North Dakota Law Review

Volume 53 | Number 2 Article 4

1976

Looking Back on a Century of Complete Codification of the Law

Robert Vogel

LOOKING BACK ON A CENTURY OF COMPLETE CODIFICATION OF THE LAW

ROBERT VOGEL*

I. INTRODUCTION

Codification of substantive law has always been rare in the English-speaking world, although common in civil-law countries,[1] dating back to the days of imperial Rome.[2]

Georgia and Dakota Territory were the first jurisdictions in the English-speaking world to codify their entire body of law, both legislative and judicial.[3]

When Georgia and Dakota Territory were codifying their substantive as well as procedural law, they were making jurisprudential history. However, probably neither realized what the other was doing, and imperfectly realized how historically important their own acts were. It is doubtful that any information on codification passed between Georgia and Dakota Territory in the early 1860s, when they were most active in codifying, because the Civil War was being fought and Georgia was a Confederate state, while Dakota Territory was on the northern frontier.

The lack of realization of the historic importance of Dakota Territory's codification is indicated by the context in which it is mentioned in the standard history of the Territory, written contemporaneously. Kingsbury's *History of Dakota Territory*[4] lists the adop-

---

* Justice, North Dakota Supreme Court; B.S., 1939, University of North Dakota; LL.B., 1942, Minneapolis-Minnesota College of Law (now consolidated into William Mitchell College of Law, St. Paul, Minnesota).

1. The Napoleonic Code of 1803 is the foundation of much of the law of Europe, as well as Quebec and, to some extent, Louisiana, on this continent. If we keep in mind the distinction between codification as an attempt to state anew all the law in written form, on the one hand, and a collection, digest, or compilation of preexisting statutes, with or without annotations, on the other, Georgia and Dakota Territory were the first in codification. Mere compilation of the laws was nothing new. Pennsylvania made a "Code," actually a compilation, of its property law 100 years before the codes of David Dudley Field. Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 396 (1907). Louisiana codified some of its law, based to a great extent on France's Napoleonic Code and upon Spanish law, in 1808. The leader in its codification was Edward Livingston, a disciple of Jeremy Bentham, as was Field. For Livingston's debt to Bentham, see Dillon, *Bentham's Influence in the Reforms of the Nineteenth Century*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 507-08n.1 (1907).

2. H. MAINE, ANCIENT LAW (2d American ed. 1874) (2d London ed. n.d.), said of Roman law, "The most celebrated system of jurisprudence known to the world begins as it ends with a Code." *Id.* at 1.

3. The documentation for this statement, and a demonstration that Georgia was first, require another article by this author, as yet unpublished.

4. 1 G. KINGSBURY, HISTORY OF DAKOTA TERRITORY (1915).

tion of substantive civil and penal codes as only one of the multiple accomplishments of the 1865 Territorial Legislature, which included the passage of private divorce bills, authorization of wolf bounties, fence and herd laws, and an act authorizing a county to build a jail.[5]

Nevertheless, the adoption of substantive codes was an epic achievement and the culmination of great efforts of legal reformers for more than a century and a half. If the actual codifiers of early Dakota Territory legislatures did not realize the historic importance of their actions, later observers, in the Dakotas and elsewhere, did so.[6]

II. NINETEENTH CENTURY ARGUMENTS ON CODIFICATION

Peter C. Shannon, then Chief Justice of the Territorial Supreme Court, was one of the three commissioners who drafted the Territorial Revised Code of 1877. He was recognized by Clement A. Lounsberry, North Dakota historian, as chiefly responsible for the codification of 1877 and the modifications included in it.[7] Shannon lauded David Dudley Field, the principal author of the New York codes, as equal in stature to the author of the Roman Justinian Code, and said that the Field Codes owed much to the Roman law as expressed in the Code of Justinian.[8]

Professor William B. Fisch, in two articles,[9] outlines the drive for codification in England and in America and the mixed results achieved. Both his articles and the preface to the 1943 Revised Code[10] reveal the Dakotas' debt to Jeremy Bentham, the father of modern codification, and his followers.

From about 1830 on, legal literature in the United States was full of articles for and against the idea of "codification,"[11] a word which, incidentally, was coined by Jeremy Bentham. Field's chief opponent,

---

5. *Id.* at 429-30.

6. *See* 1 C. LOUNSBERRY, HISTORY OF NORTH DAKOTA (1917).

7. *Id.* at 437.

8. *Id.* at 438. On the death of David Dudley Field, Chief Justice Shannon of Dakota Territory wrote:

> 'His [David Dudley Field's] ideal and model was the code of Justinian, which for thirteen centuries has been considered as one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius. His studies early taught him that the Justinian code is, indeed, the chief source whence have been drawn most of the best principles and doctrines of boasted common law. . . .'

Id.

9. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D.L. REV. 485 (1966); *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D.L. REV. 9 (1968).

10. N.D. REV. CODE, preface at 5 (1943).

11. *See, e.g.*, THE LEGAL MIND IN AMERICA—FROM INDEPENDENCE TO THE CIVIL WAR (P. Miller ed. 1969), which contains a selection of speeches for and against codification. Articles in favor of codification and against common-law methods are those by William Sampson, Henry Dwight Sedgwick, and Thomas Smith Grimke.

James Coolidge Carter, wrote an entire book in opposition to the idea of codification.[12]

One of the more interesting articles in favor of codification points out that the common law is actually only the "custom of the people of the southern part of a little island in the North Atlantic. . ."[13] and that "[o]ur real property law is the product, not of the necessities of the American people, but of the armed knights of the feudal ages. . . ."[14] In language which anticipates the difficulty of preserving codes against enervating judicial interpretation, George Hoadly points out that our lawyers are trained in the case-law system and in English legal history, and that "[l]awyers live too often intellectually in England, and not in the world."[15] Therefore, after spending two or three years mentally in England, a lawyer spends his life insular, looking backward instead of forward, following rules the reasons for which have been lost, and following a *tunc pro nunc* policy.

Bentham and his followers, on the other hand, were regarded by many, and perhaps most, lawyers and jurists, as freaks, cranks, and fools. Carter variously describes Bentham's ideas as gibberish and absurdity.[16] Professor Joseph Henry Beale, Jr., called Bentham's idea that law made by legislatures is better than law made by judges "a curious ignorance one is perhaps not quite justified in calling insane. . . ."[17] Bentham paid his respects to the common law by calling it

> that fictitious composition which has no known person for its author, no known assemblage of words for its substance, forms every where the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck on upon that imaginary ground, compose the furniture of every national code. What follows?—that he who, . . . wants an example of a complete body of law to refer to, must begin with making one.[18]

III. WHY DAKOTA TERRITORY?

With battle lines so clearly drawn, it is all the more remarkable that Dakota Territory should have adopted its codes almost by indifference. Kingsbury describes the event in this manner:

---

12. J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907). This book contains a series of lectures that were to be given at the Harvard University School of Law in the spring of 1905, but Carter died in February of that year.
13. Hoadly, *Codification of the Common Law*, 23 AM. L. REV. 495, 496 (1889) (first given as an address at the American Bar Association meeting in 1888).
14. *Id.* at 497.
15. *Id.* at 496.
16. J. CARTER, *supra* note 12.
17. Beale, *The Development of Jurisprudence During the Nineteenth Century*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 558 (1907).
18. J. BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION at xxx-xxxi (1948).

> The codes [civil and penal, from New York] were completed in February, 1865 [in New York], but had not been passed upon by the Legislature of the Empire State, when a printed copy of the report of the commission containing the civil and penal codes, and also the maritime code, came into the possession of the Supreme Court of the Territory of Dakota, then composed of Ara Bartlett, chief justice; Jefferson P. Kidder and William E. Gleason, associate justices; all good lawyers, and all favorably impressed by the codes prepared by Mr. Field. The codes adopted by the Dakota Legislature in March at the first session, in 1862, had not proved satisfactory in every respect, and the bench and bar of the territory united upon recommending that they be repealed and the Field Codes substituted in their stead. This was done at this session, the Legislature of Dakota being the first legislative body to enact and put in operation these excellent laws.[19]

Perhaps some explanation of the lack of notice of the historical importance of codification by the Territory of Dakota is found in the fact that the population of the Territory in 1870 was 14,181, probably exclusive of Indians.[20] Of the 14,181, only 2,405 lived in the northern part of the Territory, which later became North Dakota.[21] In 1862, when the first of the codes was adopted, the population of Dakota Territory was only 2,402.[22]

Another reason for the contemporary lack of interest in Dakota's codification may be that it occurred during the Civil War era and a period of deep depression in the Territory of Dakota.[23]

One of the motives for the adoption of the codes by the early legislators of Dakota Territory was that they needed laws at once, and the Field Codes were available in handy form.[24]

Another motive may have been a distrust of judge-made law, due in part to the fact that the territorial judges were political appointees from the eastern states, unfamiliar with local conditions. Lamar calls them, along with all other territorial officials, "political hacks."[25] One Chief Justice, French, had no prior judicial or legal experience when appointed. At one point the three supreme court judges were described by a politician of their own political party, who himself later became a judge and then a senator, as "an ass, a knave, and a drunkard."[26] The "ass" and the "knave" were removed the next year, but not the "drunkard." Most of the territorial judges were also active in politics. For example, Judges Kidder

19. 1 G. KINGSBURY, *supra* note 4, at 429-30.
20. U.S. DEPT. COMMERCE, 1970 CENSUS OF POPULATION, v. I, pt. A, sec. 1 at 1-49 (1972).
21. *Id.*
22. DAKOTA TERRITORY H. JOUR. 50-51 (1862) (legislative census).
23. H. LAMAR, DAKOTA TERRITORY 1861-1889 at 98 (1956).
24. For similar actions in the early American colonial period, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 78-81 (1973).
25. H. LAMAR, *supra* note 23, at 118.
26. *Id.* at 138.

and Bennett actively sought election as territorial delegate during much of their terms.[27] Kidder was elected delegate while a judge and resigned only after the election "to prepare for his congressional duties."[28]

The general level of judicial competence may be indicated by the fact that jurors challenged for bias in a criminal case were allowed to sit even though they had expressed opinions in the case and two were bondsmen for the defendant.[29]

Another reason for preferring a code to the common law may have been the common frontier attitude of independence and the feeling that a frontiersman could do anything he set his mind to, including the making and interpreting of laws. The latter attitude has persisted. An interesting example is found in chapter 82 of the Laws of 1891 of the State of North Dakota, providing for a commission to revise the laws, with the commission to consist of two attorneys at law and one "experienced businessman."[30] A continuation of this attitude may be indicated by the fact that the percentage of lawyers in the North Dakota Legislature usually is about 10 percent, compared with the 20 percent to 50 percent or more membership of lawyers in other legislatures.

A distrust of lawyers is part of the Benthamite tradition. Consider one of Bentham's descriptions of lawyers:

> With minds of every class the mind of the lawyer has to deal. Of the structure of the human mind what does the lawyer know? Exactly what the grub knows of the bud it preys upon. By tradition, by a blind and rickety kind of experience, by something resembling instinct, he knows by what sophisms the minds of jurymen are poisoned; by what jargon their understandings are be bewildered; how, by a name of reproach, the man who asks for the execution of the laws, and the formation of good ones, is painted as an enemy,—the judge who by quibbles paralyzes the laws which exist, and strains every nerve to prevent their improvement, is pointed out as an idol to be stuffed with adoration and with offerings.[31]

IV. SUBSEQUENT COMMENTS ON THE CODIFICATION BY DAKOTA TERRITORY

Professor Fisch's articles give a good account of attacks on the New York codes, which, inferentially, at least, also are attacks on

27. *Id.* at 163, 171-73.
28. 1 G. KINGSBURY, *supra* note 4, at 740-41.
29. *Id.* at 741.
30. Ch. 82 [1891] N.D. Sess. Laws 224.
31. J. BENTHAM, A BENTHAM READER 226 (M.P. Mack ed. 1969).

the Dakota Codes.[32] English opinion in particular was rather haughty in tone.[33] English criticisms were taken up with delight by Field's chief adversary, Carter, and quoted in his book.[34] But, as will be seen, even England had codified a part of its law before Dakota Territory and Georgia acted, and codified more later.

The Dakota Codes were given occasional attention, usually unfavorable, by leaders of the British and American bars. Sir Frederick Pollock eminent legal historian and lifelong correspondent with Oliver Wendell Holmes, Jr., who was sympathetic to codification in India, made these references to the western codes, meaning those of California and the Dakotas:

> That blessed Indian Specific Relief Act is still with me—not quite so bad as the corresponding sections of the New York Civil Code, on which it was partly modelled. It is strange how little harm bad codes do. I have not heard that even the New York abortion has done very much in the States where it has been enacted. *Quare* however what would happen if it were turned loose on a virgin jurisdiction where there were no professional traditions.[35]

And,

> [i]t is true that, when the law is pretty well settled, adventurous definitions do less harm than might be expected (Indian Contract Act—and the N.Y. draft Civil Code in your Western jurisdictions which foolishly adopted it).[36]

Holmes said of the publication of the Code of Procedure of the State of New York, as amended to 1870: "To say that the latest edition of the Code is a necessity to every New York lawyer is to say very little, and yet it is difficult to say more."[37]

Holmes expressed the view that codes can never anticipate future factual situations for all cases, so a code at best can constitute only "a mere textbook recommended by the government as containing all at present known on the subject."[38] He said that codes cannot be short, and cannot make each man his own lawyer, as the makers of the New York codes seemed to hope they would.[39] Holmes further stated that a code would not get rid of the lawyers and should

---

32. Fisch, *supra* note 9.
33. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D.L. REV. 9, 11-12 (1968).
34. J. CARTER, *supra* note 12, at 313-15.
35. 1 HOLMES-POLLOCK LETTERS 1874-1932 at 268 (2d ed. M.D. Howe ed. 1961) (combining two volumes into one) [hereinafter cited as LETTERS].
36. 2 LETTERS, *supra* note 35, at 199.
37. Holmes, *Value of the New York Code*, 5 AM. L. REV. 359 (1871), *reprinted in* HOLMES, BOOK NOTICES, UNCOLLECTED LETTERS AND PAPERS 57 (H.C. Shriver ed. 1936).
38. Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), Part I *partially reprinted in* HOLMES, BOOK NOTICES, UNCOLLECTED LETTERS AND PAPERS 63 (H.C. Shriver ed. 1936).
39. *Id.*

be written for them much more than the laity, and that the chief advantage of codification is making a philosophically arranged corpus juris possible, at the expense of the government and not at the risk of the writer.[40]

V. WAS BENTHAM RIGHT? WAS CODIFICATION A SUCCESS?

We cannot assume that even England has resisted all codification. It has codified large parts of its land law, its commercial law, its administrative law, and its criminal law.[41] Its first codification, the Merchant Shipping Act, in 1854,[42] preceded the adoption of the Dakota Codes. England also has codified its procedure, although the codification was done largely by the judiciary rather than by Parliament.[43] Even its codification by the judiciary of its procedure owes much to Bentham.

Certainly it is the modern view that legislation is the primary function of the legislature, rather than the courts. To this extent Bentham was clearly right. But, Bentham tended to overlook or minimize the fact that a function of the courts is to fill in the lacunae, to legislate "interstitially," as Justice Holmes put it.[44]

No legislature can anticipate every conceivable variety of factual and legal problem and legislate in advance to solve the problem. Concrete cases come before courts daily where decisions must be made, even though there is no legislative rule. If Bentham thought he could legislate for all conceivable conditions, he was wrong.

Bentham was likewise out of step with American doctrine in his opposition to written constitutions, particularly those containing general statements of abstract rights.[45] He believed in the superiority of legislatures and in their unlimited powers. This view, however, was simply not adaptable to America, where the legislature is only one of three coequal branches of government. Because of his view of the superiority of legislative law, he never had to face the problems of conflicts between legislative law and constitutional law. It is these conflicts which have resulted in the power of American courts to declare laws unconstitutional.

---

40. *Id.* at 64-65.

41. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 362-67 (5th ed. 1923); O. KAHN-FREUND, INTRODUCTION TO KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1949), *partially reprinted in* H. BERMAN, THE NATURE AND FUNCTIONS OF LAW 277, 278 (1958).

42. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 362 (5th ed. 1923).

43. English procedure is codified by rules of the Supreme Court of Judicature pursuant to parliamentary authorization, Judicature Act, 35 & 36 Vic. cap. 66 (1873). *See* 5 R. POUND, JURISPRUDENCE 436-37 (1959).

44. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

45. Bentham ridiculed the Declaration of Independence and the declarations of rights in state constitutions by asserting that every coercive law violates provisions which gives persons the right to enjoyment of life, liberty, and property. J. BENTHAM, *supra* note 18, at 335-36.

Of course, Bentham did not believe that laws could be promulgated for all time. But, he thought they could be stated simply and clearly as they existed at any one given time and that the legislatures could and would make necessary changes. In believing that legislatures could make such changes, he was undoubtedly correct; but in believing that all necessary changes would be made, he was very wrong. Legislatures can and do make the great policy changes, but courts must, of necessity, make the small adjustments, and some not so small. There are small changes which the legislature in its ponderous movements cannot be prevailed upon to make. There are larger changes which ought to be made but are not made, because no political force exists at the time which is sufficient to put the weight of the legislature into motion. The "silver platter" doctrine[46] was an abomination, a way of letting lawbreakers on police forces of one jurisdiction supply evidence to other police forces, but few legislatures seemed to care. Some courts did care and declared the practice unconstitutional. Thus, such evidence was no longer admissible.[47]

No legislature, as another example, is likely to legislate in such detail that the law will provide guidance on how far policemen may go in getting confessions, but courts can and necessarily do so.[48] In "pricking out" the limits of permissible conduct courts are far better than legislatures, and they can correct errors better and faster than legislatures can. It is also true, as critics of codes have always maintained, that no code can be complete, even as to pre-existing law. Within a recent period of a month or two, the North Dakota Supreme Court has grappled with several cases which one would think would have been settled by the provisions of the code, but were not.

The North Dakota Supreme Court through the years has had several cases involving claims of incompatibility of positions, and has always held that the common law applied, since the code was silent. For example, in *Tarpo v. Bowman Public School District No.* 1,[49] the question was whether the positions of a school teacher and a mem-

46. The "silver platter" doctrine was first expressed by Justice Frankfurter in Lustig v. United States, 338 U.S. 74 (1949). Although that case held that the evidence obtained should have been suppressed, the distinction was made whether state or federal officials did the searching. Justice Frankfurter stated:

> The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.

Id. at 78-79.

47. Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). State decisions were divided on the question and North Dakota, unfortunately, followed the now-disallowed "silver platter" doctrine. *See* State v. Lacy, 55 N.D. 83, 212 N.W. 442 (1927); State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925).

48. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mallory v. United States, 354 U.S. 449 (1947); McNabb v. United States, 318 U.S. 332 (1943).

49. 232 N.W.2d 67 (N.D. 1975).

ber of the board of education in the same district were incompatible. The court held that the two positions were contrary to each other, and that the teacher should have a choice of which position to vacate.[50]

In *City of Bismarck v. Muhlhauser*,[51] one of the questions argued, but not decided, was whether a defaulting defendant had to show diligence before he could be permitted to reopen the judgment against him. The statute[52] does not mention diligence, but case law, although subject to two interpretations, sometimes did.[53]

A third case, *Tong v. Borstad*,[54] involved the interesting question of whether, and to what extent, custom is law where the code is silent. The case involved a tenant farmer under a land share-crop rental agreement where more summer fallow was left on the premises at the termination of the tenancy than had existed at the beginning. The court held that under such circumstances the tenant would be allowed to show local custom and usage enabling him to be compensated for the difference in value.[55]

Bentham was wrong, too, in underestimating the part that customs have in making the law, and the extent of which changing customs change the law. One has only to read court decisions of even thirty or forty years ago to realize how much the law has changed in ways untouched by legislation or even specific court decision. The decisions have changed largely because public opinion and customs have changed. Justice Cardozo cites the example of the change in attitude toward spouses who refuse to live with each other.[56] Not long ago, a wife could be forced to remain with her husband, unless he consented to her departure. In 1927, when Cardozo wrote, and even less today, one would not think of using force to keep a wife at home. Yet the statutes did not change. The change was made by public opinion and custom, and now courts recognize the change.

Another factor which Bentham and Field must have underestimated in believing that codes would triumph over the common law is the effect of the common-law training, and the institutional inertia, of judges and lawyers. When the codes were adopted, Dakota's lawyers had all been educated in the East, at common-law schools, or in offices by common-law-trained practitioners.[57] The result was

50. *Id.* at 71.
51. 234 N.W.2d 1 (N.D. 1975).
52. N.D. CENT. CODE § 32-17-13 (1976).
53. Hagen v. Altman, 79 N.W.2d 53, 60 (N.D. 1956); Huwe v. Singer, 63 N.W.2d 399, 400 (N.D. 1954); Azar v. Olson, 61 N.W.2d 188, 190 (N.D. 1953).
54. 231 N.W.2d 795 (N.D. 1975).
55. *Id.* at 800.
56. B. CARDOZO, PARADOXES OF LEGAL SCIENCE 18 (1928).
57. All the early judges were from eastern states, and all the delegates to the North Dakota Constitutional Convention of 1889 were born outside the Dakota Territory. *See* N.D. CONST. CONVENTION OF 1889, PROCEEDINGS AND DEBATES 4 (1889).

that early lawyers and judges applied common-law modes of thinking in arguing and deciding cases and cited common-law precedents, even though the code clearly stated that the common law did not apply in the Territory of Dakota unless there was no statute to cover the situation.[58]

Sometimes the courts emasculated a statute by following case law from other, usually common-law states, even where it conflicted with the code.[59]

Professor J. O. Muus told with some regret how little the Codes of North Dakota were used in teaching at law schools in code states, even at the University of North Dakota Law School.[60]

Professor Fisch mentioned how the Civil Code section on negligence, even though it seemed clearly to adopt the rule of comparative negligence by providing that a tortfeasor is liable to another "except so far as the latter has, willfully, or by want of ordinary care, brought the injury upon himself,"[61] was regularly interpreted to provide only for contributory negligence as an absolute defense.[62] After Professor Fisch's article appeared, North Dakota District Judge Eugene A. Burdick interpreted the same statute in accordance with its apparent meaning, but the North Dakota Supreme Court, after reviewing many decades of contrary interpretation, reversed Judge Burdick.[63] Legislative action subsequently adopted comparative negligence as the law of North Dakota.[64] A literal interpretation of the code by early judges would have done so almost 100 years sooner.[65] California, with the same statute,[66] recently refused to construe its

58. DAK. CIV. CODE § 6 (1865-66), presently found in N.D. CENT. CODE § 1-01-06 (1975).

59. For example, N.D. COMP. LAWS § 5918 (1913) provided: "Time is never considered as of the essence of a contract unless by its terms expressly so provided."

In Sunshine Cloak & Suit Co. v. Roquette Bros., 30 N.D. 143, 152 N.W. 359 (1915), the court nevertheless held that the time for delivery of clothing for the fall season was held to be of the essence, although the contract was silent on the subject. *Id.* at 148-49, 156-57, 152 N.W. at 361, 364.

Even more inexplicably, in Asplund v. Danielson, 56 N.D. 485, 217 N.W. 848 (1918), a written contract which provided in its entirety that "I agree to take this stock from W. Asplund at $100 on the 1st day of May, 1920," *id.* at 487, 217 N.W. at 849, was held, in spite of the same statute, to provide that time was of the essence, and a demand to take the stock and pay the money on June 1, 1920, was held to be too late. *Id.* at 490, 217 N.W. at 850.

For an example of hostility of the United States Supreme Court to codification, *see* McFaul v. Ramsey, 61 U.S. (20 How.) 523 (1857).

60. Muus, *The Influence of the Civil Code on the Teaching of Law at the University of North Dakota*, 4 N.D.L. REV. 175 (1932).

61. DAK. CIV. CODE § 853 (1865-66), *amended by* Ch. 78, § 3 [1973] N.D. Sess. Laws 143, 143-44 (codified in N.D. CENT. CODE § 9-10-06 (1975)).

62. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D.L. REV. 485, 514-15 (1966).

63. Krise v. Gillund, 184 N.W.2d 405 (N.D. 1971).

64. Ch. 78, § 1 [1973] N.D. Sess. Laws 143, 143 (codified in N.D. CENT. CODE § 9-10-07 (1975)).

65. *See* Bostwick v. Minneapolis & P. Ry. Co., 2 N.D. 440, 51 N.W. 781 (1892), where the court said that the code section in question, DAK. CIV. CODE § 853 (1865-66), merely "declares and confirms that rule as recognized and explained in the foregoing cases," all of which were from non-Field Code states. *Id.* at 454-55, 51 N.W. at 786.

66. CAL. CIV. CODE § 1714 (1973).

statute literally, but adopted "pure" comparative negligence by judicial action.[67]

In summary, Bentham and his followers were not as successful as they hoped to be because: (1) they wrongly assumed that legislatures could and would keep up with all changes, great and small, in customs and practices and make needed modifications in the law;[68] (2) they underestimated the degree and speed of changes in customs and public opinion; (3) they underestimated the inertia and conservatism of judges and lawyers who had been trained in common-law methods of reasoning and the use of common-law precedents; (4) they understated the importance of interstitial interpretation by the courts; and (5) their system was not fully adaptable to a government where constitutional mandates prevailed over legislative law.

However, it must be recognized that Bentham and his followers, especially Field, accomplished much, and substantial credit is due them.

First of all, we must recognize that they gave to the sparsely settled wilderness of Dakota an instant body of law, up-to-date and reasonably adaptable to immediate use. There simply was not time to develop a body of law by common-law methods, and the choice appeared to be between codification or anarchy and vigilante justice.

Second, the codifiers were greatly successful in simplifying procedure. No lawyer in Dakota Territory, or the states of North Dakota and South Dakota, has had to delve deeply into the distinction between legal and equitable jurisdiction[69] or the esoteric differences between forms of pleading or forms of writs. There is only one form of action and one body of law.

Third, most states now have a vast body of codified law, although the laws are not always legislative in origin. These states are indebted to Bentham and Field and their followers for providing an incentive to codify. Procedure is largely codified everywhere. True, codification today is usually made by courts, not by legislatures, but the Federal Rules of Civil Procedure, Criminal Procedure, and Appellate Procedure, and the corresponding state rules, as well as the new Federal Rules of Evidence,[70] all owe much to the New York (Field) Codes of Civil Procedure and Criminal Procedure. Dakota Territory was among the earliest jurisdictions to adopt the Field Codes, and the lawyers of the Dakotas never have had to learn by

67. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

68. Professor John Henry Wigmore astutely stated: "A code fixes error as well as truth." Wigmore, *A General Survey of the History of the Rules of Evidence*, in II SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 691, 701 (1907).

69. The distinction between legal and equitable jurisdiction is no longer important except to determine whether a jury trial is available. N.D.R. Civ. P. 38(a). *See* Gresens v. Martin, 27 N.D. 231, 145 N.W. 823 (1914).

70. North Dakota Rules of Evidence, based upon the Federal Rules of Evidence, were adopted by the North Dakota Supreme Court on December 1, 1976, and will become effective on February 15, 1977, or as soon thereafter as publication of the rules is complete.

hard knocks the great importance of the reforms made by Field.

Similarly, the courts have worked a quiet revolution of codification in another way, by modifying the law of the several states to conform to such recommended codes as the Restatements of the Law by the American Law Institute and the Uniform Laws recommended by the Commissioners on Uniform State Laws. All of these are codes and all of them owe much to Bentham and Field and their followers.

North Dakota has been a leader in these kinds of codification also. It is second among all the states in the number of Uniform Laws adopted, approximately eighty-five;[71] it has frequently cited and adopted rules from the Restatements; and it was the first jurisdiction in the nation to adopt an Administrative Agencies Practice Act,[72] also a form of codification.

Critics of codification occasionally have asserted that codification has failed because it did not reduce the volume of litigation. But, their documentation of the claim is imprecise and unconvincing, consisting only of a comparison of the number of volumes of reports of the courts in various jurisdictions.[73] These comparisons are suspect for many reasons. For example, there is no way to compare the proclivity for litigation of various jurisdictions. Pioneer settlements probably had more litigation per capita than more stable population groups. Certainly the per capita number of lawsuits in pioneer North Dakota was higher than it presently is. A comparison of the number of books of reported decisions in each jurisdiction gives no indication of the average length of opinions. Justice Robinson of North Dakota once claimed that North Dakota decisions were the longest in the nation.[74] If so, it would take fewer decisions to make a volume.

Professor Fisch suggested that the codes had lost their identity, and presumably had partially failed, because the original format was destroyed in subsequent codifications.[75] In 1943 particularly, the original format of separate political, procedural, and substantive codes was abandoned in North Dakota, and an alphabetical format of sixty chapters was substituted. But surely this is a relatively unimportant change if the content of the original codes was retained,

71. Conversation with the Honorable Eugene A. Burdick, former Chairman of Commissioners of Uniform State Laws, Sept. 18, 1975. On December 1, 1976, the North Dakota Supreme Court adopted the Uniform Class Actions Rule, by amending N.D.R. CIV. P. 23, and the Uniform Certification of Questions of Law Rule, which became N.D.R. APP. P. 47.

72. Chap. 240 [1941] N.D. Sess. Laws 393 (codified in N.D. CENT. CODE ch. 28-32 (1974), *as amended*, (Supp. 1975)), was adopted two years before Wisconsin's and five years prior to approval of the Model Act by the National Conference of Commissoners on Uniform State Laws and the American Bar Association. Cooper, *Turning the Spotlight on State Administrative Procedure*, 49 A.B.A.J. 29, 30n.4 (1963).

73. *See, e.g.*, J. CARTER, *supra* note 12, at 308.

74. J. ROBINSON, WRONGS AND REMEDIES 73 (1923).

75. Fisch, *supra* note 33, at 54.

as it was to a large extent. I suspect that well over three-fourths of the original code sections are retained in our present Code, either unchanged or with only minor changes. If so, a change of format without a change of substance is surely no indication of a failure of the original concept.

Finally, in comparing the relative virtues of codes and the common law, there is no way to determine how many lawsuits were avoided simply because the plain and simple definitions of the codes left no room for argument, and lawsuits were accordingly not commenced or were settled rather than litigated. Field gives as one of his examples of imprecision in the common law the number of cases involving the definition of "navigable,"[76] and says that all of these lengthy and expensive lawsuits could have been avoided by a code definition specifying a meaning for the word. Similarly, other lawsuits may have been avoided by the codes, and we have no way of knowing how many there were.

VI. CONCLUSION

It is the author's opinion that the overall effect of the codes has been beneficial. Certainly, the benefits to the pioneers in a hostile and lawless land must have been immense. But even in later years, the benefits of the complete statement of the law as of the 1860s can still be seen. North Dakotans learned early the habit of legislating comprehensively and interpreting through the courts in detail. A written law, after all, is more likely to create a government of laws, not of men, and this has been the aim of justice through the centuries.

The habit of codifying laws has stayed with the state, and North Dakotans therefore have been among the leaders in reforming administrative and judicial procedure. North Dakota has rules of civil, criminal, and appellate procedure; more than eighty Uniform Laws; and a complete body of statutory law.

Many changes have been made since the first Dakota Code was adopted, and the changes have been made by many methods— legislation, judicial interpretation, and the use of the initiative. But, an impressive amount of the original codes remains in effect, adequately performing its functions.

I suggest that we should salute Bentham, Field, Justice Shannon, and the other codifiers of the law. They accomplished less than they hoped for, and with less harm than their opponents feared. Still, they did accomplish a great deal. Dakota Territory was their laboratory, one of the first two in the English-speaking world, and the product, on the whole, was good.

76. Field, *Law Reform in the United States*, 25 AM. L. REV. 516, 529 (1891).