Livingston. He was a New Yorker, devoted to law reform, who found

[40]Dargo, *op cit.*, p. 173. The actual sources of the code of 1808 are far from clear; basically, the code seemed to be French, with a certain Spanish element, but there is great doubt, and much arguing among scholars, as to the precise weighting of the two. On this point, see Dargo, *op. cit.*, pp. 155–64. Whatever the facts about the code itself, there is evidence that the courts cited Spanish authorities almost as much as they cited French ones. See Raphael J. Rabalais, "The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana, 1762–1828," 42 La. L. Rev. 1485 (1982).

The *living* law of the territory, the actual legal customs of the people, is still another matter. Hans Baade has examined marriage contracts in French and Spanish Louisiana and concluded that French "legal folkways" with regard to marital property were dominant before Spanish rule; that they continued in some parts of the territory during Spanish rule; and that they popped back into full vigor throughout the colony when Spanish rule ended in 1803. Hans W. Baade, "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence," 53 Tulane L. Rev. 3 (1978).

[41]*Cottin* v. *Cottin,* 5 Mart. (O.S.), 93, 94 (1817).

[42]Quoted in William B. Hatcher, *Edward Livingston* (1940), p. 247. For Livingston's role in the making of the civil code of 1825, see ch. 11, "The Codifier," pp. 245–88.

fertile soil for his talents in Louisiana. About eighty percent of the code's provisions were drawn directly from the Code Napoleon. French legal commentary was another important source. The common law had some influence, particularly on the law of obligations. The special needs of Louisiana were only one factor in the minds of the commissioners. They also wanted to prove that a pure, rational system of law was attainable in America. They rejected

> the undefined and undefinable common law.... [In England] the Judge drew his own rule, sometimes with Lord Mansfield, from the pure fountain of the Civil Code, sometimes from the turbid stream of doubtful usage, often from no better source than his own caprice.... [In Louisiana] our Code... will be progressing toward perfection.... the Legislature will not judge, nor the Judiciary make laws.... [W]e may hope to have the rare and inestimable blessing of written Codes, containing intelligible and certain rules to govern the ordinary relations and occurrences of life, the operations of commerce and the pursuit of remedies by action.[43]

As the quotation shows, the commissioners expected that the civil code would be only the first of a series. A code of practice was adopted by 1825. It was one of the most original of the codes. It blended French, Spanish, and common-law forms into a skillful, efficient whole. The common-law writs which were retained did not have to "pursue the forms, and be conducted according to the rules and regulations prescribed by the common law," as the code of 1805 had asserted. Louisiana came, then, to use a tripartite system of procedure, vaguely comparable to the compromise of Texas. The court structure was American. Some aspects of the common law were preserved, notably trial by jury in criminal cases. The rest of the system was a joining of two civil-law streams. In Texas common law dominated, in Louisiana civil law. In both cases, the blend was more streamlined and efficient than the common law, at least in its 19th-century version. Other states, less free to innovate, reached this state of development more gradually.

Once it had enacted a civil code and a code of procedure, the Louisiana legislature lost its zest for novelties. A proposed code of commerce was never adopted.[44] Livingston's codes of evidence and criminal law were too advanced for the legislature to swallow.

[43]Louisiana Legal Archives, vol. 1 (1937), xcii.

[44]The civil code already covered some aspects of commercial law.

The age of innovation passed. French language and French customs also slowly lost their grip. The civil-law substrate remained solid, in translation. The constitution of 1812 expressly provided that the legislature "shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact" (art. IV, sec. 2). This was meant to rule out passage of a general statute purporting to "receive" the common law. The gesture was probably unnecessary. The civil law, like the right to trial by "an impartial jury of the vicinage"[45] (also preserved by the constitution), was too important to the people who mattered in New Orleans. They were used to it; they did business by it. The codes survived the destruction of a distinctive French culture; they became an element of Louisiana's *legal* culture—part of the learning and lore of lawyers, part of the life and experience of consumers of law. By virtue of this fact, the social and educational costs of changing the system became far greater than the benefits that might be gained by matching the law of Louisiana to the law of its neighboring states. The "reform" elements of Louisiana's codes were based on civil law; but their goal was clear, concise, and useful law, law that a man could count on and make business predictions by, law which could be easily mastered. To the old-line residents, the common-law system was a weird and foreign chaos; they did not realize that the reform goals of Louisiana were also goals of common-law reform. What is clear is that, in the main, Louisiana's codes were not survivals, any more than was the case with the system of pleading in Texas. The codes were rather a reworking of an inherited legal culture, along paths that ran parallel to those the common law would follow.[46]

In Louisiana, it is a matter of local pride that there is a special legal tradition, different from other states. Louisiana is proud to belong to the great civil law family. Hence, it is natural, and easy, to overstate differences between Louisiana's legal culture and that of (say) Arkansas or Texas. Louisiana is part of a federal system,

[45]Louisiana const., 1812, art. VI, sec. 18.

[46]The same 1812 constitution, which forbade a change to the common-law system, declared that all laws and public records had to be in "the language in which the constitution of the United States is written" and the same for "judicial and legislative... proceedings." Louisiana const., 1812, art. VI, sec. 15. For those who did not speak French, French was a nuisance. This callous attitude toward the historic tongue of the settlers suggests obliquely that the preservation of the civil law in Louisiana owed precious little to sentiment.

and is subject to federal law. That was significant even in the early 19th century; it has grown more so with the passage of time. It shares a common economic system with its neighbors. The political system is not much different from Mississippi or Alabama. American settlers streamed in and out across the border, neither noticing nor caring, by and large, that they were crossing the frontier between civil and common law. Attitudes toward law and expectations about law, one guesses, are more or less the same in Shreveport as in Little Rock or Natchez. The cultural elements of Louisiana law were and are closer to Mississippi and Texas than to Ecuador or France. Whole raw pieces of common law—such as the trust—were eventually absorbed by Louisiana. Much new law that was added during the 19th century was not noticeably "civil law" in its content: business law, railroad law, the law of slaves. The civil law lives on in Louisiana, but mostly as lawyers' law and lawyers' process. In most other essential regards, Louisiana law has long since joined the Union.

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. It was, in short, a code in the French sense, not a statute. It was a lattice of reasoned principles, scientifically arranged, not a thick thumb stuck into the dikes of common law. The substance of the Field Code was almost as daring as its style. The heart of the code was its sixty-second section, which declared:

> The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.

Taken literally, this was the death sentence of common-law pleading. It was meant to put an end to all special pleading, forms of actions and writs, and to close the chasm between equity and law; it was meant to destroy at one blow the paraphernalia of this most recondite, most precious, most lawyerly area of law.

Like many other revolutions, the upheaval of 1848, in the legal communes of New York, was not completely a bolt from the blue. The Field Code had a number of distinguished intellectual forefathers. In England, Jeremy Bentham, who died in 1832, had savagely attacked the "ancestor-worship" of the common law. Bentham put his vigorous pen at the service of legal rationality. Lawyers in Bentham's circle preached hard for reform of the common law, particularly procedure. In 1828, Henry Brougham spoke for six hours in the House of Commons, eating a "hatful of oranges as he went, calling for law reform," and ending with a dramatic plea: "It was the boast of Augustus... that he found Rome of brick, and left it of marble; a praise not unworthy of a great prince. ... But how much nobler will be the Sovereign's boast... that he found law dear, and left it cheap; found it a sealed book—left it a living letter; found it a patrimony of the rich—left it the inheritance of the poor; found it a two-edged sword of craft and oppression—left it the staff of honesty and the shield of innocence."[3] In response to Brougham's speech, Parliament appointed

[3]Quoted in Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750–1965* (1967), p. 19; see also Robert W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p. 43. Millar's book is a richly detailed, if technical, account of American civil procedure.

a commission to consider procedural reform, and passed some reform statutes in the early 1830s. In the United States, the Field Code had a precedent of sorts in the codes drawn up by Edward Livingston in Louisiana. The Louisiana codes were not relevant, technically speaking, since Louisiana was a more or less civil-law state; the fusion of law and equity in Texas could also be explained away on the grounds of civil-law contamination. In some other states, notably Massachusetts, commissions had issued reports calling for improved and simplified procedure. Colonial practice had been much simpler than English practice and colonial habits had never been wholly extinguished. As we have seen, a number of states had taken up procedural reform; Georgia's experiment had been quite radical for its day. Undoubtedly, precedents and examples were important. But most of all, the time was ripe. Code pleading was an idea whose day had finally come.

Not that code pleading was an immediate and unqualified success. Ironically, the code had particular trouble in New York itself. In 1849 the Field Code was re-enacted, but much wounded by amendments and supplements. The new act contained 473 sections. An act of July 10, 1851, again substantially amended the code. This act in turn was frequently amended. In 1870, the legislature appointed a new commission to revise the code; it reported a fresh version in 1876, of monstrously inflated size—"reactionary in spirit... a figure of Falstaffian proportions among the other codes," its principles "smothered in details."[4] By 1880, the New York procedural codes (including the code of criminal procedure) contained no less than 3,356 sections.[5] This was a far cry, indeed, from the simplicity and artlessness that the original code had proclaimed as its goal. In the 1890s, New York's procedure was still considered so imperfect that a strong movement grew up at the bar to reform it still further.

The courts, too, showed a certain hostility and resistance to change. The conventional wisdom has it that many judges manhandled the code. One extreme example, perhaps, was Judge Samuel Selden, who remained convinced that law and equity were categories of the real world. He simply could not grasp the idea

Also useful is Charles M. Hepburn, *The Historical Development of Code Pleading in America and England* (1897). On the general background, see Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (1981).

[4]Hepburn, *op. cit.*, p. 130.

[5]Alison Reppy, "The Field Codification Concept," in Alison Reppy, ed., *David Dudley Field Centenary Essays* (1949), pp. 17, 34–36.

of merging the two: "It is possible to abolish one or the other," he wrote, in an 1856 decision, "but it certainly is not possible to abolish the distinction between them."[6] Chief Justice John Bradley Winslow of Wisconsin wrote in 1910 that the "cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history."[7] But the historical record is not quite that clear; very little is known about the behavior of trial-court judges, though the fate of the code was really decided there. Certainly the code could not destroy the habits of a lifetime, nor, by itself, transform what may have been deeply imbedded in a particular legal culture. But the stubbornness of the judges was a short-run phenomenon, to the extent it occurred. The real vice of the code probably lay in its weak empirical base. The draftsmen derived their basic principles from ideas of right reason, rather than from a careful study of what actually happened in American courts, and what functions and interests courts and their lawsuits served.

The Field Code, as such, did not make much headway in the East. Even in New York, the draftsmen of the code thought of it merely as a temporary draft; the full text, completed a few years later, was too much for the legislature to swallow. Further west, the situation was dramatically different. The ink was hardly dry on Field's Code when Missouri adopted it into law (1849). In 1851, California, a new state, at the uttermost limit of the country, enacted the Field Code. Before the outbreak of the Civil War, the Field Code had been adopted in Iowa, Minnesota, Indiana, Ohio, Washington Territory, Nebraska, Wisconsin and Kansas.[8] Nevada adopted the code in 1861, and by the turn of the century, so had the Dakotas, Idaho, Arizona, Montana, North Carolina, Wyoming, South Carolina, Utah, Colorado, Oklahoma, and New Mexico.

Why the West? Supposedly, the Western bar was young and open-minded; technical training in common-law pleading was not common coin among these lawyers. Stephen Field, David Dudley Field's brother, was a prominent California lawyer, and may have helped advance his brother's cause. In Missouri, an attorney named

[6]J. Selden, in *Reubens v. Joel,* 13 N.Y. 488, 493 (1856); see Charles E. Clark, "The Union of Law and Equity," 25 Columbia L. Rev. 1 (1925).

[7]Quoted in Clark, *op. cit.*, p. 3.

[8]Kentucky and Oregon also adopted the code, but maintained the separation of law and equity. Iowa reintroduced the distinction in 1860. Millar, *op. cit.*, p. 54. Later, Arkansas adopted the Kentucky model.

David Wells had been agitating for years for the abolition of the distinction between law and equity. Both states had some remnants of civil law in their background; both entered the Union with a history of land controversies and a full docket of land-grant problems. These land claims were hard to analyze in terms of the distinction between "legal" and "equitable" matters; as to these claims, the distinction was meaningless and procedurally disruptive.

Western states were also more eclectic in general than states of the older East. The glitter of the Field Code may conceal the extent to which some Eastern states (Massachusetts, for example) were working toward procedural reform in their own way, in accordance with what the bar considered the inherent logic of their own institutions. The New York name had no magic in Massachusetts. Some states rejected the Field Code as unsuitable, or too advanced, or as the product of a different culture. Dean Henry Ingersoll of the University of Tennessee, writing in the Yale Law Journal in 1891, decried the "attempt of one State to adapt a Code of Procedure prepared for an entirely different social and business condition." In North Carolina, one of the few Eastern states to adopt the code, he felt the experiment (which he blamed on blacks and carpetbaggers) had been a disaster:

> During... Reconstruction... the legal practice of the State was reconstructed by the adoption of the New York Code of Civil Procedure, with all its penalties and high-pressure machinery adapted to the conditions of an alert, eager, pushing commercial community. Rip Van Winkle was not more surprised on returning to his native village after his long sleep than were the lawyers of the old "Tar-heel State."... This new-fangled commercial machine... was as well adapted to their condition as were the light driving buggies of the Riverside Park to the rough roads of the Black mountains, or the garb of the Broadway dandy to the turpentine stiller.... North Carolina had about as much use for the system as she had for a clearing-house, a Central Park or a Stock Exchange. The clamors of the bar soon brought about... amendment ... and left [the code]... a great cumbrous piece of machinery without driving-wheels, steam-chest or boiler, propelled along by the typical slow oxteam.[9]

[9]Henry H. Ingersoll, "Some Anomalies of Practice," I Yale L.J. 89, 91, 92 (1891).

Actually, it is dubious whether systems of procedure fit particular cultures so snugly as Ingersoll seemed to think; or whether North Carolina was really so primitive or so idiosyncratic as not to need procedural reform. Ingersoll's diatribe mostly meant that lawyers could attack code pleading more easily when it was possible to identify it with an alien, and in this case, a hated culture. In his statement, there may lurk a small grain of truth: procedural reform was most necessary, or at least most desirable, in commercial states. In a business economy, business needs as rational and predictable a common context as it can possibly get. An orderly, rational law machine was infinitely preferable to the chaos of common-law pleading. Business wanted the machine to turn out swift, nontechnical, predictable decisions, based on the facts, not on the accidents of writs and forms of action. Classical pleading was a sort of slow, gentlemanly ritual dance. Its aim was to isolate pure "issues" of law or fact. But these issues often turned out to be mere by-products of pleading, hence, in a sense, purely hypothetical. Old procedure and excess technicality survived the longest in parts of the law where society had less of a sense of the value of mass-producing results. The jury trial of a murderer is a unique, unstandardized event, the exact legal opposite of a garnishment or a parking ticket.

But where business was unavoidably dependent on the courts, procedure was radically and successfully simplified. This process was not obvious because the development was quiet, almost invisible. Just as a mass market led to mass production of commodities, so a mass market led to mass production of law. The system stamped out, like so many iron nails, its tiny but numberless outputs. Their importance lay in their cumulative effect—small debts collected, garnishments achieved, instruments neatly recorded. These legal outputs generally depended on the validity of pieces of paper invented by businessmen and business lawyers. Where the courts accepted these documents (as they usually did), business could safely ignore the grand debate over codes and procedure, debates about the esthetic shape of the legal system, that raged in upper circles of the bar. These great debates—whether law emanated from the spirit of the people or not, whether the common law would lose its soul if it was codified completely—meant little or nothing to people engaged in making and losing money, day by day.

In the earlier part of the 19th century, law reform probably

did command wide support from the businessmen or merchants.[10] They saw that law was cumbersome and unfeeling; they sensed that it was necessary to redirect the law, to strip it of excesses, before they could make use of it efficiently. David Dudley Field promised the businessman that law would become his willing tool. And so it did, but not in the way that Field imagined. The industrialists of the Gilded Age did not use law and lawsuits to solve ordinary business disputes. They used law to collect and record, as a tool of mass production. In the grand struggles of robber barons, too, lawyers used law as a weapon; the barons battled each other in court, showering each other with a blizzard of writs and injunctions. And in the big constitutional cases, business tried to bend, delay, or prevent the rise of the welfare state. The reformers never succeeded in their Utopian aim of creating a simple, rational system of law. To this extent, their dreams went sour. But the failure was not on the technical level; reformers were frustrated by concrete interest groups, and the uses groups made of legal process.

The bar in some states opposed code pleading with gusto. But code pleading in the long run probably had a good effect on lawyer's practice. One of the root ideas of the code was fact-pleading, so simple and rational that the average citizen would not need a lawyer. This was a completely visionary goal. Yet procedure became, on the whole, much less technical. In a small way, this perhaps helped free lawyers from the drudgery of learning how to plead and appeal. Procedural reform may have indirectly smoothed the way for the rise of the "office" bar—counselor-lawyers who never set foot in court. Or, perhaps, the rise of the "office" bar meant that traditional rules and skills of pleading became ever rarer, and hence had less and less support from leaders of the bar.

By 1900, the Field Code was widely adopted, copied, modified. Field's reforms had earned, moreover, the supreme compliment of close study in England, mother country of the common law. Field's work influenced the English Judicature Act of 1873. English reforms, in turn, had American consequences. The Connecticut Practice Act of 1879, for example, drew "in considerable measure upon the English reforms," and was, on the whole, "a

[10]See, in general, Lawrence M. Friedman, "Law Reform in Historical Perspective," 13 St. Louis U.L.J. 351 (1969); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (1976), chapter 3 (on William Sampson).

distinct advance over the codes which had emanated from ... New York."[11]

In short, before the 19th century was over, almost all states had reformed their procedures at least somewhat. Only a minority—New Jersey, Delaware, Illinois—clung tenaciously to old-style pleading. Yet no state had carried its reform as far as Field would have liked. In every state, the union of law and equity remained imperfect. For one thing, the federal Constitution, and state constitutions, had provisions preserving the right of trial by jury; courts felt that they had to pay attention to the historical distinction between law and equity since only in "law" was there a jury right to be preserved. On balance, the union of the two systems was a triumph for equity; from equity, the new procedure derived some of its most striking traits: greater freedom in joinder of parties, a liberal attitude toward the rights of defendants to put forward counterclaims, more suppleness in general in the use of judicial remedies. Even those New England states which had never granted full equity powers to their courts—Maine, New Hampshire, Massachusetts—granted these powers after the Civil War. In fact, many striking legal developments, between 1850 and 1900, made creative use of tools of equity. Courts put bankrupt railroads in receivership and virtually ran the roads; they forged out of the injunction a terrible sword to use in industrial disputes. Injunction and receivership were both old, trusty tricks of equity, rapidly and vigorously reshaped. This was, after all, a period of activist judges; equity, free from the jury's fetters, was made to order for a judge with a taste for power.

COURT PROCEDURE IN COURT

Despite the Field Code, questions of procedure continued to claim a high proportion of the attention of appellate courts. Upper courts had the power to control lower courts and juries with a tight hand, at least as far as the formal record was concerned. Between 1870 and 1900, there are persistent complaints that some state supreme courts behaved as if their chief function was to reverse decisions of their lower courts for technical errors. A piece

[11]Robert W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p. 55.

in a law journal in 1887 expressed the view that the Texas Court of Appeals "seems to have been organized to overrule and reverse. At least, since its organization that has been its chief employment." As evidence, the article cited an amazing fact: during the twelve years of the court's existence, it had reversed 1,604 criminal cases, and affirmed only 882—a margin of almost two to one. In one volume of reports, there were five reversals to every single affirmance.[12]

This was Roscoe Pound's "hypertrophy," most marked in criminal cases, and carried over from the earlier part of the century. At least on paper, tighter rules about the conduct of trials continued to tame the lower-court judges. Judges had once been in the habit of giving oral instructions to the jury. They told the jury about the law in frank, natural language. But this practice died out—or was driven out. The instructions became solemn written documents, drafted by the lawyers. Each side drew up statements of law; the judge merely picked out those that were (in his judgment) legally "correct." In any event, the instructions were technical, legalistic, utterly opaque. They were almost useless as a way to communicate with juries; the medium conveyed no message.[13] Each instruction had to be framed with great care, so as not to give the upper court a chance to find reversible error. At one time, too, it was standard for judges to comment on the evidence, to tell the jury quite openly what the judge thought about the witnesses, and what their testimony was worth. In Missouri, for example, this practice was stamped out by 1859.[14]

Appellate procedure also remained very technical and complex, throughout the 19th century. After reading cases in the last part of the century, Roscoe Pound was "tempted to think that appellate procedure existed as a system of preventing the disposition of cases themselves upon their merits."[15] Here too, the Field Code tried to bring in a radical new order; it swept away all the cumbersome rules, the distinctions between writs of error

[12]Note, "Overruled Their Judicial Superiors," 21 Am. L. Rev. 610 (1887).

[13]See, for examples in criminal cases, Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910* (1981), pp. 186–187.

[14]Henry F. Luepke, Jr., "Comments on the Evidence in Missouri," 5 St. Louis U.L.J. 424 (1959); on the role of the jury in 19th century law in general, see Note, "The Changing Role of the Jury in the Nineteenth Century," 74 Yale L.J. 170 (1964).

[15]Roscoe Pound, *Appellate Procedure in Civil Cases* (1941), p. 320.

and appeals in equity, and replaced them with a single form of review, which it called an "appeal." Some noncode jurisdictions (Alabama in 1853, Pennsylvania in 1889) also abolished the writ of error, and brought in a simpler form, which they too called an *appeal*.[16]

But in general, record worship did not die out. It seemed to retain a stranglehold on appellate review; it was as if upper courts tried, not cases, but printed formulae, and tried them according to warped and unreal distinctions. Again, excesses in behavior were most striking in criminal appeals. Harwell, the defendant in a Texas case decided in 1886,[17] had been arrested and convicted for receiving stolen cattle. The Texas court reversed, because, among other things, the jury found the defendant "guity" instead of "guilty." In 1877, the same court reversed a conviction because the jury carelessly wrote, "We, the jury, the defendant guilty," leaving out the word "find."[18] The same court, however, magnanimously upheld a conviction of "guily" in 1879,[19] proving that a "t" was less crucial than an "l" in the common law of Texas.

It is not easy to account for this behavior. Perhaps appeal courts were simply too busy for perspective. They relied less on long oral arguments than on written briefs. They spent their lives looking at formal records, and may have come to believe in them too much. Again, the profession took itself (as always) very seriously. A judge may consider very significant an error which an outsider would find trivial at best. Stylistically, this was a period of conceptualism, of dry legal logic. The bench, as we have suggested, was peopled with lesser men; rules were their one excuse for power. Some procedural excess may have stemmed from a good idea gone bad: a fumbling attempt to govern, standardize, and rationalize trials, appeals, and written arguments. Appellate reports sometimes complained about the sloppy or misdirected work of lawyers and lower-court judges. This was particularly true in the early years of a state or territory. It seems clear that some appeal judges took seriously the job of riding herd on lower courts, lawyers, and juries, and set a high value on at least minimal regularity in procedure. The law commonly allowed litigants who lost

[16]Pound, *op. cit.*, PS, pp. 260–61.

[17]*Harwell* v. *State*, 22 Tex. App. 251, 2 S.W. 606 (1886); see also *Taylor* v. *State*, 5 Tex. App. 569 (1877); *Wilson* v. *State*, 12 Tex. App. 481 (1882).

[18]*Shaw* v. *State*, 2 Tex. App. 487 (1877).

[19]*Curry* v. *State*, 7 Tex. App. 91 (1879).

in municipal courts or justice-of-the-peace courts to take their cases to the regular trial courts. There the litigant would get a trial *de novo* (that is, the court would do the whole trial over, including the evidence and the finding of facts).[20] This shows a certain lack of respect for the craftsmanship of basement courts. Record worship showed a similar disrespect for trial courts.

On the other hand, it is easy to exaggerate the amount of record worship. The legal literature is full of horror stories, but rather short on facts and figures. One rarely hears about the cases—and there must have been many—in which the trial court *did* act unfairly; and yet the appeal court let things lie. Consistently, more cases were affirmed than reversed: 60 percent or more, in most jurisdictions. This hardly suggests a gleeful perversity on the part of high courts.

At the trial court level, criminal procedure was harder to reform than civil procedure. The constitutions themselves put limits on reform by enshrining certain practices in bills of rights. There was, for example, no way the federal government could abolish use of the grand jury in serious criminal cases.[21] Moreover, there was probably less impetus for reform. Suspicion of government died hard. People were not so anxious to relax rules of criminal procedure, for fear of unleashing the full power of government. Of course, textbook procedure was not the same as living procedure in court. The legal guarantees of fair trial hardly worked at all for ignorant, timid, or unpopular defendants. Kangaroo-court justice, the blackjack, police harassment, the Ku Klux Klan, vigilante justice, and the lynch law of the 1880s and 1890s in the South were as much a part of the living law of criminal procedure as record worship was. The two phenomena may even be connected. The vigilantes and the lynch mobs demanded quick, certain law and order (as they defined these); they did not trust the regular courts in either respect. The devilish inversions of procedure, perpetrated by vigilantes and lynch mobs, acted as a kind of countervailing force: a balance, of sorts, to the power of upper courts to bind and loose for reasons that looked irrational below.

[20]See, for example, *Hurtgen* v. *Kantrowitz*, 15 Colo. 442, 24 Pac. 872 (1890).

[21]By the 5th amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." On this institution in general, see Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634–1941* (1963).

The law of evidence remained complex. Simon Greenleaf, in his treatise on evidence (first published in 1842), had once praised the "symmetry and beauty" of this branch of law. A student, he felt, "would rise from the study of its principles convinced, with Lord Erskine, that 'they are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life.'" A more realistic critic, James Bradley Thayer, of Harvard, writing in 1898, felt, on the other hand, that the law of evidence was "a piece of illogical... patchwork; not at all to be admired, or easily to be found intelligible."[22] It was still largely a gloss on trial by jury, and its amazing complexity—John H. Wigmore spun ten volumes out of it in the twentieth century—had no counterpart outside of the common law. Indeed, Thayer reported that even English lawyers were surprised "to see our lively quarrels over points of evidence." In the United States, objections to evidence were presented as "exceptions, a method never common in England and now abolished there, which presents only a dry question of law—not leaving to the upper court that power to heed the general justice of the case which the more elastic procedure of the English courts so commonly allows; and tending thus to foster delay and chicane."[23]

The law of evidence remained consistent with its immediate past. It was founded in a world of mistrust and suspicion of institutions; it liked nothing better than constant checks and balances; it was never sure whether anyone, judge, lawyer, or jury, was honest or competent. On the other hand, a few of its more restrictive rules were mitigated. The old rule that an interested party could not testify was abolished. England took this step in 1843, Michigan in 1846, and other states followed over the next thirty years. The rule that disqualified the *parties* to a lawsuit was only a special case of the rule; it too was abolished. Connecticut may have been the earliest to do so, in the late 1840s; other states followed, though some of them rather slowly; Illinois took this step in 1867.[24] The states then, however, passed laws which prevented a survivor from testifying about transactions with a dead person: "If death has closed the lips of the one party, the policy

[22]The Greenleaf quote, and Thayer's comment, are in James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), pp. 508–09.

[23]Thayer, *op. cit.*, pp. 528–29.

[24]Rev. Stats. Conn. 1849, Title 1, ch. 10, sec. 141: "No person shall be disqualified as a witness... by reason of his interest... *as a party* or otherwise" (emphasis added); Laws Ill. 1867, p. 183.

of the law is to close the lips of the other."[25] The list of exceptions to the hearsay rule also kept swelling. In general, then, more categories of evidence became admissible; but there were also more rules.

CODIFICATION AND REFORM

Field's Code of procedure was only one part of a larger, bolder plan to codify the whole common law. The smell of feudalism still oozed from the pores of the common law. To men like Jeremy Bentham and his followers in England, and David Dudley Field, Edward Livingston, and others in America, the common law was totally unsuited for an Age of Reason. It was huge and shapeless. Common-law principles had to be painfully extracted from a jungle of words. "The law" was an amorphous entity, a ghost, scattered in little bits and pieces among hundreds of case-reports, in hundreds of different books. Nobody knew what was and was not law. Why not gather together the real principles of law, put them together, and build a simple, complete and sensible code? The French had shown the way with the Code Napoleon. Louisiana was at least something of an American demonstration. In 1865, Field published a general Civil Code, divided into four parts. The first three dealt with persons, property, and obligations; the fourth part contained general provisions. This scheme of organization ran parallel to that of the great French code; like that code, Field's Code tried to set out principles of law exhaustively, concisely, and with great clarity of language. But New York would have none of it. Till the end of his long life, Field continued to press for adoption in his state. He never succeeded. New York did enact a penal code, which went into effect in 1881; but the civil code was repeatedly turned down, the latest snub occurring in 1885.

The codification movement is one of the set pieces of American legal history. It has its hero, Field; its villain is James C. Carter of New York,[26] who fought the idea of codification with as much vigor as Field fought for it. Codification was wrong, Carter felt,

[25]*Louis's Adm'r* v. *Easton*, 50 Ala. 470, 471 (1874); see John H. Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol. 1 (2nd ed., 1923), pp. 1004–05.

[26]On Carter (1827–1905), see the essay by George A. Miller in *Great American Lawyers*, Vol. 8 (1909), pp. 3–41.

because it removed the center of gravity from the courts. The legislature—the code-enacting body—was comparatively untrustworthy; it was too passionately addicted to the short run. "The question is," he wrote, whether "growth, development and improvement of the law" should "remain under the guidance of men selected by the people on account of their special qualifications for the work," or "be transferred to a numerous legislative body, disqualified by the nature of their duties for the discharge of this supreme function?"[27] Codes impaired the orderly development of the law; they froze the law into semipermanent form; this prevented natural evolution. Carter was impressed by the teachings of the so-called historical school of jurisprudence, founded by German jurists in the early 19th century. They taught Carter that laws were and ought to be emanations from the folk wisdom of a people. A statute drafted by a group of so-called experts was bound to be an inferior product, compared to what centuries of evolution, of self-correcting growth, could achieve. The courts apply to private disputes a "social standard of justice" which is "the product of the combined operation of the thought, the morality, the intellectual and moral culture of the time." The judges know and feel this, because "they are a part of the community." The "social standard of justice grows and develops with the moral and intellectual growth of society.... Hence a gradual change unperceived and unfelt in its advance is continually going on in the jurisprudence of every progressive State."[28] This point of view, of course, was useful not only in fighting codification; it was also a handy club to use against much of the social and economic legislation of the late 19th century. These too were doomed to failure; they were hasty intrusions, and they contradicted the deeper genius of the law.

Field saw codification in a different light. The laws were "now in sealed books, and the lawyers object to the opening of these books." Lawyers "as a body never did begin a reform of the law, and, judging from experience, they never will."[29] The closed books had to be opened. Progress demanded no less. The two great antagonists were in many ways one in their basic point of view. Legislative patchwork was as offensive to Field as to Carter, as

[27]James C. Carter, *The Proposed Codification of Our Common Law* (1884), p. 87.

[28]James C. Carter, *The Provinces of the Written and the Unwritten Law* (1889), pp. 48–49.

[29]Titus M. Coan, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field,* vol. III (1890), pp. 238, 239.

offensive as the patchwork common law. The codes that Field had in mind would be the work of experts—jurists like Field himself. The legislature would simply take the codes and give them its stamp of validity. The codes, then, would be the product of a legal elite; they would be subtle and flexible, as the common law should have been, but was not, since the common law had become (unfortunately) a prisoner of history, bound up in the narrow self-interest of old-fashioned men. Carter and Field, then, agreed about ends, disagreed about means. They both valued flexibility in the law; liked a businesslike rationality; distrusted the role of nonexperts, of laymen, in the making of law. Carter preferred common-law judges, as philosopher-kings, and looked on codes as straitjackets. Field took the opposite view.

In the last third of the century, ideas like those of Carter and Field were, so to speak, in the air. They were similar, in some respects, to the ideas of Christopher Columbus Langdell, who led the reform of legal education at Harvard, starting in 1870. Langdell felt strongly that the common law was a science, that it contained within itself a precious core of basic principle. Legal education should find and teach this essence, as refined in the crucible of experience, and with the legislative warts removed. Langdell shared Carter's basic concept of law; yet his idea of a legal principle was much like that of Field, only implicit, evolutionary, more subtly dynamic.

The Civil Code—and Field's codes on other branches of law—were not total failures. Like the Code of Civil Procedure, they found greater acceptance far from home. Dakota Territory enacted a civil code in 1866; Idaho and Montana also made a code part of their law. The chief victory, however, was California, which enacted a civil code in 1872. This was, however, not a blanket adoption of Field's code. Its provisions were thoroughly revised and reconstituted, in the light of California's own prior statutes and cases.[30] California also adopted a penal and a political code.

Codification found a home in Georgia as well. The legislature appointed three commissioners in 1858 to prepare a code "which should, as near as practicable, embrace in a condensed form, the Laws of Georgia." The code was to embody the "great fundamental principles" of Georgia's jurisprudence, and "furnish all the information, on the subject of law, required either by the citizen or the subordinate Magistrate." The code was divided into

[30]See Arvo Van Alstyne, *The California Civil Code* (1954), p. 11.

four parts—"the Political and Public Organization of the State," then a civil code ("Which treats of rights, wrongs, and remedies"), a code of practice, and a penal code. The Georgia code did not purport to make new law, or to "graft upon our system any new features extracted from others, and unharmonious with our own." It merely attempted to clarify and restate, to "cut and unravel *Gordian knots*," to "give shape and order, system and efficiency, to the sometimes crude, and often ill-expressed, sovereign will of the State." The code ran to some 4,700 sections. It was adopted in 1860 as the law of Georgia.[31]

The success of the codes in the West was due to reasons that by now are familiar. These were sparsely settled states in a hurry to ingest a legal system. A few had something of a civil-law tradition. In none of the Western states did the bar have a strong vested interest in the continuance of old rules, especially rules of pleading. Codes were a handy way to acquire new law, a way of buying clothes off the rack, so to speak. But once the codes were on the books, the results fell far short of the hopes. What happened afterwards would have brought Field to the rim of distraction. Courts and lawyers were not used to codified law; they tended to treat some of the code provisions in accordance with ingrained common-law habits and prejudices. In some cases, the codes' provisions were construed away; more often, they were simply ignored. Nor did the legislature keep its hands off the codes; they tended to let stand the broad statements of principles (they made little difference anyway), but they added all sorts of accretions. It is hard to resist the conclusion that the codes had almost no impact on behavior, either in court or out. Law in action in California did not seem much different from law in action in noncode states, in any way that the codes would help to explain.

The codes did focus attention on some of the drawbacks of common law. The codes are the spiritual parents of the Restatements of the Law—black-letter codes of the 20th century, sponsored by the American Law Institute, but meant for persuasion of judges, rather than enactment into law. Both codes and restatements were reforms that did not reform. In the 19th century, law was constantly and vigorously changing; every new statute was in a sense a reform; so was every new doctrine and ruling. The drafters of codes were interested in reform in a special sense.

[31] *The Code of the State of Georgia,* prepared by R. H. Clark, T. R. R. Cobb, and D. Irwin (1861), pp. iii, iv, vii, viii.

They wanted to perfect an existing system. They wanted to make it more knowable, harmonious, certain. Drastic shifts in allocation of political or economic power, through law, were not to their purpose.

Behind the work of the law reformers was a theory of sorts: that legal system is best, and works best, and does the most for society, which most conforms to the ideal of legal rationality—the legal order which is most clear, orderly, systematic (in its formal parts), which has the most structural beauty, which most appeals to the modern, well-educated jurist. This theory was rarely made explicit, and of course never tested. It was in all probability false, since it is hard to see how society can be changed by reforms which only rearrange law on paper. One child labor act or one homestead act had more potential impact than volumes of codes.

In fact, paper changes were in a way the main point of law reform: law reform was, basically, those changes in law which could be agreed upon by leaders of the bar, and which were not socially or politically sensitive. Only these could be put forward as the program of the bar, without arousing public animosity. A uniform wage-and-hour law, or a tax code, could never be presented as something blandly, incontrovertibly good. Law reform became prominent as the public-service work of the legal profession; it was useful for the lawyer's tarnished image. But service to the whole public is sometimes the same as service to nobody. No doubt the public (and most lawyers) hardly suspected that "law reform" had such limited goals, and such minor potential impact; law reform generally masqueraded as a vital social movement. In any event, law reform could be used by lawyers to justify their own monopoly of practice; it could pass for one of the social services that every profession is supposed to perform.[32]

This, at least, was the character of late 19th-century law reform. It was a program of the upper or organized bar. The bar association movement began in the 1870s; and by the 1890s, the American Bar Association, and the local organizations, were pushing vigorously for reform and unification of American law. But even the "law reform" that came out of these efforts was fairly meager, at least up to the end of the 19th century. Codification on a uniform basis was extremely difficult in a federal union. As far as most branches of law were concerned, each state from Maine to

[32] See, in general, Lawrence M. Friedman, "Law Reform in Historical Perspective," 13 St. Louis U.L.J. 351 (1969).

the Pacific was a petty sovereignty, with its own brand of law. The American Bar Association left most of the law alone; it concerned itself with fields of law whose implications crossed state lines: the law of migratory divorce, for example, and commercial law, both of which were notoriously nonuniform.

On the surface, reform efforts resulted in solid achievements in standardizing commercial law. Arguably, the need was great. The United States was, or had become, a gigantic free-trade area; businessmen needed fair, uniform laws of commerce to take advantage of this huge, rich domestic market. Moreover, many differences in detail, in the state laws, had no particular basis in culture or opinion; the laws were functionally the same, with little quirks here and there, and small technical differences. Uniformity could not be achieved through the courts, not even the federal courts, though these courts did in fact make an effort;[33] the job demanded legislation. In the last decade of the century, the ABA threw its weight behind a uniform law movement. States were encouraged to appoint commissioners who would meet and consider the problems. The first major effort of the commissioners on uniform state laws was a Negotiable Instruments Law, modeled after the English Bills-of-Exchange Act (1882), and with something of a nod to the California code. The NIL was to become one of the most successful of all the so-called uniform laws. It had been widely enacted by 1900; and it won almost universal acceptance before it was swept away by the Uniform Commercial Code in the 1950s and 1960s.

There were other triumphs of uniformity, however, which are easy to overlook, because they did not come out of the formal movement for uniform laws. The Interstate Commerce Act of 1887, the Sherman Act of 1890, the Bankruptcy Act of 1898, were all in a real sense responses to demands, whether commercial or political, for a single national authority. The "national" scope of legal education and legal literature was another impulse toward uniformity, at least as far as legal culture is concerned, and particularly after Langdell purged Harvard of the lecture method

[33]The federal courts, under the doctrine of *Swift* v. *Tyson*, were supposed to apply general law, not the law of particular states, in cases between citizens of different states. See above, pp. 261–62; Tony A. Freyer, *Harmony and Dissonance: The Swift & Erie Cases in American Federalism* (1981); on other efforts by the federal courts in this direction, see Tony A. Freyer, "The Federal Courts, Localism, and the National Economy, 1865–1900," 53 Bus. Hist. Rev. 343 (1979).

and launched the case method on its way. Not that all members of the legal profession were trained and socialized in the same way; but the profession was stratified more by social class and training than along geographical lines.

Publishers continued to spew forth an incredible profusion of legal materials: cases by the thousands; statutes in every state, every year or every other year; regulations, rulings, ordinances, and local customs on a scale that dwarfed the imagination. Tricks of research made this fabulous diversity somewhat more tractable. In the last quarter of the century, the West Publishing Company, of St. Paul, Minnesota, began a profitable business based on taming the dragons of case law. The states published their decisions very slowly; West published them fast, and bound them up into regional reporters (Atlantic, Northeast, Northwest, Southern, Southeast, Southwest, and Pacific). *The Northwest Reporter,* which included Minnesota, was the first; it began to appear in 1879. West ultimately indexed the cases with a naïve but effective "key-number" system. Very soon, the little pop-art key of this private company became an indispensable tool of the lawyers. *The Century Edition of the American Digest,* which West published beginning in 1897, gathered together every reported case (it claimed there were more than 500,000 of them) indexed, classified, and bound into fifty volumes, from "Abandonment" through "Work and Labor." Each ten-year period since then, West has published a *Decennial Digest,* harvesting the cases for that decade; in between, it markets advance sheets and temporary volumes. The Citator system also began in the late 19th century. The Citator, published for individual states, then for regional groupings, helps the lawyer find out the later history of a reported case. All this is expressed in dry numbers and letters; but from these the reader can tell who cited the case, on what point, and whether it was approved, disapproved, or "distinguished." The Citator began as gummed labels for lawyers to paste in their personal or office copies of reports. Then it graduated to bound volumes. These red books, thick and thin, useful but unloved, became as familiar to lawyers as West's little keys.

Nothing remotely comparable was ever done, unfortunately, for the even more chaotic system of statute law; Frederic Stimson published *American Statute Law* in 1881, a thick volume which gave the gist of the statutes, but it was nothing but a palliative. Until very recently, enacted law was still an uncharted sea, fifty times

over; it was waiting for some hero with an index. Nobody, until the computer came on the scene, proved up to the task.

In a federal system, the diversity of American law was deep-seated and ineradicable, despite a common heritage, despite the oneness of the economy, despite the tools (telephone, telegraph) that developed to bridge distances, despite the West system of reporters and digests. The older the state, the more volumes of reports bulged on its shelves. Each state built up its own body of laws, and, as time went on, had less and less need to grub around elsewhere for precedent, or pay attention to its neighbors, and hardly any need at all to look at mother England. The West system did not cure these local diseases. The same was true of statutes; borrowing was common, but each state had its own codes and revisions. There were regional groupings, to be sure. "Legislative precedent" can be traced as it traveled across the country. California acted as a focal point for Western legislation and case law; Nevada, its desert satellite, drew on it heavily. The Southern states worked out local solutions (if that is the word) to mutual problems of race relations; the smaller New England states modeled their railroad commissions on that of Massachusetts; states of the great plains had common problems of agriculture, freight rates, grain storage, railroad regulation; they all borrowed answers from each other. In general, what kept the dialects of law from becoming mutually unintelligible was their community of experience. The states traveled similar economic and social journeys, and the law went along.

That people and goods moved freely across state lines was the most important fact of American law. It meant that a competitive market of laws existed in the country. If a New Yorker had money, and wanted a divorce, she went to another state. If the corporation laws of his state were too harsh to suit an entrepreneur, New Jersey was willing to accommodate, and later on, Delaware. The states could act as "laboratories" of social legislation, to use a later euphemism; but this was only half the story. The states acted also as competing sellers of jurisprudence in a vast federal bazaar. A kind of Gresham's law was in operation: easy laws drove out the harsh ones. Experiments in the "laboratories" would not work so long as neighbor states refused to go along. New York's hard divorce laws remained nominally in force; but they were at least partly nullified by the divorce mills, notably (in the 20th century)

in Nevada.[34] Legislators hesitated to pass advanced labor laws for fear of driving out business; there always seemed to be other states which were only too eager to attract runaway businesses by offering low-wage shelters. Big national companies could not be controlled by regulation in any one particular state; the national railroad nets laughed at the efforts of a Rhode Island or a Connecticut. The only solutions were voluntary moves toward uniformity or strong federal control. The first had no real muscle behind it. The second was the ultimate solution.

As of 1900, the American legal system was, as it had been, a system of astonishing complexity. Much had been streamlined and simplified; but the sheer number of separate sovereignties, and the inherent jumble of the common-law system, meant that there was plenty of complexity (useful and useless) left to complain about. Diversities as old as the 17th century still survived here and there. Local circumstances, local economic needs, local turns of events, local legal cultures—these helped preserve some diversities, and helped create new ones. Legislation was not uniform; each state had its own set of statutes. English influence was down to a trickle; but Massachusetts, conservative in lawyer's law, was a port of entry for a few last pieces of English doctrine, which landed at Boston and were transshipped farther West. No two states had the same economy, society, or history; no two had the same mix of peoples. Yet, these differences among states cannot easily explain all the differences in the laws. Why Illinois should have a more backward civil process than Missouri is not easy to explain by reference to concrete social forces. Centrifugal and centripetal forces were both strong—and complex—currents running through American law.

[34] In the 20th century, Nevada made a career, so to speak, out of legalizing what was illegal elsewhere, especially in its big neighbor, California. Gambling was and is the most egregious example.