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# LET'S REPEAL THE FIELD CODE!

Scott J. Burnham<sup>1</sup>

## I. INTRODUCTION

In 2005, the Montana legislature unanimously repealed Montana Code Annotated section 28-2-722, which made employment contracts unenforceable by the employer beyond a term of two years.<sup>2</sup> That in itself, while a good thing, was not particularly significant.<sup>3</sup> But as Gilderoy Lockhart said to Harry Potter, “it’s a *start*, Harry, it’s a *start*.”<sup>4</sup> The 1895 Montana legislature had taken that statute, among others, from the California Civil Code.<sup>5</sup> California had adapted its statutes from the Field Civil Code, which David Dudley Field authored and proposed in the 1860s for New York, although New York never adopted it.<sup>6</sup> The Montana

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1. Professor of Law, The University of Montana School of Law. I am grateful for the research assistance of John Mastin, a recent graduate of The University of Montana School of Law.

2. Before it was repealed, Montana Code Annotated section 28-2-722 (2003) (repealed 2005) provided:

A contract to render personal services cannot be enforced against the employee beyond the term of 2 years from the commencement of service under it, but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

This statute was codified in Title 28, Chapter 2, Part 7, which is captioned “Illegal Objects and Provisions.” This careless use of terms is another irritant of the Field Code. One should be concerned about committing an illegal act, but the act described in this statute – making an employment contract for more than two years – was in no way illegal. There was no prohibition against making or performing such an agreement, nor was the agreement void. It was simply unenforceable, and even then, only by the employer. I am grateful to Dan Browder, a student at The University of Montana School of Law, for pointing out this distinction. See 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1374-77 (1962).

3. The brevity of the bill repealing Montana Code Annotated section 28-2-722 was noted in Robert Natelson, *Billings House Member Sponsors Smartest Bill*, BILLINGS OUTPOST, April 21, 2005, at 5. The bill read “Section 1. Repealer. Section 28-2-722, MCA, is repealed. The End.” *Id.* (quoting H.B. 257, 59th Leg., 2005 Mont. Laws ch. 166), available at <http://www.billingsnews.com/story?storyid=16814&issue=258> (last visited Feb. 1, 2006).

4. J. K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 91 (1999). This was my favorite line from the book. I can’t believe it didn’t make it into the movie.

5. See *infra* Part III, where I discuss the interpretation of the Montana Code Annotated’s historical annotations following each statute. The historical annotation following Montana Code Annotated section 28-2-722 (2003) (repealed 2005) is:

En. Sec. 2675, Civ. C. 1895; re-en. Sec. 5258, Rev. C. 1907; re-en. Sec. 7773, R.C.M. 1921; Cal. Civ. C. Sec. 1980; Field Civ. C. Sec. 1013; re-en. Sec. 7773, R.C.M. 1935; R.C.M. 1947, 41-206; amd. Sec. 20, Ch. 117, L. 1979.

6. See, e.g., Montana Code Annotated section 28-2-722 (2003) (repealed 2005), which derived from former California Civil Code section 1980 (Deering 1885) (repealed 1937),

legislature should continue its good work by repealing the remaining Field Civil Code statutes that were enacted in Montana. This essay explains why.<sup>7</sup> Part II explains the general background of the Field Code, Part III explains the background of the Montana statutes, Part IV discusses the problems caused by the Field Code in Montana jurisprudence, and Part V concludes that the Field Code statutes should be repealed from the Montana Code.

## II. BACKGROUND OF THE FIELD CODE

Although confined to one compact place in Field's original code, some 766 Field Code provisions are scattered throughout the Montana Code Annotated, making the task of tracking them down difficult. A substantial number are found in Title 70, in the area of property.<sup>8</sup> These were the subject of scrutiny by my colleague Robert Natelson, whose conclusion about the modern utility of the statutes was very similar to mine, if stated with more restraint.<sup>9</sup> Title 1 of the Montana Code Annotated contains the "maxims of jurisprudence."<sup>10</sup> These pithy sayings are derived from Roman Law. There is nothing wrong with them as hortatory bromides, but when reduced to black letter law they can cause great mischief, as we shall see.<sup>11</sup> Title 27 contains a number of Field Code

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which derived from DAVID DUDLEY FIELD, *THE CIVIL CODE OF THE STATE OF NEW YORK* section 1013 (Proposed Draft 1865); *THE COLUMBIA ENCYCLOPEDIA* 982 (Paul Lagassé ed., Columbia Univ. Press, 6th ed. 2000), available at <http://www.bartleby.com/65/fi/Field-Da.html> (last visited Feb 2, 2006).

7. I previously expressed my point of view about the Field Code in Andrew P. Morriss, Scott J. Burnham & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371 (2000) [hereinafter *Debate*]. See also Andrew P. Morriss, *Decius S. Wade's Necessity for Codification*, 61 MONT. L. REV. 407 (2000); Andrew P. Morriss, "This State Will Soon Have Plenty of Laws" — *Lessons from One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359 (1995) [hereinafter *Lessons from One Hundred Years*].

8. MONT. CODE ANN. tit. 70 (2005).

9. In Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 93 (1990), the author concludes:

Thus may we speculate and trace pictures of what might be. The precise forms of those pictures remain of secondary importance. Of primary importance is the following: When left to a developing common law, the rules on running covenants would be home-grown. They would meet the needs and ideals of justice, not of somewhere else, but of Montana.

10. MONT. CODE ANN. tit. 1, ch. 3 (2005).

11. See *infra* Part IV.C. for discussion of Montana Code Annotated section 1-3-204 (2005). The maxims of jurisprudence also caused mischief in *Roundup Cattle Feeders v. Horpestad*, 184 Mont. 480, 603 P.2d 1044 (1979), in which a feedlot operator fed cattle for a number of months according to contract, but was unable to continue because of financial circumstances brought on by events beyond its control. The feedlot operator sought to recover in restitution the value of the benefit conferred upon the owner of the cattle for sev-

statutes in the areas of remedies and torts.<sup>12</sup> Field Code statutes also lurk in Title 30, in such commercial areas as sales, auctions, factors, and trademarks; in Title 31, credit transactions; Title 39, employment; Title 40, family law; Title 41, minors; Title 69, regulation of carriers; and Title 71, mortgages and pledges.<sup>13</sup>

A quick glance at these statutes indicates their antiquated flavor. Some are merely unhelpful, like this guidance on the remedy for the tort of seduction: "The damages for seduction rest in the sound discretion of the jury."<sup>14</sup> Similarly unhelpful is a statute for the chartering of a ship:

**Contract for letting of ship.** The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or part owner may be a charterer.<sup>15</sup>

Other statutes are absurd. Consider this sequence from the chapter on Sales that seems to proceed by describing the sound of one hand clapping, then the other, and then the two together:

**Agreement to sell.** An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.<sup>16</sup>

**Agreement to buy.** An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing.<sup>17</sup>

**Agreement to sell and buy.** An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.<sup>18</sup>

Things go from humorous to dangerous when the Code states the rule for implied warranties in a contract for sale:

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eral months' worth of feeding. The usual rule, described by RESTATEMENT (SECOND) OF CONTRACTS section 374 (1981), is that a contract breaker may recover in restitution after paying damages. However, the Montana Supreme Court denied Roundup's claim for restitution, citing Montana Code Annotated section 1-3-208 (1979), which provides in its entirety, "No one can take advantage of his own wrong." *Roundup Cattle Feeders*, 184 Mont. at 485, 603 P.2d at 1047.

12. See, e.g., MONT. CODE ANN. § 27-1-317 (2005).

13. See, e.g., *id.* §§ 30-11-101, 31-1-101, 39-2-101, 40-2-101, 41-1-101, 69-11-101, 71-1-101.

14. *Id.* § 27-1-322.

15. *Id.* § 70-8-201.

16. *Id.* § 30-11-104.

17. *Id.* § 30-11-105.

18. MONT. CODE ANN. § 30-11-106 (2005).

**No implied warranty in mere contract of sale.** Except as prescribed by this part, a mere contract of sale or agreement to sell does not imply a warranty.<sup>19</sup>

This rule is, of course, the opposite of the rule applicable to warranties implied in the sale of goods under the Uniform Commercial Code (“UCC”).<sup>20</sup> The conflict between the two warranty provisions is easily resolved, as the more particular statute applying to the sale of goods creates an exception to the more general statute applying to all sales.<sup>21</sup> Why wasn’t this statute repealed when the UCC was enacted? Presumably it still applies to those sales contracts not covered by the narrower Article 2, which applies only to the sale of goods. Therein lies the danger, because drafters and judicial interpreters of many transactions outside the scope of UCC Article 2, such as software contracts and contracts for the sale of electricity, apply Article 2 by analogy.<sup>22</sup> However, in Montana, we would have to apply the antiquated Field Code rules rather than the rules supplied by the more modern UCC. For example, under Montana Code Annotated section 30-11-210, a buyer of software in Montana would get no implied warranty of the merchantability of the product.<sup>23</sup>

Speaking of danger, Field did not realize the firestorm he was starting when he included this provision addressing unborn children among his Code provisions on the rights of minors: “A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.”<sup>24</sup> For subsequent developments, see the proposed Montana “Protection for the Unborn Child Act,” which would make it a criminal offense to cause the death of an unborn child.<sup>25</sup>

19. *Id.* § 30-11-210.

20. See Montana Code Annotated section § 30-2-314(1), one of Montana’s U.C.C. statutes, which provides in pertinent part that “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”

21. If we did not know this general rule, sure enough Montana Code Annotated section 1-2-102 (2005) informs us:

**Intention of the legislature – particular and general provisions.** In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

22. See, e.g., *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 468 (1998) (applying U.C.C. § 2-609 to the sale of electricity by analogy).

23. MONT. CODE ANN. § 30-11-210 (2005).

24. *Id.* § 41-1-103.

25. H.B. 231, 59th Leg. (Mont. 2005).

This proposed “amendment” to the statute flows logically from Field’s words.

Over the years, the Montana legislature has repealed a number of Field Code statutes, often replacing them with the more modern uniform laws. For example, Field Code statutes in the area of real property rentals were replaced by the Uniform Residential Landlord Tenant Act in 1977,<sup>26</sup> and almost a hundred Field Code statutes in the area of trusts and estates were replaced by the Uniform Probate Code in 1974<sup>27</sup> and the Trust Code in 1989.<sup>28</sup> But much work remains to be done!

Of course, not every Field Code statute warrants repeal. A few serve a regulatory function or purposefully change the common law rule.<sup>29</sup> These should remain, but those merely stating the common law as it stood in the 1860s should be repealed.<sup>30</sup>

### III. BACKGROUND OF THE MONTANA STATUTES

The focus here is contracts, where 152 Field Code statutes remain in Title 28.<sup>31</sup> Where did these contract statutes come from? When I went to law school, contract law was taught as common law. I remember the professor calling to our attention something in the back of the textbook known as the UCC, which he recommended we look at some rainy day. However, even the UCC, while it calls itself a code, generally serves the goal of facilitating rather than regulating. The UCC enshrines the principle of freedom of contract – parties are generally free to change the rules. The rules, as provided by the UCC, are “default rules” to be applied in the absence of agreement.<sup>32</sup> Under the UCC, the rules are also trumped by waiver, course of dealing, course of performance, industry practice, etc.<sup>33</sup> They are also intended to be flexible –

26. See MONT. CODE ANN. §§ 70-24-101 to -442 (2005).

27. *Id.* §§ 72-1-101 to 72-5-502, 72-16-601 to -612.

28. *Id.* §§ 72-33-101 to 72-36-302.

29. See *infra* Part IV.C. for discussion of MONT. CODE ANN. § 28-1-1401 (2005).

30. See Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 146-148 (2005) [hereinafter *War Against Arbitration*], in which I discussed the danger of taking an area of the law that is facilitatory and making it regulatory by codifying it.

31. In addition, there are also almost 100 Field Code statutes in the areas of agency and guaranty in Title 28. These could be eliminated without creating a void in the law, as the law in those areas may now be found in the RESTATEMENT (SECOND) OF AGENCY (1958), and the RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY (1996).

32. U.C.C. § 1-302 (2001); MONT. CODE ANN. § 30-1-302 (2005).

33. See, e.g., U.C.C. §§ 1-205 (2001), 2-208 (1977); MONT. CODE ANN. §§ 30-1-205, 30-2-208 (2005).

they are the rules because they reflect commercial practice, not the rules handed down from above to those in commerce.

While in theory the principles of contract law govern all contracts, frequently the law with respect to some particular transaction becomes so rule-bound, so regulated, that it is spun off and not considered part of the general rubric of contract law anymore.<sup>34</sup> Examples of separately codified areas are credit transactions,<sup>35</sup> consumer transactions,<sup>36</sup> and insurance contracts.<sup>37</sup> Beyond this is special interest legislation which takes us by surprise when we find statutes governing particular transactions, such as those governing the sale of farm implement dealerships,<sup>38</sup> wheelchair purchases,<sup>39</sup> and liability of ski resorts.<sup>40</sup> Traditionally though, the basic core of contracts has been developed through the common law.

In Montana, however, the law of contracts, along with the other traditional common law areas of torts and property, is statutory. The source of Montana's laws lies in a Nineteenth Century reform movement called codification. The codifiers believed that common law was inaccessible – it was like having no law at all.<sup>41</sup> Robert Rantoul, a contemporary codifier of Field's, stated that "[n]o man can tell what the Common Law is; therefore it is not a law: for a law is a rule of action; but a rule which is unknown can govern no man's conduct."<sup>42</sup> Field himself complained, "[n]o Judge should have power to decide a cause without a rule to decide it by, else the suitor is subjected to his caprice."<sup>43</sup>

In the 1860s, David Dudley Field, a New York lawyer, toiled for years on codification. Field codified not only substantive areas of law like contracts and property, but laws for local governments, civil procedure, and even international law. The attraction of the

34. One scholar refers to the law of contracts as the law of "leftovers." LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 193 (1965).

35. MONT. CODE ANN. tit. 31 (2005).

36. *Id.* tit. 30, ch. 14, part 1.

37. *Id.* tit. 33.

38. *Id.* §§ 30-11-801 to -811.

39. Montana Wheelchair Warranty Act, MONT. CODE ANN. §§ 30-14-1201 to -1207 (2005).

40. MONT. CODE ANN. § 23-2-731 (2005).

41. Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 758 (2003) (quoting PETER J. KING, *UTILITARIAN JURISPRUDENCE IN AMERICA* 302 (1986)).

42. *Id.*

43. *Id.* (quoting DAVID DUDLEY FIELD, *CODIFICATION OF THE LAW, IN SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 349, 354 (A.P. Sprague ed., 1884)).

codes is readily apparent – the codes would produce the same law for every jurisdiction, clearly organized and easily accessible. Field's scheme never took hold in New York,<sup>44</sup> but it did catch on in California and the Dakota Territories, which enacted much of his Code.<sup>45</sup> When the Fourth Montana Legislature met in 1895, it decided to adopt the Field Code, employing the California version.

These statutes can be found in the Montana Code Annotated using the convenient History provided by our Legislative Council after each statute. For example, following Montana Code Annotated section 28-2-409, a statute we will discuss momentarily, we find this annotation:

History: En. Sec. 2122, Civ. C. 1895; re-en. Sec. 4983, Rev. C. 1907; re-en. Sec. 7485, R.C.M. 1921; Cal. Civ. C. Sec. 1577; Field Civ. C. Sec. 762; re-en. Sec. 7485, R.C.M. 1935; R.C.M. 1947, 13-313.<sup>46</sup>

If we break this information down into its component parts and arrange them in chronological order, we see its historical significance:

<i>Information</i>	<i>Significance</i>
Field Civ. C. Sec. 762	Field Civil Code source
Cal. Civ. C. Sec. 1577	California Civil Code source
En. Sec. 2122, Civ. C. 1895	Enacted in the Montana Civil Code, 1895
re-en. Sec. 4983, Rev. C. 1907	Re-enacted in the Revised Code, 1907
re-en. Sec. 7485, R.C.M. 1921	Re-enacted in the Revised Code of Montana, 1921
re-en. Sec. 7485, R.C.M. 1935	Re-enacted in the Revised Code of Montana, 1935
R.C.M. 1947, 13-313	Re-enacted in the Revised Code of Montana, 1947

This history proves extremely useful when researching the law in areas governed by sections of the Montana Code Annotated. The researcher can go back to the Field Civil Code for additional information about the “original intent” of the drafter because Field often provided notes and sources in his Code. One can then look to cases decided under the corresponding California Civil Code section for persuasive authority. The California cases are particularly useful when, as is often the case, there are no Mon-

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44. New York did enact Field's Code of Civil Procedure, thus putting that state out of step with most other jurisdictions that have enacted the Federal Rules of Civil Procedure. Arvo Van Alstyne, *The California Civil Code*, in 6 WEST'S ANN. CAL. CODES 1-43, at text accompanying n.10 (1954), available at [http://www.sandiego.edu/lrc/civil\\_code.html](http://www.sandiego.edu/lrc/civil_code.html) (last visited Feb. 2, 2006).

45. In addition to Montana and California, the Field Civil Codes have also been enacted, at least in part, in such states as North Dakota, South Dakota, Oklahoma, Idaho, New Mexico, Alabama, and Guam. *See, e.g.*, N.D. CENT. CODE § 9-03-13 (2005); S.D. CODIFIED LAWS § 53-4-9 (2005); OKLA. STAT. tit. 15, § 63 (2005); IDAHO CODE ANN. § 32-901 (2005); N.M. STAT. § 40-2-1 (2005); ALA. CODE § 8-1-20 (2005); GUAM CODE ANN. tit. 18, § 85313 (2005).

46. MONT. CODE ANN. § 28-2-409 (2005).



tana cases on point. Montana courts will not blindly follow the California precedent, however. As the Montana Supreme Court correctly stated in *Grady v. City of Livingston*,<sup>47</sup> where an attorney had urged the California interpretation on the court:

We are not unmindful of the rule to the effect that when one jurisdiction adopts a statute from another that the adopting jurisdiction also adopts the construction placed on the statute by the highest court of the state from which the statute is taken. But we have laid down a further rule which is that "this court will not blindly follow the construction given a particular statute by the court of a state from which we borrowed it, when the decision does not appeal to us as founded on right reasoning."<sup>48</sup>

Curiously, however, there is little history explaining why the Montana legislature adopted the Field Code as state law.<sup>49</sup> Perhaps Montanans were worried confusion would ensue if the new state was governed by the common law. Since Montana had been Spanish and French prior to its acquisition by the United States, questions could arise over what law prevailed. This was apparently the justification for California's adoption of the Field Code, for California, which had been part of Mexico just prior to statehood, also traced its legal ancestry to European civil codes.<sup>50</sup>

Cynics argued that enactment of the Field Code in Montana justified the legislature's continued existence. In other words, legislators were provided job security because of the ongoing need to reconcile the code sections with other statutes that were not repealed, amend them to accommodate local conditions for which they were not suited, and update them as time passed.<sup>51</sup> The whole-hearted approval of the Field Code, however, was stated in terms that were far from cynical. Colonel Wilbur F. Sanders, a former U.S. Senator and a leading proponent of codification, wrote with cheerful naiveté to Field's brother:

[A] citizen of Montana, who has but little money to spend on books, needs to have lying on his table but three: an English Dictionary to teach the knowledge of his own mother tongue; this Book of the Law [the Field Codes], to show him his rights as a member of civilized society; and the good old Family Bible to teach him his duties to God and to man.<sup>52</sup>

47. 115 Mont. 47, 141 P.2d 346 (1943).

48. *Id.* at 57-58, 141 P.2d at 351 (quoting *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 74 P. 197, 198 (1903)).

49. This history is recounted in *Lessons from One Hundred Years*, *supra* note 7, and Natelson, *supra* note 9.

50. Van Alstyne, *supra* note 44.

51. *Lessons from One Hundred Years*, *supra* note 7, at 408-09.

52. See *Debate*, *supra* note 7, at 380.

There were, of course, critics at the time, though they were few and swept aside in the rush to reform. One of the national critics, James C. Carter,<sup>53</sup> made these points in opposition to codification:

1. In fact, lay people would not be able to read or comprehend codes. And those who could read and understand them, would neglect to read them.
2. Nonlawyers would find the “precise formulas” of codes less comprehensible than “the simple principles of justice.”
3. Codification was impractical because no one could anticipate the facts of future transactions. The codes would freeze the development of the law and lose the evolutionary advantage of the common law.<sup>54</sup>

If Carter could see Montana jurisprudence today, he would have the pleasure of saying, “I told you so.” His point that lay people would not be able to comprehend the codes is exemplified by those self-taught legal experts like our Freemen friends who are quite adept at stringing together code sections into legal sounding gobbledygook.<sup>55</sup> Carter’s allegation that those who could understand code sections would neglect them is exemplified by many Montana lawyers, who are still not habituated to look for relevant statutes, and, as this essay will relate, by the Montana Supreme Court.

Carter’s point that nonlawyers would find precise formulas less comprehensible than simple principles rang true with me when I was asked to teach contract law at the Training Institute for Judges of Courts of Limited Jurisdiction.<sup>56</sup> I was given an hour to make my presentation to that group, which is composed largely of nonlawyers. I knew it would be pointless to enumerate a bunch of code rules and exceptions that they would be unable to remember or apply. Instead, I asked the judges to imagine them-

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53. Roscoe Pound had this to say about Carter in *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS: CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 6-7 (Alison Reppy ed., 1949):

In New York when you think of David Dudley Field you recall also his redoubtable adversary, the American apostle of the nineteenth-century historical jurisprudence, James Coolidge Carter. As American lawyers thought in the last quarter of the nineteenth century, Carter would have been rated the higher. As we think today, Carter has no longer a significant place in the science of law.

54. See *Debate*, *supra* note 7, at 374-75.

55. See, e.g., materials posted at Freedom Domain, <http://www.freedomdomain.com> (last visited Jan. 27, 2006).

56. See my prior discussion of this lecture in *War Against Arbitration*, *supra* note 30, at 143-44.

selves as the gentry in England a thousand years ago who were asked to decide contract cases. Those early practitioners of the common law tradition did not have statute books, cases, or encyclopedias readily available to them. Rather, they looked to two basic principles: 1) when the parties have used their freedom of contract to make their own agreement, enforce the agreement they made; and 2) when the parties have not established a rule to govern themselves, do what is reasonable. I told the judges that if they followed the same principles – freedom tempered by what is reasonable and prudent – they would deduce the correct result in a contract case 90% of the time.<sup>57</sup>

One might argue that there is little difference between the common law and a code that merely states common law principles. Would such a scheme achieve the goals of the common law while making the principles accessible? The answer is no. To say that a code merely states the common law is an oxymoron. The common law is fluid, not set in stone. The common law also uses the basic rule of reason to fill in gaps in the law. But what happens when statutes leave a gap? The UCC expressly provides that “[u]nless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity . . . supplement its provisions.”<sup>58</sup> Consequently, the UCC operates like the common law. By contrast, in a matter governed by the Field Code, apparently a gap means that the legislature chose not to allow the court to read in the common law in the omitted area.<sup>59</sup>

The fact that the Field Code stated specific rules applicable to an earlier historical era is the third of Carter’s criticisms. Here again, Carter was right. The common law of contracts in Montana is frozen in the Nineteenth Century, and not just in 1895, when the Field Code sections were enacted, but in 1860, when they were written.

Furthermore, the Field Code does *not* state the basic principles of the common law. It never mentions the primary rule – freedom of contract! To further undermine freedom of contract, the statutory structure seduces lawyers and judges into thinking that the rules are regulations. This undermines one of the princi-

57. The other 10% is where some statute has mucked up these basic rules. *Id.*

58. U.C.C. § 1-103(b) (2004), enacted at MONT. CODE ANN. § 30-1-103 (2005).

59. For example, the Montana Supreme Court held that the gift of an engagement ring was not a conditional gift because the statutes on gifts, which were derived from the Field Code, were silent on the topic of conditional gifts, and “[t]his court declines the invitation to create a new category of gifting by judicial fiat.” *Albinger v. Harris*, 2002 MT 118, ¶ 34, 310 Mont. 27, ¶ 34, 48 P.3d 711, ¶ 34 (citing MONT. CODE ANN. §§ 70-3-201 to -205 (2005)).

pal purposes of contract law, which is not to regulate transactions, but to facilitate them. We will now turn to some examples of how the Field Code has harmed Montana jurisprudence.

#### IV. PROBLEMS IN MONTANA JURISPRUDENCE CAUSED BY THE FIELD CODE

The earliest critics of the Field Code pointed out that codification of the common law would harm the state's jurisprudence rather than help it.<sup>60</sup> Some of the problems caused by the Field Code include:

- A. The Field Code is ignored because it does not state the rules correctly;
- B. The Field Code is ignored because it does not allow the law to develop along reasonable lines;
- C. The Field Code is followed mechanically, with sections taken out of context;
- D. The Field Code is tortured to make it say what the user wants it to say; and
- E. The Field Code is law frozen in an earlier time.

We will now explore some areas of contract law exemplifying these problems.

##### *A. The Field Code Is Ignored Because It Does Not State the Rules Correctly*

We begin with an area where the Montana Supreme Court has gotten the law right – but only by ignoring the Field Code. The Montana Code Annotated contains Field Code statutes in the area of mistake that provide as follows:

**28-2-401. When apparent consent not free.** (1) An apparent consent is not real or free when obtained through. . . mistake.<sup>61</sup>

**28-2-408. Kinds of mistake.** Mistake may be either of fact or law.<sup>62</sup>

**28-2-409. What constitutes mistake of fact.** Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:

- (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or

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60. See *Debate*, *supra* note 7, at 374-75.

61. MONT. CODE ANN. § 28-2-401 (2005).

62. *Id.* § 28-2-408.

(2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.<sup>63</sup>

**28-2-410. What constitutes mistake of law.** Mistake of law constitutes a mistake, within the meaning of this part, only when it arises from:

- (1) a misapprehension of the law *by all parties*, all supposing that they knew and understood it and all making substantially the same mistake as to the law; or
- (2) a misapprehension of the law by one party of which the others are aware at the time of contracting but which they do not rectify.<sup>64</sup>

It is not surprising that section 28-2-409 provides that a mistake of fact (the usual kind of mistake) is grounds for rescission. What is surprising is that the statute refers to mistake “on the part of the person making the mistake.” This language suggests that mistake is grounds for rescission even if the mistake is unilateral, that is, only one party is under the mistaken belief. This reading of the statute is reinforced by the language of section 28-2-410, which states that a mistake of law is grounds for rescission only if the misapprehension is “by all parties,” that is, a mutual mistake.

The doctrine of mutual mistake is so ingrained in the law that the Montana Supreme Court has never applied section 28-2-409 literally in mutual mistake cases. For example, in *Carey v. Wallner*,<sup>65</sup> the purchasers of a nursing home tried to rescind the contract on grounds that the parties both believed a license was not required to operate it, when in fact a license was required. The court began its analysis by citing section 28-2-409. It then added:

A unilateral mistake is not normally grounds for relief for the mistaken party, whereas a mutual mistake is. A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain.<sup>66</sup>

The authority the court cites for this correct statement is an Idaho case! We should not need an Idaho case if we have a Montana statute.

In defense of this nonliteral reading of a Field Code provision, it may be argued that the court does not have to apply a Field

63. *Id.* § 28-2-409.

64. *Id.* § 28-2-410 (emphasis added).

65. 223 Mont. 260, 725 P.2d 557 (1986).

66. *Id.* at 265-66, 725 P.2d at 561 (citing *Bailey v. Ewing*, 105 Idaho 636, 639, 671 P.2d 1099, 1102 (1983)).

Code provision literally because it can be read in the context of the common law. However, the theory of the Field Code is that the common law has been pre-empted by one convenient source. In fact, the Montana Code Annotated tells us so in section 1-1-108, a section not taken from the Field Code:

**Common law – applicability of.** In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.<sup>67</sup>

One may wonder where the Montana Supreme Court is to look for the common law when it is appropriate to do so. The next section of the Montana Code Annotated, section 1-1-109, a so-called “reception” statute, provides that when the common law applies, the common law should be found in the law of England.<sup>68</sup> This section was recently cited by the court in *Dorwart v. Caraway*,<sup>69</sup> a case holding that citizens have a private right of action for violation of the Montana Constitution:

We conclude that the *Bivens* line of authority buttressed by § 874A of the Restatement (Second) of Torts are sound reasons for applying a cause of action for money damages for violations of those self-executing provisions of the Montana Constitution. We also conclude that those rights protected by Article II, Sections 10, 11 and 17 of the Montana Constitution are self-executing based on the same analysis employed by the Supreme Court of Vermont in *Shields*. We conclude that this result is further compelled by our own statutory law and, in particular, §§ 1-1-109 and 27-1-202, MCA. Section 1-1-109, MCA, provides that:

The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state.<sup>70</sup>

This analysis follows a discussion of the decisions of other states that had addressed the issue. It is somewhat startling to see the court, after consideration of those persuasive recent authorities from our sister states, turn to the ancient common law of England for authority.

67. MONT. CODE ANN. § 1-1-108 (2005).

68. Although Montana is one of the few states that has enacted the Field Code, many states have “reception” statutes that declare the law to be the common law of England, sometimes the common law up to a particular date. A catalog of these statutes is found in Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 Mo. L. Rev. 595, 605-06 (2002).

69. 2002 MT 240, 312 Mont. 1, 58 P.3d 128.

70. *Id.* ¶ 44.

Of course, if English and recent American jurisprudence conflicted, the court would find a way to avoid the application of the English law, not necessarily out of a parochial rejection of the foreign, but from the enlightened precept of the common law that in the absence of precedent, the court should follow the better view. For example, in both *Aetna Accident & Liability Co. v. Miller*<sup>71</sup> and *State ex rel. Metcalf v. District Court*,<sup>72</sup> where one of the parties made a strong argument for application of the common law English rule, the court reviewed the American precedents and deemed them to have greater weight than the obsolete English law. The court in *Aetna* declined to follow the statute that prescribed English common law, stating:

Just what is meant by the “common law” in this connection, however, is a matter open to definition. Broadly speaking, it means, of course, the common law of England; but it means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth.<sup>73</sup>

It makes sense to allow the law to free itself from past restraints. This point was nicely made by the court in *Metcalf*, when it said, “[m]any of the rules of the common law, however admirably adapted to monarchical England during the seventeenth or eighteenth century, are altogether out of harmony with the spirit of our democratic institutions and inapplicable to present-day conditions[.]”<sup>74</sup> But flexibility is a strength of the common law, not of code law. The law cannot perform this function if it is frozen in the year 1860.

### *B. The Field Code Is Ignored Because It Does Not Allow the Law to Develop Along Reasonable Lines*

In the mistake cases, the Montana Supreme Court ignored the literal language of the statute because the language of the statute does not reflect what the statute is supposed to say. In other cases, the court ignored the language of the statute because the language of the statute gets in the way of the law’s development.

In *Montana Mountain Products v. Curl*,<sup>75</sup> the plaintiff, as the former employer of the defendant, sought to enforce a restrictive

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71. 54 Mont. 377, 170 P. 760 (1918).

72. 52 Mont. 46, 155 P. 278 (1916).

73. *Aetna*, 54 Mont. at 382, 170 P. at 760.

74. *Metcalf*, 52 Mont. at 49, 155 P. at 279.

75. 2005 MT 102, 327 Mont. 7, 112 P.3d 979.

covenant that the defendant had agreed to when she was an employee. The court referred to Montana Code Annotated section 28-2-703, which addresses the enforceability of restrictive covenants:

**Contracts in restraint of trade generally void.** Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, . . . is to that extent void.<sup>76</sup>

The trial court took a look at this “clear and unambiguous” statute and concluded that Montana law imposes an absolute restriction on restrictive covenants.<sup>77</sup> The Montana Supreme Court rejected this determination, stating that “this Court has held that only restraints on trade that are unreasonable are void.”<sup>78</sup> That is indeed the common law rule – the more sensible rule – but it is not the rule enacted by the Montana legislature.

At least in *Montana Mountain Products* the statute was discussed in the text of the opinion, even if its import was ignored. In *Arrowhead School District No. 75 v. Klyap*,<sup>79</sup> the issue was the enforceability of a liquidated damages clause. Nowhere is there greater judicial hostility to freedom of contract than in the area of liquidated damages, and the Field Code reflects that hostility. The trial court determined that the liquidated damages clause was enforceable in the light of the relevant statute, Montana Code Annotated section 28-2-721.<sup>80</sup> The statute begins by providing that a liquidated damages provision is *void*, and then carves out exceptions:

**When provision fixing liquidated damages valid.** (1) Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent *void*, except as expressly provided in subsection (2).

(2) The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.<sup>81</sup>

The law’s abhorrence of liquidated damages stems from the principle that the purpose of contract damages is to compensate

76. *Id.* ¶ 10 (citing MONT. CODE ANN. § 28-2-703 (2005)). The court goes on to note that there are exceptions allowing restrictive covenants in sections 28-2-704 and 28-2-705 for the sale of a business and the dissolution of a partnership that are not relevant to this case. *Id.*

77. *Id.* ¶ 15.

78. *Id.* ¶ 11.

79. 2003 MT 294, 318 Mont. 103, 79 P.3d 250.

80. *Id.* ¶ 9.

81. MONT. CODE ANN. § 28-2-721 (2005) (emphasis added).



the injured party, not to punish the breaching party. Therefore, a clause that provides a penalty for breach will not be enforced, while a clause that compensates the injured party should be enforced. In fact, a liquidated damages clause can be a significant cost-savings provision in the event of a dispute, for the plaintiff may be able to get summary judgment, at least with respect to the damages. Such a clause can also make it efficient for a plaintiff to recover damages that are otherwise difficult to prove. If the defendant can readily challenge the liquidated damages provision, however, these savings are lost.

In *Klyap*, the Montana Supreme Court overruled a long line of cases that had made it easy for a party to challenge liquidated damages provisions and substituted a new test that will make it harder to avoid liquidated damages clauses.<sup>82</sup> The new test inquires whether the clause is unconscionable. In a long and erudite opinion by Justice Nelson, the court relegated discussion of the statute, which we would expect to be the cornerstone of the analysis, to a footnote:

According to the language of § 28-2-721, MCA, liquidated damages are only allowed in a situation where damages are impractical or extremely difficult to prove. However, this section was adopted in 1895 from the Field Civil Code and consequently does not reflect the modern principle that parties in any type of situation can agree to liquidated damages as a matter of freedom of contract.<sup>83</sup>

It will not surprise the reader that I could not agree more with the court's implication that Field Code statutes are frequently outmoded and frequently impede freedom of contract. But that does not seem to be a sufficient reason to ignore the mandate of the Montana legislature. I laud the result in *Klyap*, with its attendant paean to freedom of contract,<sup>84</sup> but am troubled that it was achieved by ignoring a statute.

There is a legitimate concern about whether liquidated damages should be enforced when they are dictated by the party with greater bargaining power, one of the factors in unconscionability analysis. Interestingly, California achieved a similar result the straightforward way: it amended the statute. The amended statute makes a useful distinction, providing that the liquidated damages clause is presumptively valid when found in a commercial

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82. *Klyap*, ¶¶ 45-56.

83. *Id.* ¶ 24 n.7.

84. "The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." *Id.* ¶ 20 (citation omitted).

contract and presumptively void when found in either a consumer contract or a residential lease – transactions where one party notoriously lacks bargaining power.<sup>85</sup>

Frequent amendment is another way to keep the Field Code statutes fresh. California, for example, has frequently amended its Civil Code. However, this is a task of little concern to a citizen legislature, and might provide fertile ground for lobbyists. Rather than fix it, I say we throw it on the junk pile of legal history.

### *C. The Field Code Is Followed Mechanically, with Sections Taken Out of Context*

Colonel Wilbur Sanders' view that all one would need to know about the law is found in the Montana Code Annotated is simplistic and wrong.<sup>86</sup> It is wrong because one cannot look at code sections in isolation. They were created as a codification of the common law and make sense only in the context of the common law, not when ripped from that context.<sup>87</sup> A good example of the Montana Supreme Court taking a Field Code section out of context arises in the area of accord and satisfaction.

85. CAL. CIV. CODE § 1671 (2005) states:

**Validity; standards for determination; applicability of section.**

(a) This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.

(b) Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

(c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either:

(1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or

(2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.

(d) In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

86. See *supra* text accompanying note 52.

87. Two of my astute former students, Judith Albright and Cathleen Sohlberg, pointed out that this problem is exacerbated by electronic research, when the statute may be retrieved without the context of other statutes.

The relevant Montana Code Annotated sections in the area of accord and satisfaction provide as follows:

**Accord – definition and effect.** An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.<sup>88</sup>

**Satisfaction – definition and effect.** Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction.<sup>89</sup>

These statutes simply state the common law. The issue that frequently comes up with respect to an accord and satisfaction is whether the creditor's acceptance of the debtor's offer to pay less than the full amount of the debt, followed by payment of the lesser amount, discharges the debt. For example, I say to you, "I don't dispute that I owe you \$1000. Are you willing to accept payment of \$600 to discharge the debt?" You agree and I pay you the \$600. You then sue me for the balance of \$400 and I raise our agreement as a defense. Are you entitled to the \$400? The common law answer was yes. Our agreement is not enforceable because of the pre-existing duty rule, which is just another way of saying that a promise has to be supported by consideration. When I promised to pay you \$600, I was merely doing what I was already bound to do anyway. To put it another way, you gave up \$400, but you got nothing in return.

The Field Code section on accord does not change this common law result. It defines an accord as "an agreement," but if an exchange lacks consideration, then there is not an enforceable agreement. Note also that this statute does not require that an accord be in writing. The general rule is that oral contracts are perfectly enforceable; the few exceptions are found in another group of statutes called the Statute of Frauds.

For years, the Montana Supreme Court got the law of accord and satisfaction right, often without paying attention to the statutes.<sup>90</sup> Then along came a case illustrating Carter's point that those who can read code sections sometimes do not read them correctly. In *Geissler v. Nelson*,<sup>91</sup> the court applied the relevant Mon-

88. MONT. CODE ANN. § 28-1-1401 (2005).

89. *Id.* § 28-1-1402.

90. See Scott J. Burnham, *A Primer on Accord and Satisfaction*, 47 MONT. L. REV. 1 (1986).

91. 222 Mont. 409, 722 P.2d 632 (1986).

tana Code Annotated sections to the facts and determined that there had been an accord and satisfaction:

There is no doubt in the instant case but that Geissler accepted the consideration tendered by Nelson which would constitute a satisfaction if in fact the parties entered into an accord. Section 28-1-1401, MCA, clearly defines an accord as an "agreement" to extinguish the original obligation for something different or less than the creditor is entitled.<sup>92</sup>

So far, so good. The court then went on to apply an additional statute from the Montana Code Annotated:

There, however, is the additional requirement that an offer to enter an accord be accepted in writing. Section 28-1-1403, MCA, provides:

Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction or rendered in pursuance of an agreement *in writing* for that purpose, though without any new consideration, extinguishes the obligation.

. . . We, therefore, hold that the District Court properly found that there was no accord entered by the parties because there was no such "agreement" and even if there was it was not in writing.<sup>93</sup>

Here the court got it wrong. There is no requirement that an offer to enter into an accord must be accepted in writing. Section 28-1-1403 serves a different purpose, which may not be apparent on its face, but becomes clear when the statute is examined in its context. As discussed above, an accord is not enforceable if the debt is undisputed, for then there is no consideration. As a practical matter, however, parties may wish to settle undisputed obligations with a lesser payment, and the law may wish to accommodate them. In many jurisdictions, this accommodation was accomplished through the common law. In Montana, it was accomplished by the enactment of section 28-1-1403.<sup>94</sup>

Through that statute, the legislature in its wisdom removed the requirement of consideration to form an enforceable accord. Like many statutes that dispense with consideration, it requires a

92. *Id.* at 413, 722 P.2d at 635.

93. *Id.*, 722 P.2d at 635 (emphasis added).

94. MONT. CODE ANN. § 28-1-1403 (2005). This statute was not part of the Field Code, but was borrowed from California along with the Field Code statutes. It was derived from CAL. CIV. CODE § 1524 in 1895. History: En. Sec. 2063, Civ. C. 1895; re-en. Sec. 4957, Rev. C. 1907; re-en. Sec. 7459, R.C.M. 1921; Cal. Civ. C. Sec. 1524; re-en. Sec. 7459, R.C.M. 1935; R.C.M. 1947, 58-504. The statute provides:

**When part performance extinguishes obligation.** Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.

signed writing as a consideration substitute. Therefore, if the creditor agrees in a signed writing to accept a lesser payment, and the debtor gives the lesser payment, the debt is discharged. But the statute is not doing all the work the court would have it do in *Geissler*. It does not require that an accord be in writing; it only provides that an accord otherwise unenforceable for lack of consideration is enforceable if there is a writing signed by the creditor.<sup>95</sup>

This example indicates the proper role statutes play in a common law system. If we presume freedom of contract and the common law, then we enact statutes for one of two purposes: for regulation or to change the common law rule. A statute like section 28-1-1403 is a salutary change in the common law rule. If it stood on its own, not surrounded by statutes that merely state the common law rule, its purpose would be more clear.

What would happen if we were not able to look to the Montana Code Annotated to find our rules of contract law? We would have to research the common law, and discover the reason for the rules. In this event, there would probably be less mechanical application of the rules. Nowhere is the mechanical application of a rule clearer than in the court's application of Montana Code Annotated section 1-3-204, which provides:

**Waiver of benefit of a law.** Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.<sup>96</sup>

When the Montana Supreme Court has to determine whether parties may contract around a rule, it frequently looks to Montana Code Annotated section 1-3-204 for guidance. For example, in *Rothwell v. Allstate Insurance Co.*,<sup>97</sup> a federal court certified to the Montana Supreme Court the question of whether an employee could waive the rule found in Montana Code Annotated section 39-2-701(1) that an employer must indemnify an employee for expenses incurred by the employee.<sup>98</sup> The court stated that because "Allstate relies on § 1-3-204, . . . resolution of the certified question turns on whether § 39-2-701(1), MCA, was established for a public reason."<sup>99</sup> The court concluded that waiver of the rule would be contrary to "public policy."<sup>100</sup>

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95. *Id.* § 28-1-1403.

96. *Id.* § 1-3-204.

97. 1999 MT 50, 293 Mont. 393, 976 P.2d 512.

98. *Id.* ¶ 1.

99. *Id.* ¶ 6.

100. *Id.* ¶ 16.

Dissenting, Justice Gray expressed concern that the court provided little guidance for parties trying to make the distinction called for in section 1-3-204.<sup>101</sup> She stated:

My second point with regard to the error I perceive in the Court's opinion is the Court's somewhat loose use of the term "an expression of public policy" as the equivalent of the language "established for a public reason" which is contained in § 1-3-204, MCA. It can — and should — be said that every statute duly enacted by the Legislature is an expression of public policy with regard to its subject matter. However, the "public policy" connotation cannot properly be equated to the "public reason" language in § 1-3-204, MCA, because to do so would render § 1-3-204, MCA, a nullity. Section 1-3-204, MCA, clearly contemplates that only some laws have been established for a "public reason" and, pursuant to the statute, the benefit of such laws cannot be waived by private contract. Interpreting "public reason" and "public policy" as essentially identical renders the language of § 1-3-204, MCA — permitting waiver of the advantage of a law intended solely for an individual's benefit — totally ineffective and mere verbiage. Such a result clearly was not intended by the Legislature and we are obligated to interpret statutes to give them effect wherever possible, rather than to render them mere surplusage. *Formicove, Inc. v. Burlington Northern, Inc.* (1983), 207 Mont. 189, 194, 673 P.2d 469, 471 (citation omitted). For these reasons, it is my view that the Court's implicit substitution of "an expression of public policy" for the statutory language "established for a public reason" is both inappropriate and unsupported.

My disagreement with the result the Court reaches in this case does not mean that no supportable arguments can be made for that result. My disagreement is that the Court has not supported its result with any legal analysis or authority. Absent such support, I must respectfully dissent.<sup>102</sup>

This dissent hits the nail on the head. If section 1-3-204 is saying that under a regime of freedom of contract, parties cannot contract around public policy, and public policy is whatever the legislature declares it to be in statutes, then parties do not have freedom to contract around any statute. And in a system where all contract law is statutory, parties would not be able to contract around any rule of contract law! This is, of course, contrary to the fundamental principle of contract law that divides rules into "immutable rules" that cannot be varied by the parties and "default rules" that can be varied. If the only contract statutes that were enacted were regulatory, then the court's interpretation might make sense. However, if the statutes are merely a codification of the

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101. *Id.* ¶¶ 17-25 (Gray, J., dissenting).

102. *Id.* ¶¶ 24-25 (Gray, J., dissenting).

common law, including the default rules of the common law, then it makes no sense to conclude that all the rules are immutable.<sup>103</sup> Such a conclusion deprives us of our freedom of contract.

It is all too easy, as Justice Gray points out, to support a result by pointing to a statute rather than to support it “with any legal analysis or authority.”<sup>104</sup> In fact, the error is compounded when the statute in question is one of the Field Code provisions that has no business being a statute in the first place. Section 1-3-204, in context, is a maxim of equity, like “[t]he law disregards trifles” or “[s]uperfluity does not vitiate,” both of which are also codified in the Montana Code Annotated.<sup>105</sup> The maxims were never intended to have their language scrutinized like regulations, but were intended to aid in the administration of justice.<sup>106</sup>

#### *D. The Field Code Is Tortured to Make It Say What the User Wants It to Say*

Just as malfeasance is worse than misfeasance, a greater sin than carelessly reading a statute is intentionally torturing it to force it to say what you want it to say. An example of where the Montana Supreme Court has done that arises in the area of exculpatory clauses.

*Miller v. Fallon County*<sup>107</sup> is probably best known as the case that ended interspousal tort immunity in Montana. Lesser known, and perhaps totally ignored, is the fact that it ended the effectiveness of exculpatory clauses in Montana. An exculpatory

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103. The principle that statutes are not immutable rules is clearly articulated in U.C.C. section 1-102(3) (2004), which provides:

The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.

Codified at MONT. CODE ANN. § 30-1-102 (2005). This principle is not, however, found in the Field Code.

104. *Rothwell*, ¶ 25 (Gray, J., dissenting).

105. MONT. CODE ANN. §§ 1-3-224, 1-3-228 (2005).

106. My apologies to the Montana Supreme Court for criticizing its use of Montana Code Annotated section 1-3-204 (2005) in *Cole v. Valley Ice Garden*, 2005 MT 21, 325 Mont. 388, 106 P.3d 556, in *War Against Arbitration*, *supra* note 30, at 149 n.37. Prior to its official publication, but after the law review went to press, the Court pulled its original opinion and substituted another that does not mention the statute. See *Cole v. Valley Ice Garden*, 2005 MT 115, 327 Mont. 99, 113 P.3d 275.

107. 222 Mont. 214, 721 P.2d 342 (1986).

clause is a contractual provision whereby one party agrees not to hold the other party liable for the other party's negligence.<sup>108</sup>

In *Miller*, Cecil Miller, an independent truck driver, contracted to render services to Pre-Fab Transit Co. As is customary among truckers, Cecil asked permission to bring his wife Linda along on his trips. The company agreed as long as Linda Miller signed an agreement waiving her right to pursue any negligence claim against Pre-Fab if she was injured. She was injured and Pre-Fab raised the exculpatory clause as a defense.<sup>109</sup>

The analysis of exculpatory clauses was not new to the Montana Supreme Court. In an earlier case, *Haynes v. County of Missoula*,<sup>110</sup> when Haynes entered his horses in the Missoula County Fair, the application contained an exculpatory clause relieving the County of liability for negligence. Haynes sued Missoula County for negligence when a fire in the horse barn destroyed the horses, and the County defended by citing the exculpatory clause.<sup>111</sup> In approaching the issue of whether the exculpatory clause was enforceable, the Montana Supreme Court looked to the traditional analysis in which the court asked whether the area in which the exculpation occurred was one of public interest or purely private interest. If it was an area of public interest, where a party offered an essential service to members of the public who would be denied the service if they did not agree to an exculpatory clause, the clause was not enforceable. However, if it was an area of private interest, the clause was enforceable.<sup>112</sup> The test was clearly laid out by the California Supreme Court in *Tunkl v. Regents of the University of California*.<sup>113</sup> In *Haynes*, the Montana court applied the *Tunkl* test, concluding that because the county fair was an area of public interest, the exculpatory clause was not enforceable.<sup>114</sup>

The *Miller* court, however, neglected to apply the *Tunkl* test that it had established as precedent in *Haynes*.<sup>115</sup> A cynic might conclude that the reason was because under that test, the court would have had to conclude that riding in a truck with a spouse is an area of private rather than public interest, and that Linda

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108. BLACK'S LAW DICTIONARY 608 (8th ed. 2004).

109. *Miller*, 222 Mont. at 216, 721 P.2d at 343.

110. 163 Mont. 270, 517 P.2d 370 (1973).

111. *Id.* at 275, 517 P.2d at 374.

112. *Id.* at 281-83, 517 P.2d at 377-78.

113. 383 P.2d 441 (Cal. 1963).

114. *Haynes*, 163 Mont. at 283-84, 517 P.2d at 378.

115. *Miller*, 222 Mont. 214, 220-22, 721 P.2d 342, 346-47 (1986).



Miller would therefore lose. For whatever reason, the court did not apply that precedent, but instead analyzed the exculpatory clause in the light of a Field Code statute, Montana Code Annotated section 28-2-702:

**28-2-702. Contracts which violate policy of the law – exemption from responsibility.** All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.<sup>116</sup>

Recognizing that the statute came to Montana from the Field Code via California, Justice Morrison invoked a standard principle of statutory interpretation: if a state borrows a statute from another state, it also borrows that state's interpretation of the statute.<sup>117</sup> California had consistently interpreted the statute to mean that a party could not contract to exculpate itself 1) from fraud, 2) from intentional torts, or 3) from violations of the law.<sup>118</sup> On the issue of whether a party could exculpate itself from its acts of ordinary negligence, California had concluded that this area was not addressed in the statute and used the *Tunkl* test to determine whether exculpation from negligence would be permissible in a particular context.<sup>119</sup>

Rejecting the California approach, the *Miller* court took a closer look at the statute. Noting that the statute provides that contracts which exculpate from "violation of law" are not enforceable, the court asked the eternal question, "What is law?" It answered that question by stating that law is not only constitutions and statutes, but common law as well.<sup>120</sup> And the common law establishes that a person has certain legal duties, such as not acting negligently. Therefore, when the statute provides that a person cannot agree to a "violation of law," it must be saying that a person cannot agree to exculpation from negligence. If this is the case, then the public/private distinction is irrelevant. Therefore, regardless of the context, no one can ever agree to an exculpatory clause.<sup>121</sup>

116. *Id.* at 220, 721 P.2d at 345-46 (citing MONT. CODE ANN. § 28-2-702 (2005)).

117. *Id.*, 721 P.2d at 346.

118. *Id.*, 721 P.2d at 346 (citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d, 441, 441 (Cal. 1963)).

119. *Id.* at 220-21, 721 P.2d at 346 (citing *Tunkl*, 383 P.2d at 441).

120. *Id.* at 221, 721 P.2d at 346-47.

121. *Miller*, 222 Mont. at 221, 721 P.2d at 347. The court here did not seek assistance of another statute from Title 1. MONT. CODE ANN. § 1-2-101 (2005) provides:

This case, like many applying the Field Code, has the effect of taking away freedom of contract and regulating the contracting process. In *Miller*, the Montana Supreme Court held that every exculpatory clause is unenforceable and there is no way to draft around that conclusion.<sup>122</sup> This will come as news to parties who continue to employ exculpatory clauses in their contracts.<sup>123</sup> I am not sure why these practices continue in the face of *Miller*. It may be that the drafter is being deceptive, inserting an unenforceable provision for its *in terrorem* value. It may be that the drafter is making a good faith attempt to test the law, in the hopes that a reconstructed Montana Supreme Court will look at it differently.<sup>124</sup> And it just might be too unbelievable that such an outrageous decision was made, so drafters proceed as if it had not.<sup>125</sup>

### *E. The Field Code Is Law Frozen in an Earlier Time*

It has often been said that the glory of the common law has been its ability to adapt to changing circumstances. Even the

**Role of the judge – preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

122. *Miller*, 222 Mont. at 221, 721 P.2d at 347.

123. My employer, for example. A couple of years ago, when I took a rafting trip sponsored by The University of Montana, the University had me sign an exculpatory clause. I have even seen agreements in which trucking companies allow spouses to ride as long as they sign an exculpatory clause.

124. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

125. I hope it is clear that my point is not that the exculpatory clause in *Miller* should have been enforced (although I do think that), but that the issue of whether it should have been enforced should have been the subject of meaningful analysis. Karl Llewellyn criticized courts that “construed” the language of contracts into meaning something the language clearly did not mean rather than facing squarely the issue of whether the substance should be enforced. Much the same could be said of the Court’s construction of the statute in *Miller*: “[S]ince they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.” Karl Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

UCC, as a “common law code,”<sup>126</sup> has shown amazing resiliency in its ability to address commercial transactions in the fifty years since its adoption. The Montana Field Code statutes, however, have shown an amazing lack of resiliency. We are using statutes that remain largely unchanged since their creation in the 1860s and their adoption in Montana in the 1890s. Two examples of law frozen in time are the elements of a contract and the standard for mental incapacity.

### 1. *Elements of a Contract*

If a person ever needed a handy definition of *contract*, Montana Code Annotated section 28-2-101 is available for guidance: “A contract is an agreement to do or not to do a certain thing.”<sup>127</sup> Gee, that sure was helpful. The Code then goes on to tell us what the “essential elements” of a contract are:

**Essential elements of a contract.** It is essential to the existence of a contract that there be:

- (1) identifiable parties capable of contracting;
- (2) their consent;
- (3) a lawful object; and
- (4) a sufficient cause or consideration.<sup>128</sup>

The element I want to call attention to is subsection (4), “a sufficient cause or consideration.” We are all familiar with the concept of *consideration*, but does anyone know what *cause* is?<sup>129</sup> Yet it is in the backbone of our contracts statutes! It is astonishing that in our more than one-hundred-year history, the state has had plenty of cases where the Montana Supreme Court has explored whether there is consideration for a contract, but none where it has asked whether there is cause. The enforcement of agreements on a theory of cause would undoubtedly throw our system through a loop, for under the civil law understanding of cause, a broader array of agreements would be enforced than is enforced under the common law understanding of consideration.

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126. See, e.g., Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1042-43 (1960-61).

127. MONT. CODE ANN. § 28-2-101 (2005).

128. *Id.* § 28-2-102.

129. I won't give it away (which is another way of saying I don't understand it), but the reader who wants to learn more about the meaning of *cause* might consult William Noel Keyes, *Cause and Consideration in California – A Re-Appraisal*, 47 CAL. L. REV. 74 (1959).

## 2. *Standard for Mental Capacity*

Many cases nationally have explored the proper test to determine when a person lacks capacity to contract due to mental illness.<sup>130</sup> The classic test was one of cognitive ability, asking whether the person “understood” the transaction. Modern psychiatry, however, has shown that a person may be capable of understanding the transaction, but may not be able to act in accordance with that understanding.<sup>131</sup> For example, a person suffering from bipolar disorder (manic-depression) who is in the manic stage may, because of the mental illness, be unable to act in accordance with his or her understanding.

The common law growth of the law is demonstrated by courts in jurisdictions such as Texas, which in *Nohra v. Evans*<sup>132</sup> replaced the cognitive test with the motivational test:

In this case we are urged to extend the established rule beyond the test of understanding, or cognition, to encompass motivation, or exercise of will, on the theory that appellant acted under compulsion of a mental disorder but for which the writings would not have been executed.

As observed earlier, no court in this state has approved a test for mental capacity other than under the cognitive standard, except as the rule has been enlarged in will cases to include insane delusions when delusions are shown to be intimately related to the making of a will.

Thus we arrive at the point of deciding whether the traditional standard governing competency to contract fails to account for the person who, because of mental illness, lacks the ability to control his or her conduct, even though the ability to understand appears to be unimpaired. We believe that the understanding test does fail to afford the finder of facts the opportunity to determine whether a person who is mentally ill, having met the standard of cognition, nevertheless lacks the ability to control his conduct, at the time the contract was made, because of his mental affliction.

Only within the twentieth century have developments in the science of mind and mental behavior made it clear that all mental faculties are not simultaneously affected by mental illness, the contrary being a belief held by the courts during the years in which the cognitive standard evolved and became established.<sup>133</sup>

The Texas court was able to change the rule. What would happen should a similar case be brought in Montana? We would

130. 53 AM. JUR. 2D *Mentally Impaired Persons* § 156 (2006).

131. See, e.g., *Ortelere v. Teachers' Ret. Bd. of the City of N.Y.*, 250 N.E.2d 460 (NY 1969).

132. 509 S.W.2d 648 (Tex. App. 1974).

133. *Id.* at 654.

first have to look to the relevant statute, Montana Code Annotated section 28-2-203, which provides as follows:

**Contracts of persons with limited understanding.** A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in part 17 of this chapter.<sup>134</sup>

We do not have a modern Montana case on point, so we can look to the relevant California law for guidance in interpreting this statute. In the case of *Smalley v. Baker*,<sup>135</sup> like the Texas court in *Nohra*, the California court was asked to apply the modern motivational test rather than the cognitive test where a person with bipolar disorder entered into a contract.<sup>136</sup> The *Smalley* court concluded that because Civil Code section 39, the source of Montana Code Annotated section 28-2-203, refers to the person's *understanding*, the statute embodies the cognitive test and the legislature had not seen fit to update it:

The manic phase of the illness under discussion is not, however, a weakness of mind rendering a person incompetent to contract within the meaning of Civil Code sections 38 and 39. These sections exclude the manic-depressive psychosis by their very language since they make specific reference to the person's 'understanding.' This language, as interpreted by the decisions, establishes the 'understanding' or cognitive test as the prevailing standard of legal competency. As already pointed out, the cognitive test deals with the mental capacity to understand the nature and purpose and effect of the transaction and not with the motivation for entering into it. The manic phase of the manic-depressive psychosis does not impair such understanding, but only relates to the motivation. Notwithstanding the long-standing psychiatric recognition of such psychosis the Legislature has not, in its wisdom, seen fit to broaden section 39 so as to include within its ambit the motivational standard of incompetency. . . .

In the present case all the evidence shows that Smalley did have the capacity to understand what he was doing. Smalley, Mrs. Smalley, and Bratton all testified to this effect. The testimony of the psychiatrists was not to the contrary, the essence of their testimony in this regard being that Smalley's judgment was affected. This syndrome is characteristic of the manic phase of the manic-depressive

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134. MONT. CODE ANN. § 28-2-203 (2005). By the way, the legislature has shown some capacity to improve the Field Code. Prior to its repeal in 1979, the Montana statutes included Field Code section 13, which provided that "Persons of unsound mind, within the meaning of this code, are idiots, lunatics, imbeciles, and habitual drunkards." MONT. REV. CODE ANN. § 64-104 (Smith 1969) (repealed 1979).

135. 69 Cal. Rptr. 521 (Cal. Ct. App. 1968).

136. *Id.* at 527-28.

psychosis, but, as previously noted, does not go to the subject's powers of understanding. In short, under the traditional test of competence set out in Civil Code section 39, Smalley was not incompetent to enter into a contract.<sup>137</sup>

A Montana court might similarly conclude that Montana could not apply the motivational test, a result which is certainly consistent with the language and original intent of the statute. Taking this analysis one step further, assume a Montana lawyer was able to persuade the court that a person who entered a contract in Montana lacked mental capacity as defined in the statute. What happens next? Note that section 28-2-203 of the Montana Code does not provide that the contract of the person of unsound mind is voidable, but that it is "subject to rescission as provided in part 17 of this chapter."<sup>138</sup> In part 17 of chapter 2, we find the relevant statute, Montana Code Annotated section 28-2-1711, which provides:

**When party may rescind.** A party to a contract may rescind the same in the following cases only:

- (1) if the consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party;
- (2) if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
- (3) if such consideration becomes entirely void from any cause;
- (4) if such consideration, before it is rendered to him, fails in a material respect from any cause; or
- (5) if all the other parties consent.<sup>139</sup>

Where does this statute provide that the contract of a mentally incapacitated person is subject to rescission? It does not say it! In fact, this issue was addressed in *Fleming v. Consolidated Motor Sales Co.*,<sup>140</sup> where the Montana Supreme Court determined that the plaintiff was mentally incapacitated, but nevertheless concluded that he was unable to avoid the contract:

Giving full sanction to the rule heretofore discussed, we must concede that it is equally well established that in the absence of a showing of entire lack of understanding, and in the absence of fraud or imposition, there is no degree of mental weakness on the part of either of the contracting parties recognized in the law as vitiating a

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137. *Id.* at 528-29.

138. MONT. CODE ANN. § 28-2-203 (2005).

139. *Id.* § 28-2-1711.

140. 74 Mont. 245, 240 P. 376 (1925).

contract. The law does not presume to make a distinction between much and little intellect.<sup>141</sup>

The California legislature may not have enacted the motivational test, but it did remedy this oversight. Civil Code section 1689, the California analog to section 28-2-1711, was amended to provide for rescission when there has been a finding of incapacity under section 39, the analog to section 28-2-203.<sup>142</sup> In Montana, however, we must continue to live with an antiquated statute.

## V. CONCLUSION

These examples demonstrate that the Field Code creates many opportunities for mischief. The solution is simple – repeal the Field Code provisions in the Montana Code Annotated. Has something as radical as the repealing of hundreds of laws ever been done? Curiously, it was done in California, which in 1850 adopted the “American common law” as its law, presumably to make clear that it would no longer follow the law of Mexico.<sup>143</sup> It was not until twenty-two years later that California enacted the Field Code, and unlike Montana, it did so after considerable debate and modification of the Field Code to meet its needs and heritage.<sup>144</sup>

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141. *Id.* at 264, 240 P. at 382.

142. CAL. CIV. CODE § 1689 (West 2005) (emphasis added), states:

**§ 1689. Grounds**

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785, 1789, 1930 and 2314 of this code, Section 2470 of the Corporations Code, Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

143. Van Alstyne, *supra* note 44, at text accompanying nn.7-8.

144. *Id.*, at text accompanying nn.44-59.

Some might ask whether we would have any law after repeal of the statutes. During the 1990s, Montana was the butt of much humor because it allegedly did not have a speed limit. Montana did, of course, have a speed limit. That speed limit was “a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation.”<sup>145</sup> Those glorious days came to an end, however, when the Montana Supreme Court, in *State v. Stanko*,<sup>146</sup> declared this “basic rule” to be unconstitutionally vague, concluding that, in Justice Trieweiler’s words, “the average motorist in Montana would have no idea of the speed at which he or she could operate his or her motor vehicle on this State’s highways without violating Montana’s ‘basic rule’ based simply on the speed at which he or she is traveling.”<sup>147</sup> The legislature promptly changed the speed limit to the more prosaic “70 miles an hour during the daytime and 65 miles an hour during the nighttime.”<sup>148</sup>

The court’s analysis of the speed limit illustrates the commonly held belief that if we only have basic rules, then we do not have laws or we do not know what the laws are.<sup>149</sup> The concern is the same when the law is found in the common law instead of codes. Field claimed that common law was unwritten law, and hence unknown law:

The question whether a Code is desirable is simply a question between written and unwritten law. That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known, and if it is

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145. MONT. CODE ANN. § 61-8-303(1) (1997) (repealed 1999).

146. 1998 MT 321, 292 Mont. 192, 974 P.2d 1132.

147. *Id.* ¶ 28. Three justices dissented. *Id.* ¶¶ 33-40. Let’s list that honor roll here: Justices Turnage, Regnier, and Gray.

148. MONT. CODE ANN. § 61-8-303(1)(b) (2005). Of course, lest a person think it was permissible always to travel at this numerical rate of speed, the newly enacted statute also provided:

(4) Subject to the maximum speed limits set forth in subsections (1) and (2), a person shall operate a vehicle in a careful and prudent manner and at a reduced rate of speed no greater than is reasonable and prudent under the conditions existing at the point of operation, taking into account the amount and character of traffic, visibility, weather, and roadway conditions.

*Id.* § 61-8-303(4) (2005) (amended 1999).

149. After I wrote this, I discovered that the great Richard Danzig had used the same analogy in *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 633 (1975). Danzig’s point is that the legislature is best suited to set a particular speed limit, such as 75 miles per hour, because the legislature’s emphasis is on the result, not the method. A court is best suited to make a decision as to whether a particular speed is unreasonable, but it should not set a limit. In enacting the “basic rule,” then, Danzig sees the legislature as having acted more like a court making a common law rule.



to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws.<sup>150</sup>

The argument has superficial appeal, but it is specious. If we did not have this writing, if we had a law of contracts that was the equivalent of our late lamented “reasonable and proper” speed limit, would we have any difficulty determining what factors to consider when determining the outcome of an issue in contract law? I do not think so. Even Rudy Stanko, who spoiled the basic speed limit rule for the rest of us, admitted that his proclivity to speed was due not to the fact that he could not tell the difference between a reasonable speed and an unreasonable speed, but due to the fact that he had a lead foot.<sup>151</sup>

Without the statutes, our lawyers and courts when planning transactions and making decisions would have to revert to the great body of common law contracts. Is this an accessible body of law? The codifiers claimed that to know what the rule was, a person had to read all the decided cases on point and synthesize them. And because a person was unlikely to do that before acting, a person would not know what the law was until after the person had acted. The English codifier Jeremy Bentham referred to the common law as “dog law,” for a person trains a dog by punishing it for not following a rule, and thus teaches it what the rule is after the fact.<sup>152</sup>

But this is nonsense, or, as Bentham himself liked to say, “nonsense on stilts.”<sup>153</sup> A person never had to read all the common law cases to discover what the common law rule is, because there was always someone willing to synthesize the cases in the form of a treatise or encyclopedia in which a person could find a coherent statement of the rules and principles, often supplemented with commentary. At one time these rules and principles

150. DAVID DUDLEY FIELD, *THE CIVIL CODE OF THE STATE OF NEW YORK*, at vii (Weed, Parsons & Co. 1865). I have speculated elsewhere that the reason the Field Code raises the status of written contracts to unnecessary heights is because the Field Code itself elevates the value of writing to unnecessary heights. See *Debate*, *supra* note 7, at 401.

151. Conversation with Stanko around a poker table somewhere in Montana in the dim past. As another example, I recall many years ago that my faculty was considering what to do about a student who had cheated on an exam. The faculty member who had given the exam was concerned that he “had not told students not to cheat” and therefore they didn’t know better. My colleague Al Stone responded dryly, “There must be a common law of cheating.”

152. *Debate*, *supra* note 7, at 382.

153. JEREMY BENTHAM, *RIGHTS, REPRESENTATIONS, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION* (Philip Schofield et al. eds., 2002).

could be found in Blackstone's Commentaries on the Laws of England. Today they are elucidated in the well-written Restatement (Second) of the Law of Contracts and in numerous treatises, such as Corbin on Contracts and Farnsworth on Contracts.

So let us repeal the statutes, except for the few that either change the common law rule or that are regulatory. Then, instead of mechanically applying or misapplying antiquated statutes, our courts and lawyers would have to identify the policies behind the rules and justify those policies in a modern setting. Through that process, contracts jurisprudence would have an opportunity to flower in Montana.

